



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

PETITION NO. 19 OF 2011

IN THE MATTER OF ARTICLES 22, 23 AND 50 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 40 AND 47 OF THE CONSTITUTION

BETWEEN

PAUL MOSES NGETHA

PETITIONER

AND

KENYA ANTI-CORRUPTION COMMISSION

RESPONDENT

RULING

By an application dated 4th February, 2011, the petitioner sought a conservatory order to restrain the respondent from any further interference and/or dealings with a parcel of land known as **L.R. No. 209/13539 I.R. No. 80454, House No. 23 (97/48) off Suna Road, Nairobi**, (hereinafter referred to as “**the suit property**”), by way of eviction, seizing, possessing or otherwise whatsoever interfering with his title, ownership and possession of the said property pending hearing and determination of **Civil Suit No. HCC ELC No. 2054 of 2007**, (formerly HCC No. 1143 of 2006) **KACC vs MOSES NGETHA**.

The petitioner alleged that he is the registered owner of the suit property, having purchased the same from the City Council of Nairobi in 1992 at a consideration of **Kshs.1,100,000/=**. However, the respondent’s position is that the petitioner acquired the suit property fraudulently, with the object of improperly alienating public property which was vested with the City Council of Nairobi. The respondent filed **HCCC No. 1143 of 2006** seeking to challenge the petitioner’s ownership of the suit property. That suit is still pending in court. While the suit was in court the petitioner was served with a notice to vacate the house and to pay rent arrears amounting to **Kshs.408,900/=**. That notice prompted the petitioner to seek redress in court and an injunction was granted restraining the City Council of Nairobi from interfering with his quiet occupation of the suit property pending the hearing and determination of the suit.

The respondent did not want to await the court’s determination of the matter and vide letters dated

14th September and 21st October, 2010 to the Minister for Lands, the respondent's Director forwarded a list of parcels of land, including the suit property, which he alleged had been unlawfully acquired by individuals and/or private companies. The respondent asked the Minister to take appropriate action to have the properties restituted to the public.

Vide **Gazette Notice No. 15580** published sometimes in November 2010 or thereabout, the Registrar of Titles stated as follows:

“Whereas the parcel 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 parcels of land were reserved for public purpose 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 the said titles.”

Subsequent to publication of the said gazette notice, on 13th January, 2011 the respondent wrote to the petitioner asking him to surrender the suit property. That prompted the petitioner to file a petition as well as the present application. In the petition the petitioner sought a permanent injunction to restrain the respondent, its officers, servants and/or agents from evicting, seizing or otherwise interfering with his ownership, possession and/or use of the suit property. He also sought a declaration that the respondent's conduct of demanding the surrender of the suit property is a violation and infringement of his right to property.

The respondent opposed the application for conservatory orders and stated, *inter alia*:

- **That the issue of ownership of the suit property is a matter directly in issue in HCC ELC No. 2054 of 2007.**
- **That any constitutional issues arising in relation to the suit property ought to be tried in the aforesaid case and the conservatory orders sought herein ought to have been applied for in the same case.**
- **That the foundation of the said HCC ELC No. 2054 of 2007 is the illegal acquisition of the suit property by the petitioner.**
- **That the right to property under Article 40(6) of the new Constitution does not extend to unlawfully acquired property.**
- **That the respondent had not violated the petitioner's right to property.**

It is not disputed by the respondent that there is an order of injunction restraining the City Council of Nairobi from interfering with the petitioner's occupation of the suit property pending hearing and determination of **HCC ELC No. 2054 of 2007**. The legality of the petitioner's ownership of the suit property has been challenged by the respondent in the aforesaid suit. The respondent raised weighty issues of law which must be determined by this court. The respondent sought, *inter alia*, a declaration that the petitioner's acquisition of the suit property is null and void for all intents and purposes. The respondent further sought an order to compel the Registrar of Titles to cancel the title in respect of the suit property and restore ownership thereof to the City Council of Nairobi.

On the other hand, the petitioner insists that he is a bona fide purchaser for value and his rights to the suit property are indefeasible. Although **HCC 1143 of 2006 (now ELC 2054 of 2007)** was filed way back in 2006, the plaintiff therein (the respondent) has so far not prosecuted the same. Irrespective of the merits of the case, I do not think that it was proper for the respondent to cause the Minister for Lands and/or his officials to unilaterally revoke the title documents in respect of the suit property before the aforesaid matter was heard and determined. That action effectively destroyed the substratum of the pending suit. I say so because one of the orders sought by the respondent is an order directing the

Registrar to cancel the petitioner's title to the suit property. But before the court could hear the matter and determine it one way or the other, the respondent pushed for the cancellation of the title. The due process of law was not followed.

In **REPUBLIC vs COMMISSIONER OF LANDS & ANOTHER ex parte CHETAN DEVJI SHAH & ANOTHER, Misc. Application No. 74 of 2010**, the ex parte applicants sought an order of certiorari to quash the decision of the Registrar of Titles, Nairobi, contained in a Kenya Gazette Notice revoking the title to a parcel of land that was registered in their names. The Registrar had caused to be published in the Kenya Gazette a similar notice as the one referred to hereinabove. The ex parte applicants had purchased the parcel of land in question together with all the developments thereon including a house.

The court considered the legality of the decision by the Registrar of Titles and made reference to the provisions of **Sections 60 and 61 of the Registration of Titles Act Cap 281. Section 60** states as follows:

“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.”

That section only empowers the registrar to summon a holder of a grant, certificate of title or other instrument to deliver to him such document for the purpose of being corrected where the registrar is satisfied that the document;

- a) was issued in error; or**
- b) contains any misdescription of land or boundaries; or**
- c) an entry or endorsement has been made in error; or**

- d) was fraudulently or wrongfully obtained; or**
- e) is fraudulently or wrongfully obtained.**

If the registrar summons a person for any of the aforesaid reasons and the person refuses or neglects to comply with the summons or cannot be found, the registrar may apply to the court to issue summons for that person to appear before the court and show cause why the grant, certificate or other document should not be delivered up to be corrected.

It was held that it is only the court that has power to direct a registrar to cancel a title, but only in appropriate cases where, after examining the person and considering all the relevant issues of law and fact, the court is satisfied that such title ought to be cancelled.

The rule of law, which includes due process, is one of the values and principles of governance that bind all State organs, State officers, public officers and all persons whenever any of them applies or

interprets the Constitution or any law or makes or implements public policy decisions. See **Article 10** of the **Constitution of Kenya, 2010**. In **REPUBLIC vs COMMISSIONER OF LANDS & ANOTHER ex parte CHETAN DEVJI SHAH & ANOTHER (Supra)**, this court delivered itself thus:

“While I appreciate the respondents’ concern, which is shared by this court and the public generally, regarding several parcels of land formerly owned by the Government that were unlawfully acquired by individuals and the need to ensure that they revert to the Government, that exercise must be undertaken in accordance with the law.”

In my view, it would be a mockery of the due process of law for a party to file a case asking the court to revoke a title and before the party has prosecuted the case decides to employ an extra-judicial methodology to have the title in question revoked. The respondent does not seem to find anything wrong with that. What then was the purpose of filing **HCC No. 1143 of 2006**? The respondent’s case against the petitioner may be quite strong but irrespective of the merits of the case, it is only fair that the respondent takes the initiative to prosecute the same. The last time the matter was before the court was 4th February, 2009.

In the circumstances, the interests of justice demand that conservatory orders be issued to maintain the status quo pending hearing and determination of HCC ELC No. 2054 of 2007 (formerly HCC No. 1143 of 2006) **KENYA ANTI-CORRUPTION COMMISSION vs MOSES NGETHA**, which I hereby do. The respondent shall bear the costs of this application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF SEPTEMBER, 2011.

D. MUSINGA

JUDGE

In the presence of:

Nazi – Court Clerk

Mrs. Kipingu for Mrs. Yator for the Petitioner

Mr. Machira for the Respondent