



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 14 OF 2011

**IN THE MATTER OF: AN APPLICATION BY MUSK-DEER LIMITED FOR LEAVE TO
 APPLY FOR JUDICIAL REVIEW AND ORDERS OF CERTIORARI, PROHIBITION AND
 MANDAMUS**

AND

**IN THE MATTER OF: PARCELS OF LAND KNOWN AS MOMBASA/BLOCK1/528 AND
 MOMBASA/BLOCK 1/529**

AND

**IN THE MATTER OF: THE CONSTITUTION OF KENYA GOVERNMENT LANDS ACT, CAP
 280, LAWS OF KENYA, TRUST LAND ACT CAP 288, LAWS OF KENYA, THE REGISTERED
 LAND ACT, CAP 300, LAWS OF KENYA AND THE LAND ACQUISITION ACT, CAP 295
 LAWS OF KENYA**

BETWEEN

MUSK-DEER LIMITED.....APPLICANT

AND

LAND REGISTRAR, MOMBASA.....1ST RESPONDENT

THE COMMISSIONER OF LANDS.....2ND RESPONDENT

MINISTER OF LANDS.....3RD RESPONDENT

J U D G M E N T

1. By Gazette Notice No. 15572 published on 26th November, 2010, the 1st respondent revoked the applicant’s titles to parcels of land known as Mombasa/Block 1/258 and Mombasa/Block 1/259. The applicant who was aggrieved by this action obtained leave of this court to apply for orders of judicial review. Consequently, the applicant filed a substantive motion seeking orders of certiorari, prohibition and mandamus, respectively to quash the respondents purported revocation of his titles, prohibit the respondents from alienating or allocating or vesting the titles to any other person, and an order compelling the respondents to restore the applicant’s titles.

2. The application is supported by a verifying affidavit sworn by the applicant’s finance manager Yakatali Amirali Lamuwalla, and a statutory statement which was originally filed on 24th February, 2011 under Order 53 Rule 1(2) of the Civil Procedure Rules. The Hon. The Attorney General filed a notice of appointment on behalf of the respondents who were duly served with the application. However, no

response to the application was filed. When the application came up for hearing, Mr. Kamau a state counsel from the AG's office indicated that he had not received any instructions and opted to leave the court. That being the case, hearing of the application proceeded ex-parte.

3. The applicant has explained that the suit properties were transferred to it by Chembe Holdings Limited on 24th April, 2007 at a consideration of Kshs. 15 million. The transfer was registered and the applicants duly issued with certificate of leases. At the time of the transfer, Chembe Holdings Limited was the holder of a leasehold interest pursuant to a 99 year lease granted to Chembe Holdings Limited by the Government of Kenya under the Registered Land Act Cap 300. The lease was effective from 1st December, 1998.

4. The applicant is aggrieved by the revocation of its titles through the Gazette Notice. Counsel for the applicant has submitted that the respondents had no powers either under the Constitution of Kenya, or the Registered Land Act, or the Government Lands Act or the Trust Land Act to revoke the applicant's titles. It is further submitted that the revocation was an infringement of the applicant's proprietary rights as provided under Article 40 of the Constitution of Kenya. Further, that the rules of natural justice were violated as the applicant was not given a hearing before the revocation was done.

5. It is evident that the facts as stated by the applicant stand unchallenged. The protection of the individual's right to property is provided under Article 40 of the Constitution of Kenya as follows:

“40.(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property –
(a) of any description; and
(b) in any part of Kenya.
(2) Parliament shall not enact a law that permits the state or any person –
(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).
(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation –
(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that –
(i) required prompt payment in full, or just compensation to the person; and
(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.
(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause 93) who may not hold title to the land.
(5)
(6)”

6. It follows that the applicant's property could only be taken away by the state in accordance with the above provisions. The respondents have not filed any response to the application nor have they made any attempts to justify their action. The Gazette Notice gives the reasons for the revocation as the allocation having been illegal and unconstitutional, public need and interest. Neither the constitution nor any of the aforesaid statutes give power to the respondents to revoke titles in case of illegal allocation. Such powers lie with the court. If the respondents seriously wanted to pursue the issue of illegal allocation the respondents ought to have moves this court for appropriate orders. In the case of property required out of public need and interest, Article 40 clearly provides that the procedure relating to compulsory acquisition must be followed.

7. Needless to state that the respondents goofed. The purported revocation was a nullity as the respondents acted arbitrarily and without any authority. The revocation was also a violation of the

applicant's constitutional right to protection of private property. The authorities cited by the applicant's counsel are all in favour of the application.

8. I therefore allow the application and issue orders as prayed.

Dated, signed and delivered this 29th day of November, 2011.

H. M. OKWENGU

JUDGE

In the presence of:

Koech H/B for Okongo for the Applicant

Kamau for Respondents

Kiponda Court Clerk