



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Judicial Review 15 of 2011

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

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTE R OF: THE GOVERNMENT LANDS ACT

AND

IN THE MATTER OF: TRUST LAND ACT

AND

IN THE MATTER OF: REGISTRATION OF TITLES ACT

AND

IN THE MATTER OF: KENYA GAZETTE NOTICE NO.10905/2010

AND

IN THE MATTER OF: THE REVOCATION OF TITLES TO PARCELS OF LAND KNOWN AS LAND REFERENCE NOS.24773, 24774, 24775, 24776, 24777, 24778, 24779 & 24780 SITUATE AT MLOLONGO

AND

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW
*BETWEEN***

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

REGISTRAR OF TITLES – NAIROBI.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

EXPARTE

- 1. MERCY MUTHONI MBUBA**
*(In her capacity as the Administrator
of the Estate of EUSTACE MBUBA MWOGA
also known as EUSTATE MBUMBA NTWIGA)*

2. TIMOTHY MUSAU MUTUA

3. DANIEL MUTUKU MBEVI

JUDGMENT

Pursuant to leave granted by this Court on 11th February 2011, the Exparte Applicants herein commenced Judicial Review proceedings against the Registrar of Titles Nairobi and the Hon. Attorney General through a Notice of Motion dated 16th February 2011. The Registrar of Titles Nairobi is named as the 1st Respondent while the Hon. Attorney General is named as the 2nd Respondent.

The Exparte Applicants are Mercy Muthoni Mbuba, Timothy Musau Mutua and Daniel Mutuku Mbevi. Mercy Muthoni Mbuba, the 1st Applicant instituted the proceedings on behalf of the Estate of her Late husband Eustace Mbuba Mwoga also known as Eustace Mbumba Ntwiga in her capacity as the Administratrix of the Estate of the late Eustace Mbuba Mwoga having been so appointed by the High Court of Kenya at Embu on 21st July 2006 in Succession Cause No.254 of 2006.

Land parcels known as Land Reference Numbers 24773, 24774, 24775, 24776, 24777, 24778, 24779 & 24780 formed part of that Estate. The 2nd Applicant, Timothy Musau Mutua is the registered proprietor of the parcel of land known as LR.No.24779 while the 3rd Applicant Daniel Mutuku Mbevi is the registered proprietor of the parcel of land known as LR.No.24779.

According to the Applicants, the titles to all those parcels of land (hereinafter referred to as the suit properties) were issued under the provisions of the Registration of Titles Act (RTA). The suit properties are situated at Mlolongo within Mavoko Municipality.

In their Notice of Motion dated 16th February 2011, the Applicants sought the following orders.

- 1. An Order of Certiorari to remove into the High Court and quash forthwith the decision of the 1st Respondent revoking the Applicants titles to parcels of land known as LR.24773, LR.24774, LR.24775, LR.24776, LR.24777, LR.24778, LR.24779 and LR.24780 situate at Mlolongo within Mavoko Municipality.**
- 2. An Order of Certiorari to remove into the High Court and quash forthwith the decision of the 1st Respondent contained in Kenya Gazette Notice No.10905/2010 published in Kenya Gazette of 17th September 2010, revoking the Applicants' title to parcels of land known as LR.24773, LR.24774, LR.24775, LR.24776, LR.24777, LR.24778, LR.24779 and LR.24780 situate at Mlolongo within Mavoko Municipality.**
- 3. An Order of Prohibition, prohibiting the Respondents, their agents, contractors, servants or employees from demolishing, pulling down or otherwise interfering with the structures erected on the Applicants' parcels of land and or evicting, trespassing, or otherwise interfering with the Applicants' quiet occupation and enjoyment of the parcels of land known as LR.24773, LR.24774, LR.24775, LR.24776, LR.24777, LR.24778, LR.24779 and LR.24780 situate at Mlolongo within Mavoko Municipality.**

4. An Order of Mandamus compelling the 1st Respondent to restore in the land's register and all other relevant documents held by the Registrar of Titles, Nairobi or any other land's registry in the Republic of Kenya, the entries that the Applicants' are the registered proprietors of the parcels of land known as LR.24773, LR.24774, LR.24775, LR.24776, LR.24777, LR.24778, LR.24779 and LR.24780 situate at Mlolongo within Mavoko Municipality.

5. The costs of this application be provided for.

The application is supported by the statutory statement dated 10th February 2011 and the verifying affidavits sworn by each of the Applicants and the annexures thereto.

It is premised on the grounds stated on the statutory statement which were also reproduced in the Notice of Motion.

The Applicants' case is well enumerated in the grounds supporting the motion and in the verifying affidavits sworn by each of the Applicants accompanying their application for leave to apply for orders of Judicial Review.

The uncontroverted facts of this case are that prior to the publication of Gazette Notice No.10905 in the Kenya Gazette of 17th September 2010, the late Mbuba Mwoga also known as Eustace Mbumba Ntwiga, the 2nd and 3rd Applicants were the registered proprietors of parcels of land known as LR. Nos. 24773, 24774, 24775, 24776, 24777, 24778, 24779 & 24780 (suit properties) having been so registered and titles issued under the Registration of Titles Act. However, through Gazette Notice No.10905 of 2010, the 1st Respondent published his decision to revoke their titles to the suit properties on grounds that the suit properties had been reserved for public purposes and had been illegally allocated to the Applicants. The said Gazette Notice which is what precipitated the filing of these proceedings was in the following terms:

GAZETTE NOTICE NO.10905

THE CONSTITUTION OF KENYA

THE GOVERNMENT LANDS ACT

(Cap.280)

THE TRUST LAND ACT

(Cap.288)

NOTIFICATION OF REVOCATION OF LAND TITLES

WHEREAS the parcels of land whose details are described under the Schedule herein below were allocated and title issued to private developers, it has come to the notice of the Government that the said pieces of land were reserved for public purposes, that is, expansion of the Nairobi/Mombasa Highway, under the relevant provisions of the Constitution, the Government Lands Act (Cap.280) and the Trust Land 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 all the said titles.

SCHEDULE

Mavoko Municipality

L.R. 24773

L.R. 24774

L.R. 24775

L.R. 24776

L.R. 24777

L.R. 24778

L.R. 24779

L.R. 21734

L.R. 25992

G.G. GACHIHI

Registrar of Titles, Nairobi

The Applicants case is that the Registrar of Titles (1st Respondent) had no legal power or authority either under the Constitution or any other law to revoke titles to the suit properties and that in purporting to do so through a Gazette Notice, the 1st Respondent violated their constitutional right to acquire and own property in any part of Kenya which is enshrined in Article 40 (1) of the Constitution of Kenya 2010.

The Applicants averred that the 1st Respondent's action was in breach of Article 47 of the Constitution as the Registrar failed to follow due process by giving them an opportunity to be heard before revoking their titles and also failed to communicate to them reasons for his decision.

The Applicants also contended that the 1st Respondent's action breached their legitimate expectations that they would be consulted, informed or notified of any administrative action that was likely to adversely affect their rights or interests in the suit properties.

In support of the Applicant's case, Mr. Ishmael learned counsel for the Applicants strongly argued in his elaborate submissions that the Registrar's action of revoking the Applicants titles was not only ultra vires his legal mandate but was also a decision made in breach of the rules of natural justice which made it null and void *ab initio*. He relied on the decisions made by this court in the cases of **Sound Equipment -Vs- Registrar of Titles & Another (2011) eKLR, Kuria Greens Limited -Vs- Registrar of Titles & Another (2011) eKLR, Kenya Breweries Ltd -Vs- Municipal Council of Mombasa, Mis. App. No.244 of 2001 (2009) eKLR, Republic -Vs- Kisumu District Lands Officer & Another (2010) eKLR and Republic -Vs- the Land Registrar Lamu, Exparte Yasin Fahim Twahe & Another Misc. App. No.17 of 2010.**

The Respondents opposed the Applicant's Notice of Motion through grounds of opposition filed on their behalf on 19th March 2012 by Mr. Kiage, a State Counsel instructed by the Hon Attorney General.

The grounds of opposition which mainly attacked the competence of the Applicants' Notice of Motion on account of form were subsequently withdrawn by Mr. Kiage in the course of his submissions after establishing that the applicants had sworn verifying affidavits in support of the application for leave to commence Judicial Review proceedings. It would appear that the grounds of opposition had been filed on the assumption that there were no such affidavits on record. It is important to note that though granted ample time and opportunity to file replying affidavits in support of their case, the Respondents had not filed any replying affidavit by the time case proceeded for hearing on 31st July 2012. This means that the facts deponed to by the Applicants in their verifying affidavits remained unchallenged.

Mr. Kiage in his submissions argued that as the suit properties had been reserved for public purposes but were irregularly or illegally acquired and registered in the names of the Applicants, the 1st Respondent had legal authority and power to revoke their titles under Section 60(1) of the Registration of Titles Act. Counsel added that once the Applicant's became aware of the Gazette Notice, they should have instituted civil action against the Respondents to prove ownership of the suit properties and the validity of their titles. He urged the court to be persuaded by the decision of my brother Hon. Korir, J in **Republic -Vs- Attorney General & Another, Exparte Samuel Kazungu Kembi (2012) eKLR (JR.No.56 of 2011)**.

Lastly, Mr. Kiage urged the court to uphold the State's decision through the 1st Respondent to revoke the Applicant's titles since the same was taken in the public interest which is paramount.

Having considered the pleadings filed in this case and the submissions, both written and oral made by counsel on record for the parties together with all the authorities cited, I find that the main issues for determination by this court are threefold namely;

- (1) Whether the Registrar of Titles (1st Respondent) had power or jurisdiction to revoke the Applicants' title to the suit properties under any law.
- (2) Whether in revoking the Applicants' title through a gazette notice, the 1st Respondent breached the rules of natural justice and the Applicants' right to fair administrative action.
- (3) Whether the Applicants are entitled to the reliefs sought.

On the first issue, I find that it is not disputed that the Late Eustace Mbuba Mwoga, the 2nd and 3rd Applicants were the registered holders of title to the suit properties which titles had been issued under the Registration of Titles Act.

Before embarking on a consideration of the issues raised in this case, I wish to observe that the decision challenged in these proceedings was made when the old regime of land laws were in force. The said laws have since been repealed by the Land Registration Act of 2012 and therefore, any reference to the law in this judgement if not specifically mentioned will be a reference to the laws applicable when the impugned decision was made.

Turning to the first issue, it is now settled law that persons who are registered as owners of land under the Registration of Titles Act acquire an absolute and indefeasible title which cannot be challenged except on grounds of fraud or misrepresentation to which the owner is proved to be a party. This legal position is well articulated in Section 23(1) of the Registration of Titles Act which states as follows:

“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”.

A reading of this section clearly shows that it seeks to protect the sanctity of title held by owners of registered land. The Court of Appeal has had an opportunity to interpret Section 23(1) of the Registration of Titles Act in **Joseph Arap Ngo'k -Vs- Justice Moiyo ole Keiwua, Nairobi Civil App. No.60 of 1997** where it stated:

“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 the 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”.

Given that a title holder’s proprietary interest in registered land is protected under both the constitution (see Article 40) and the law unless fraud or misrepresentation in the way title was acquired is proved against the owner, the question that this court is called upon to answer is whether the Registrar has power under the law to revoke title to land through a gazette notice on the basis of an allegation that the land had been illegally or irregularly acquired as happened in this case.

This question has been the subject of litigation before this court and has been answered in a number of decisions made by this court. They include the decisions in **Kuria Greens Limited -Vs- Registrar of Titles & Another (2011) eKLR, Kongowea Market Estate Ltd. -Vs- Registrar of Titles (2011) eKLR, Sound Equipment -Vs- Registrar of Titles & Another (2011) eKLR, Nairobi Petition No.106 of 2010 and Republic -Vs- Registrar of Titles, Mombasa& 2 Others Exparte Emfil Ltd (2012) eKLR** among others.

The main principle running through the holdings in all these cases is that the 1st Respondent is not clothed with any power to revoke or cancel a title however acquired through a gazette notice.

It was argued on behalf of the Respondents that the Registrar of Titles has power under Section 60(1) of the Registration of Titles Act (the Act) to revoke or cancel titles issued under the Act.

Section 60(1) provides that;

“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 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.”

It is worth noting that as per the marginal notes, Section 60 of the Act deals with wrongful or fraudulent entries or retention of documents. The marginal notes by themselves give a clear indication that the said section does not deal with revocation of titles either by the registrar or anybody else.

I am in total agreement with the interpretation of Section 60 of the Act given by my brother Majanja J in **Power Technic Limited -Vs- The Hon. Attorney General and 2 Others (2012) eKLR** where he was dealing with 19 consolidated petitions whose facts were on all fours with the present case.

J. Majanja expressed himself thus:

“A plain reading of Section 60 will show that the powers of the Registrar are limited to correcting errors and misdescription of land or boundaries or where entries or endorsements to any grant or certificate of title are made in error or are fraudulent. This is a limited jurisdiction that does not include cancellation of titles. Even where the Registrar exercises such powers granted to him the facts that are condition precedent of the exercise of such power must be shown to exist and the party against whom the power invoked must be given an opportunity to be heard. Section 65 empowers the Registrar to do all things that are necessary to ensure that there is a fair hearing”.

Section 60(2) which was alluded to by Mr. Kiage as the source of power mandating the Registrar to use his discretion to revoke titles only gives the Registrar an option of applying to the court for summons to compel the attendance of a person who had previously failed to honour the Registrar's summons to deliver up a certificate of title, grant or other instrument for correction if the same had been issued in error or was obtained by fraud or misrepresentation. Section 60(2) does not definitely give the Registrar any discretion to cancel/or revoke title suspected to have been fraudulently obtained.

I have perused the offending Gazette Notice No.10905 of 2010 and I have noted that though the 1st Respondent cited the Constitution of Kenya, the Government Lands Act and the Trust Land Act as the law under which the said revocation was made, the notice did not specify the particular sections of the law invoked to justify the action taken by the Registrar.

I have carefully read the Constitution and the Acts of Parliament cited in the notice and I have not come across any provision that empowers the 1st Respondent or the Commissioner of Lands to revoke titles issued under the Registration of Titles Act unilaterally without recourse to a court of law.

To conclude this issue, it is my finding and decision that the 1st Respondent did not have any power under the law to revoke the Applicants title to the suit properties through a gazette notice. The Registrar could only lawfully cancel or revoke title in compliance with directions given by a court order.

I concur with the findings made by Musinga J when ruling on a similar issue in a constitutional petition based on facts similar to the facts in the present case when he stated in **Kuria Greens Ltd -Vs- Registrar of Titles (supra)** that;

“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 registered title in the absence of a court order to that effect”.

In view of the foregoing, I find that the 1st Respondent acted without jurisdiction in purporting to revoke the Applicants' titles to the suit properties as he had no power or legal mandate to do so.

The purported revocation was unlawful as it contravened Article 40(1) of the Constitution of Kenya as it amounted to the arbitrary acquisition of land from citizens without prompt payment or compensation as provided for under Article 40(3) of the Constitution.

I now wish to comment on Mr. Kiage's submission that the Applicants' right to acquire and own the suit properties did not enjoy constitutional protection in view of Article 40(6) of the Constitution. Article 40(6) provides that the constitutional protection guaranteed in Article 40(1)(2) & (3) do not extend to any property that had been found to have been illegally or unlawfully acquired.

It is important to note that in this case, apart from alleging in the gazette notice that the suit properties prior to their allocation to the Applicants had been reserved for public purposes, the Respondents did not tender any evidence to substantiate the claim that the suit properties had been reserved for the expansion of the Mombasa/Nairobi Highway or that the Applicants had illegally or fraudulently acquired titles thereto.

I take the view that even if there was such evidence, the finding that the suit properties were illegally acquired has to be made through a legally established process which can only be afforded by a court of law and cannot be left to the 1st Respondent's whims or opinion.

There is no evidence that such a finding has been made in respect of the suit properties in this case to warrant the application of Art 40(6) of the constitution. In the circumstances, I find that no basis has been established for the Respondent's submission that the Applicants are not deserving of the protection guaranteed under Article 40 to all persons of the right to own and acquire property of any description in any part of Kenya.

In the circumstances, I find that no basis has been established for the Respondent's submissions that the Applicants are not deserving of the protection guaranteed under Article 40(1) of the Constitution to all persons to own and acquire property of any description in any part of Kenya.

Finally, the Applicants contended that the 1st Respondent's action of revoking their titles through a Gazette Notice violated the rules of natural justice and amounted to unfair administrative action on the

part of the 1st Respondent.

It is not disputed that the Applicants were not given notice of the intended revocation of their titles nor were they given an opportunity to state how they had acquired the said titles before the 1st Respondent published the offending gazette notice. There cannot be any doubt that this action by the 1st Respondent violated the fundamental rule of natural justice which requires that no man shall be condemned unheard. Even if for one moment the court were to assume that the 1st Respondent had power to revoke titles, the rules of natural justice required him to give the Applicants an opportunity to state their side of the story before making a decision to take away their proprietary rights and interest in the suit properties.

In this case, there is undisputed evidence that the Applicants got to know of the decision to revoke their titles through a gazette notice. This was obviously an affront to the rules of natural justice and amounted to a violation of the Applicants right to fair administrative action which is protected under Article 47(1) of the Constitution.

I now turn to a consideration of the reliefs sought in this case. Mr. Kiage urged the court to follow the precedent set by J. Korir in Republic –Vs- Attorney General & Another, Exparte Samuel Kazungu Kambi (2012) eKLR and decline to grant the orders sought by the Applicants.

I have read J.Korir's decision and has noted that the honourable judge declined to grant the reliefs sought in that case in the exercise of his discretion after finding that Judicial Review remedies were not the most efficacious in the circumstances of that case. Though this court is not bound by that decision, I find that the facts and circumstances in that case are distinguishable from the facts in this case in that in the Kazungu Kambi case, there was an interested party who had claimed ownership of the land whose title had been revoked through a Gazette Notice. In this case, no third party came forward to claim ownership of the suit properties. In any case, the exercise of the court's discretion in granting or declining to grant orders of Judicial Review is dependent on the facts and circumstances of each case and in this case, I am satisfied that the reliefs sought herein are the most efficacious to correct what is obviously an illegal decision and to prevent it from being implemented to the detriment of the Applicants.

In the end, I am satisfied that the Applicants have demonstrated that they are deserving of the orders of certiorari and mandamus as sought in Prayer 2 and Prayer 4. In my view, Prayer 1 is duplicated in Prayer 2 which is better framed as it encompasses the offending Gazette Notice.

As far as Prayer 3 is concerned, I find that the Prayer for an Order of Prohibition is drafted in very general and vague terms. It appears to be targeted at persons or entities who are not parties to these proceedings. Such an order if granted would in my view be incapable of enforcement.

As a general rule, courts of law should not issue orders in vain or orders which are incapable of enforcement. In the premises, I decline to grant an order of prohibition as sought in Prayer 3.

The upshot of this judgment is that the application dated 16th February 2011 is merited and it is allowed in terms of Prayer 2 and 4. Since it is on record that the 1st Applicant had commenced these proceedings on behalf of the Estate of her Late husband and no averment was made by the 1st Applicant regarding the status of Succession cause No.254 of 2006, I direct that the order of mandamus issued under prayer 4 will become operative in respect of the 1st Applicant only if titles to the suit properties had been transferred to her on transmission as the personal representative of the Estate of Eustace Mbumba Ntwiga.

It is so ordered.

The Respondents will bear the costs of this application.

DATED, DELIVERED and SIGNED this 7th day of December 2012.

C.W. GITHUA

JUDGE

In the presence of

Florence – Court Clerk

Mr. Ishmael Counsel for Applicants

No appearance for Respondents