



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC JUDICIAL REVIEW CASE NO. 36 OF 2018**

**(Formerly Machakos ELC Judicial Review No. 131 of 2011)**

**IN THE MATTER OF: AN APPLICATION BY CAPRI CONSTRUCTION LTD**

**FOR ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION**

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW UNDER SECTION 8 AND 9 OF THE LAW REFORM ACT,**

**CHAPTER 26 LAWS OF KENYA, ORDER 53 OF THE CIVIL PROCEDURE RULES AND ARTICLES 40, 47, 48 AND 50 OF THE CONSTITUTION.**

**IN THE MATTER OF: GAZETTE NOTICE NO. 15581 DATED 26.11.2010 BY THE DISTRICT LANDS REGISTRAR, KAJIADO REVOKING**

**THE APPLICANT'S TITLE TO TITLE NO. NGONG/ NGONG BLOCK 2/580**

**IN THE MATTER OF : THE CONSTITUTION OF KENYA AND THE REGISTERED LAND ACT, CHAPTER 300 LAWS OF KENYA**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**AND**

**COMMISSIONER OF LANDS.....1<sup>ST</sup> RESPONDENT**

**DISTRICT LANDS REGISTRAR, KAJIADO.....2<sup>ND</sup> RESPONDENT**

**EX PARTE APPLICANT: CAPRI CONSTRUCTION LIMITED**

**JUDGEMENT**

By a Notice of Motion dated 3<sup>rd</sup> June, 2011 the Ex parte Applicant seeks for the following Orders:

1. An order of Certiorari to quash the decision of the District Land Registrar, Kajiado vide Gazette Notice No. 15581 of 26<sup>th</sup> November, 2010, revoking the Applicant's TITLE No. NGONG/ NGONG BLOCK 2/ 580.
2. An order of Mandamus compelling the 2<sup>nd</sup> Respondent to issue a fresh Gazette Notice revoking Gazette Notice No. 15581 of 26<sup>th</sup> November, 2010 with regard to TITLE No. NGONG/ NGONG BLOCK 2/ 580.
3. An order of Prohibition prohibiting the Respondents, their servants, agents, any other person, body or authority from physically taking over TITLE No. NGONG/ NGONG BLOCK 2/ 580.

4. The Costs of this application

5. Any other relief as this Honourable Court may deem fit and expedient to grant.

The application is premised on the summarized grounds that the 2<sup>nd</sup> Respondent revoked the title to the Applicant's property TITLE No. NGONG/ NGONG BLOCK 2/ 580 hereinafter referred to as 'the suit land' vide Gazette Notice No. 15581 of 26<sup>th</sup> November, 2010. The 2<sup>nd</sup> Respondent acted in total contravention of the Applicant's Constitutional right to own property and in disregard to sections 27 and 28 of the Registered Land Act. The decision to revoke the title is in breach of the Rules of Natural Justice. Further, the Respondents have no power whatsoever in law of revoking any title to any land under the Registered Land Act and it is only the High Court mandated to do so. The suit land is currently valued at Kshs. 6 million. No other remedy lies in law to prevent the Respondents from acting illegally and beyond their powers and thus adversely affecting the Applicant's Constitutional rights.

The application is based on the Statement of Facts and verifying affidavit of GEORGE KIMANI NJUKI. In the affidavit, the deponent reiterated their claim above and deposes that the revocation of the Ex parte Applicant's title was illegal, unlawful, contrary to rules of natural justice and also oppressive. He averred that the revocation was made without giving any prior notice to the Applicant.

The ex parte Applicant obtained leave on 26<sup>th</sup> May, 2011 to institute the instant motion.

In the statement of facts, the ex parte applicant contends that it is the registered proprietor of the suit land for a term of Ninety Nine (99) years from 1<sup>st</sup> April, 1997. It explains that vide a letter dated the 19<sup>th</sup> August, 2009, the County Council of Ol kejuado granted consent for the transfer of the suit land to it. Further, the Applicant acquired the suit land through a transfer of Lease dated the 7<sup>th</sup> September, 2009, in which John Gakere Gichuhi and Jane Wambui Gakere transferred suit land to it for a consideration of Kshs. 2, 300,000/=. It states that the suit land is currently valued at Kshs. 6 million. Further, that the Certificate of Lease in respect to the suit land was issued to the ex parte Applicant on 7<sup>th</sup> October, 2009 by the Ol kejuado County Council. It avers that the 2<sup>nd</sup> Respondent unilaterally published without giving it notice to be heard, a notice revoking the title of the suit land, vide Gazette Notice No. 15581 of 26<sup>th</sup> November, 2010.

The Applicant's Counsel submitted that the Respondents had no right to cancel the titles and hence acted illegally and contrary to the Constitution as Applicant's property was protected. Further, that Respondents' never brought an action to cancel the title. He contended that the Respondents never filed any documents to oppose the instant application. He concluded that the Applicant still owned the property although the title was cancelled. In his submissions he relied on sections 27 and 28 of the Registered Land Act (repealed) and the cases of **Kuria Greens Limited V Registrar of Titles & Another (2011) eKLR** and **Fahim Yasin Twaha & Another V District Land Registrar Lamu (2011) eKLR** to buttress its arguments.

#### **Analysis and Determination**

Upon perusal of the instant judicial review application, including the statement of facts and supporting affidavit as well as the submissions relied upon; the following are issues for determination:

- Whether the ex parte applicant has demonstrated sufficient grounds to be granted the orders sought.
- Who shall bear the costs of the application.

On the question as to whether the ex parte applicant has demonstrated sufficient grounds to be granted the orders sought. It is the ex parte applicant's contention that the 2<sup>nd</sup> Respondent contravened the Constitution and acted illegal by revoking his title to the suit land.

Judicial review is not concerned with the merits of the decision being challenged but with the decision making process.

**Lord Diplock** in the case of **Council for Civil Service Unions vs. Minister for Civil Service [1985] A.C. 374, at 401D** clearly set the standards of judicial review when he stated that:-

**"Judicial review has I think developed to a stage today when...one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'...By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it...By 'irrationality' I mean what can now be succinctly referred to as "Wednesbury unreasonableness"...it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it...I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision."**

Further, In the case of **Kingdom Kenya 01 Limited versus the District Land Registrar, Narok & Fifteen (15) others [2018] eKLR** the Court of Appeal held that: "Judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. See the **Commissioner of Lands –versus Hotel Kunste [1997] eKLR**. The purpose of JR is to ensure that the individual is given fair treatment by the Authority to which he has been subjected. JR as a remedy is available, in appropriate cases, even where there are alternative legal or equitable remedies. See **David Mugo t/a Manyatta Auctioneers –versus Republic – Civil Appeal No. 265 of 1997 (UR)**. JR being a discretionary remedy, it demands that whoever seeks to avail itself/himself/herself of this remedy has to act with candour or virtue and temperance. See **Zakayo Michubu Kibwange –versus Lydia Kagina Japheth and 2 others [2014] eKLR. JR** as a remedy may also be invoked where the issues in controversy as between the parties are contested. See **Zakayo Michubu Kibwange case (Supra)**. The remedy of judicial review is only available where an issue of

**a public law nature is involved. Further, that a person seeking mandamus must show that he has a legal right to the performance of a legal duty by a party against whom the mandamus order is sought or alternatively, that he has a substantially personal interest and that the duty must not be permissive but imperative and must be of a public nature rather than of a private nature.'**

In line with these set standards, I wish to decipher whether the 2<sup>nd</sup> Respondent's actions in cancelling the title to the suit land which was registered in the name of the ex parte Applicant was rational, reasonable and that he observed the basic rules of natural justice. In considering the Ex Parte Applicant's arguments, I note the dispute herein arose from the Gazette Notice No. 15581 which culminated in the cancellation of the ex parte Applicant's title among other titles. It stated thus: **' WHEREAS the parcel of land whose details are described hereunder 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 allocation were therefore illegal and unconstitutional. Under the circumstances and in view of the public need and interest, the Government revokes the said titles'**

From a cursory look at this Gazette Notice, it does not indicate whether the Ex Parte Applicant was notified of the 2<sup>nd</sup> Respondent's intention to revoke its title to the suit land. Further, from the documents presented by the Ex parte Applicant, it is evident vide a letter dated the 19<sup>th</sup> August, 2009, the County Council of Ol kejuado granted consent for the transfer of the suit land to the ex parte Applicant. Further, the Ex Parte Applicant acquired the suit land through a transfer of Lease dated the 7<sup>th</sup> September, 2009, in which John Gakere Gichuhi and Jane Wambui Gakere transferred the said suit land to it for a consideration of Kshs. 2, 300,000/=. The Certificate of Lease in respect to the suit land was issued to the ex parte Applicant on 7<sup>th</sup> October, 2009 by the Ol kejuado County Council.

Section 47 of the Constitution provides that: **'(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—**

**(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and (b) promote efficient administration'**.

Article 50 guarantees a person a right to fair hearing while Article 40 gives a person a right to own property. I note section 27 and 28 of the repealed Registered Land Act made a holder of a Certificate of Title to land, its absolute proprietor while Section 142 and 143 of the Registered Land Act (repealed) which were in place at the time the notice for revocation of title was published stated thus: **'142 (1) The Registrar may rectify the register or any instrument presented for registration in the following cases - (a) in formal matters and in the case of errors or omissions not materially affecting the interests of any proprietor; (b) in any case and at any time with the consent of all persons interested; (c) where, upon resurvey, a dimension or area shown in the register is found to be incorrect, but in such case the Registrar shall first give notice to all persons appearing by the register to be interested or affected of his intention so to rectify. (2) Upon proof of the change of the name or address of any proprietor, the Registrar shall, on the written application of the proprietor, make an entry in the register to record the change. 143 (1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake. (2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.'**

I opine that the act of the 2<sup>nd</sup> Respondent to gazette cancellation of Ex Parte Applicant's title was an administrative one. However, from his actions, in respect to the gazette notice cancelling the Ex parte applicant's title, I find that that he failed to grant it a fair hearing before doing so.

In the current scenario, I note the Respondents failed to file a response to controvert the ex Parte Applicant's averments.

Based on my analysis above, it is my view that the actions of the 2<sup>nd</sup> Respondent amounted to 'procedural impropriety' as he proceeded to issue a Gazette notice cancelling the ex parte Applicant's title without notifying it. Further, it is also evident that he failed to observe the basic rules of natural justice as well as procedural fairness as he failed to notify the Applicant before revoking his title and also failed to proceed to Court to apply for cancellation of the said title in accordance with the provisions of then then Registered Land Act (repealed) which was the Land Law in place.

In the case of **Kuria Greens Limited V Registrar of Titles & Another (2011) eKLR, Musinga J** while dealing with an issue where the Registrar of Titles proceeded to gazette revocation of titles without notice to the affected parties held that the Registrar of titles acted ultra vires and contrary to the Petitioner's constitutional rights. In associating myself with the decisions and Constitutional provisions cited above, I find that the Land Registrar acted ultra vires and violated the ex parte Applicant's constitutional right by cancelling its title without any notice whatsoever. In the circumstance, I find the instant application merited.

On the issue of costs, since this generally abides the outcome of the suit, I find that since the Respondents inconvenienced the Applicant, it is entitled to costs.

It is against the foregoing that I find the Notice of Motion dated the 3<sup>rd</sup> June, 2011 merited and proceed to allow it in the following terms:

1. An order of Certiorari be and is hereby issued quashing the decision of the District Land Registrar, Kajiado vide Gazette Notice No. 15581 of 26<sup>th</sup> November, 2010, revoking the Applicant's TITLE No. NGONG/ NGONG BLOCK 2/ 580.

2. An order of Mandamus be and is hereby issued compelling the 2<sup>nd</sup> Respondent to issue a fresh Gazette Notice revoking Gazette Notice No. 15581 of 26<sup>th</sup> November, 2010 with regard to TITLE No. NGONG/ NGONG BLOCK 2/ 580 within 90 days from the date hereof.

3. An order of Prohibition be and is hereby issued prohibiting the Respondents, their servants, agents, any other person, body or authority from physically taking over TITLE No. NGONG/ NGONG BLOCK 2/ 580.

4. Costs to the ex parte Applicant.

**Dated signed and delivered in open court at Kajjado this 12th day of March, 2020.**

**CHRISTINE OCHIENG**

**JUDGE**

**IN THE PRESECE OF:**

Juma holding brief for Machira for the ex-parte applicant

Court assistant- Mpoye