



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. APPLICATION NO. 92 OF 2010

KONGOWEA MARKET ESTATE LTD.....APPLICANT

VERSUS

REGISTRAR OF TITLES.....RESPONDENT

JUDGEMENT

1. Pursuant to leave granted on 9th September, 2010, the ex-parte applicant Kongowea Market Estate Limited moved this court under **Order LIII** of the former edition of the Civil Procedure Rules, and Section 8 of the law of Reform Act Cap 26 for orders of Judicial review as follows:

i) ***THAT an order of Certiorari do issue to remove into this Honourable Court for the purposes of being quashed the decision of the Senior Registrar of Titles, Mombasa, the Commissioner of Lands and the Minister of Lands, the Respondents herein contained in the Gazette Notice No. 3459 published in the Special Issue of Kenya Gazette dated 1st April, 2010 revoking the Applicant's Title to Parcel of land known as Subdivision No. 6034 (original No. 170/3), Section 1 Mainland North;***

ii) ***THAT an order of prohibition do issue prohibiting Senior Registrar of Titles, Mombasa, the Commissioner of Land and Minister of Lands, the Respondents herein, their servants and/or agents from alienating, allocating, handing over possession of or vesting the Title of the parcel of land known as Subdivision No. 6034 (Original No. 170/3), Section I, mainland North to any other person and from having any other dealing with the said property or taking any further proceeding or action in relation thereto;***

iii) ***THAT an order of Mandamus do issue directed at the Senior Registrar of Titles, Mombasa and the Commissioner of Lands , the 1st and 2nd Respondents herein commanding them to reinstate the Applicant's Title over the parcel of land known as Subdivision No. 6034 (Original No. 170/3), Section I , Mainland North, by, inter alia, reinstating the Applicant's name in the Certificate of Title of the said property as the proprietor of the freehold thereof and to revoke and/or cancel any dealing with the said title and any entry in the Certificate of Title of the said property made pursuant to the purported revocation of the Applicant's Title;***

iv) ***THAT the costs of and incidental to this application be provided for.***

2. The application was supported by a verifying affidavit sworn by Mohamed Shueb Ayub Musa Khamisa a director of the ex-parte applicant, as well as grounds set out in the statutory statement filed on 2nd September, 2010. Both documents were originally filed in support of the application for leave to apply for orders of judicial review.

3. The circumstances giving rise to the application as revealed from the statutory statement and verifying affidavit are as follows:

4. On 6th August 2009, Kenya Marine and Fisheries Research Institute who was the registered proprietor of property known as subdivision No. 6034 (Original No. 170/3) Section I mainland North (hereinafter referred to as the suit property), transferred the suit property to the ex-parte applicant at a consideration of Kshs. 15,020,000/- . This was the culmination of a transaction which was initiated by a tender notice sent out by Kenya Marine and Fisheries Research Institute, to which the ex-parte applicant through its director responded. Further negotiations resulted in the expert applicant making an alternative tender offer of Kshs. 15,020,000/- which offer was duly accepted resulting in the sale. The transfer was duly registered and reflected in the certificate of Title Number CR21349 issued under the Registration of Titles Act.

5. A certificate of postal search issued on 25th August 2010 under the hand of the Registrar of Titles confirmed that the ex-parte applicant was the registered owner of the suit property. Nevertheless by Gazette notice No. 3459 published in a special issue of the Kenya Gazette dated 1st April 2010, the senior Registrar of Titles Mombasa (one Geoffrey Birundu), purported to revoke the title in regard to the suit property.

6. The reasons given for the revocation of the title are reflected in the following extract of the gazette notice:

“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 of Kenya, 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”

7. It is submitted that the action of the Registrar of Titles, who was presumably acting on behalf of the Commissioner of Lands and the Minister for Lands, was high-handed, arbitrary, and violation of the ex-parte applicant's constitutional protection of right to property provided under Article 40 of the Constitution of Kenya. This is because the suit property was not allocated to the applicant by the government, but was purchased by the ex-parte applicant for valuable consideration.

8. Documents were exhibited showing that the suit property was freehold private land and had at no time been reserved for public purposes. It is further argued that the decision to revoke the ex-parte applicant's title was ultra vires, as the respondents have no powers conferred upon them by law to revoke the title to the suit property. The applicant therefore urges the court to issue orders of Judicial Review.

9. It is noteworthy that although all the Respondents were duly served, and a notice of appointment filed by the Attorney General on 29th October 2010, there was no reply to the motion. A state counsel from the Attorney General's office attended court on several occasions and was given time to file a reply. After almost 10 months, all he could say was that he was yet to receive any instructions from the Respondents. Hearing of the motion therefore proceeded ex-parte.

10. Thus the facts as stated by the ex-parte applicant stand unchallenged. It being evident that the 1st Respondent issued the gazette notice purporting to revoke the ex-parte applicant's title, the issue for determination is whether the respondents' action was ultra vires or against the rules of natural justice, such as to justify the intervention of this court by way of orders of judicial review.

11. The ex-parte applicant has annexed to the verifying affidavit documents showing that it acquired the suit property for valuable consideration from Kenya Marine and Fisheries Research Institute, who had in turn acquired the property for valuable consideration from Kongowea Properties Ltd way back on 4th September 1991. The suit property is not government land subject to the Government Land Act, nor is it Trust Land governed by the Trust Land Act. It is a freehold property registered under the Registration of Titles Act.

12. The issue of the suit property having been allocated to a private developer or being reserved for public purposes does not arise. A certificate of Title issued under the Registration of Titles Act showing the ex-parte applicant as the registered owner of the suit property has been exhibited. Section 23 (1) of the Registration of Titles Act 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.

13. Therefore the ex-parte applicant is the absolute indefeasible owner of the suit property. In the absence of proof of any fraud or misrepresentation to which the ex-parte applicant is party, his right of ownership to the suit property is protected under Article 40 of the Constitution of Kenya. The suit property could only be taken away from the ex-parte applicant through compulsory acquisition as provided under the Constitution of Kenya. That procedure was not adverted to.

14. 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.

15. The suit property being in the area of Kongowea market, I can understand the acute need for public land to manage the area around Kongowea market. This is obvious from the congestion in the area resulting in a lot of man hours being wasted in traffic. I experience it firsthand every day. Nonetheless the respondents cannot deliberately flout the law purporting to act in public interest. The same public interest demands that the rule of law must reign supreme and due process must be followed. This court is under an obligation to protect the sanctity of private property as enshrined in the Constitution of Kenya.

16. 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.

17. 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.

18. In arriving at this conclusion, I am not alone as several authorities which were cited to me by the applicant's counsel confirm that several courts of concurrent jurisdiction as this court have come to the same conclusion in similar circumstances.

19. I therefore allow the notice of motion dated 20th September, 2010 and issue order of certiorari, prohibition and mandamus as prayed. The respondents shall pay the ex-parte applicants costs. Orders accordingly.

Dated, signed and delivered this 31st day of October, 2011.

**H.M. OKWENGU
JUDGE**

In the presence of :

Ms Oluoch H/B for Okongo for Applicant
..... Respondent
Kiponda Court Clerk