



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO 1118 OF 2015

TAMROCK INVESTMENTS LIMITEDPETITIONER

VERSUS

REGISTRAR OF TITLES1 ST RESPONDENT

COMMISSIONER OF LANDS..... 2ND RESPONDENT

KENYA URBAN ROADS AUTHORITY3RD RESPONDENT

JUDGMENT

1. The petitioner, Tamrock Investments Limited, filed this petition in the High Court seeking the following verbatim orders:

a) An order of certiorari do issue to bring to this honourable court and quashed the 1st respondent's Gazette Notice Numbers 9229 and 9230 dated 29th July, 2011 purporting to revoke the petitioner's title to all that parcel of land comprised in Title Number Land Reference Number 209/12084.

b) An order of mandamus do issue to compel the 1st and 2nd respondents by themselves, their servants or agents to delete any entry on the petitioner's Certificate of Title made as a consequence to or in furtherance of the purported revocation of title of all that parcel of land comprised in Title Number Land Reference Number 209/1280

c) A declaration that the 1st and 2nd respondents' purported revocation of the petitioner's title to all that parcel of land comprised in Title Number Land Reference Number 209/12804 is unconstitutional, null and void

d) In the alternative, an order that the respondents do jointly and severally compensate the petitioner for compulsory acquisition of Land Reference 209/12804 in the sum of Kshs 41,820,000/- together with interest thereon

e) General damages.

f) Costs of this petition.

2. On 3/11/2015, Justice Mumbi Ngugi transferred the petition to the Environment and Land Court. The petition was subsequently canvassed before this court by the petitioner through written submissions without the parties leading *viva voce* evidence.

3. The case of the petitioner was that on 1/2/1994, it was allocated Land Reference Number 209/12084 comprised in Grant Number IR 61787 registered on 1/3/1994 and delineated on Survey Plan Number 175949. By Gazette Notices Number 9229 and 9230 contained in the Kenya Gazette issue dated 29/7/2011, the 1st respondent revoked the petitioner's title without affording the petitioner a hearing. The petitioner contended that the actions of the respondents were in violation of Articles 19, 22, 23, 40, 47, 50 and 64 of the Constitution.

4. The Attorney General filed a replying affidavit on behalf of the respondents sworn on 13/7/2012 by Francis Muthusi Kiminza. The case of the respondents was that the suit property was a road reserve set aside vide Development Plan No 34277 and Survey Plan No 8/214 dated 5/2/1922. Through the practice and culture of fraud, impunity and land grabbing that had afflicted Kenya's past, the road reserve was irregularly allocated and alienated to private individuals to the detriment of the greater public. They exhibited Survey Plan No 8/214 and contended that the suit property was a road truncation not available for allocation. It was the petitioners' position that were the court to accede to this petition, it would be sanitizing and affixing a seal of approval to an illegality.

5. The petitioner canvassed the petition through written submissions dated 16/5/2018. Counsel for the petitioner identified the following as the three issues falling for determination in the petition: (i) whether the 1st respondent had power to revoke a certificate of title under the Registration of Titles Act or any other law; (ii) whether the respondents' action of revoking the petitioner's title were in breach of the

petitioner's right; and (iii) whether the petitioner is entitled to any compensation.

6. It was submitted that the 1st respondent did not have the power to revoke any title whatsoever under the repealed Registration of Titles Act. Counsel argued that it was only a competent court that had jurisdiction to revoke or cancel a title. Reliance was placed on the decision in **Multiple Hauliers East Africa Limited v Attorney General & 10 others [2013] eKLR** among various other cases.

7. It was further submitted that the petitioner's title was protected under Article 40 of the Constitution and therefore, revocation of the title without a court order was a violation of the petitioner's right to property. Reliance was placed on the decision in **Republic v The Registrar of Titles, Mombasa & 2 Others ex-parte Emjil Limited [2012]eKLR**.

8. Counsel for the petitioner further argued that the impugned revocation violated the provisions of Article 47 of the Constitution in the sense that the petitioner was not given a hearing prior to the revocation. Lastly, it was submitted that the petitioner was entitled to reasonable compensation for the land because he held a valid title. Reliance was placed on the decision in **Nairobi HCC Petition No 154 of 2015 Isaac Gathangu Wanjohi v Attorney General & Others**. The petitioner urged the court to grant the prayers sought in the petition.

9. The Attorney General did not file written submissions to the petition.

10. I have considered the petition, the answer to the petition and the petitioner's submissions. I have also considered the relevant constitutional and statutory frameworks and the applicable jurisprudence. Parties did not agree on a common statement of issues. Taking into account the petition, the answer to the petition and the submissions by the petitioner, the following issues fall for determination in this petition: (i) whether the suit property is a road reserve irregularly and unprocedurally alienated to the petitioner; (ii) whether the revocation of the petitioner's title was procedurally done; (iii) what are the appropriate reliefs, if any, available to the petitioner; and (iv) what order should be made in relation to costs of this petition. I will make brief pronouncements on the four issues sequentially in the above order.

11. The first issue is whether the suit property is a road reserve irregularly and unprocedurally alienated to the petitioner. The petitioner annexed three exhibits to the petition. Exhibit number "GDP1" is a copy of Grant Number IR 61787 registered on 1/3/1994 in the name of the petitioner. Exhibit number "GDP2" is a letter dated 23/2/2012 from the 3rd respondent requiring the petitioner to immediately remove its "mabati" structures from the suit property, contending that the suit property was a road reserve. Exhibit number "GDP3" is a copy of Gazette Notice Number 9230. Although the prayers in the petition relate to two Gazette Notices, only one Gazette Notice was exhibited. The petitioner did not exhibit any other document to demonstrate that the Grant which it procured and which it is waving was procedurally obtained.

12. The suit property is situated at the junction of Rhapta Road and Ringroad, Westlands, Nairobi. The respondents contended that the suit property was at all material times a road reserve and was not available for alienation to the petitioner. They contended that the title which the petitioner is waving is a product of fraud, impunity and land-grabbing that afflicted Kenya in the 1990s and that the allocation of the road reserve was irregular and unprocedural. The respondents exhibited Survey Plan Number 8/214 as evidence to demonstrate that the suit property was planned and surveyed as a road reserve.

13. Alienation of unalienated public land in municipalities or cities at the material time was regulated by the existing legal framework on physical planning. Among the key requisites for alienation of unalienated public land was the development and approval of an area development plan (ADP) or area part development plan (APDP). The plan would set out the intended physical layout for the area and the available unalienated public land. The approved development plan would also designate the land reserved for public amenities. Alienation of available public land would then be informed by the approved development plan.

14. Other than waving the Grant to the court, the petitioner has done nothing to controvert the respondents' contention that the suit property was and is a road planned as such but irregularly alienated to the petitioner in the 1990s through what is now notoriously referred to as "public land grabbing". The petitioner has not placed before the court the approved development plan which formed the basis of the allocation and the title it is waving. Evidence presented by the respondent show that the suit property was and is a public road truncation.

15. Jurisprudence by the Court of Appeal abounds on the legal status of titles relating to irregularly alienated public amenity lands. The Court of Appeal summarized the legal position of titles relating to irregularly alienated public utility land in the following words in **Chemey Investment Limited v Attorney General & 2 others [2018]eKLR**:

Decisions abound where courts in this land have consistently declined to recognize and protect title to land, which has been obtained illegally or fraudulently, merely because a person is entered in the register as proprietor. See for example Niaz Mohamed Jan Mohamed v Commissioner for Lands & 4 others (1196)eKLR; Funzi isaland Development Ltd & 2others exparte Waa Shi Garbage Collectors & 15 others KLR (E&L) 1, 563; John Peter Mureithi & 2 Others v Attorney General 7 4 Others (2006) eKLR; Kenya National High Authority v Shalien Masood Mughal &5 Others (2017)eKLR; Arthi Highway Developers Limited v West End Butchery Limited & 6 Others (2015) eKLR; Munyu Maina v Hiram Gathiha Maina (2013)eKLR and Milan Kumarn Shah & Others v City Council of Nairobi & Others, HCCC No 1024 of 2005. The effect of all those decisions is that sanctity of title was never intended or understood to be a vehicle for fraud and illegalities or an avenue for unjust enrichment at public expense.

16. In the absence of controverting evidence by the petitioner, and in light of the evidence presented by the respondents, showing that the suit property was at all material times planned as a public road and was not available for alienation to the petitioner, the court finds that the suit property was and is a road reserve irregularly and unprocedurally alienated to the petitioner.

17. The second issue is whether the revocation of the petitioner's title was procedurally done. The respondents did not make any serious attempt to challenge the petitioner's contention that the revocation of the impugned title was done unprocedurally. They did not file submissions to respond to the petitioner's arguments.

18. The Gazette Notice which contains the impugned revocation was dated 29/7/2011. In my view, that is the date when the cause of action in this suit accrued. The current Land Registration Act, 2012, came into effect on 2/5/2012. Therefore, although the petition herein was filed after the commencement date of the Land Registration Act of 2012, the land registration legal framework applicable to this suit is the Registration of Titles Act (now repealed) because that is the law which was in force at the time the cause of action accrued.

19. The common jurisprudence prior to the commencement of the Land Registration Act was that the Registrar of Titles and the Land Registrar did not have powers to revoke a registered title. The position was that only the courts had power to order revocation of a registered title under both the Registration of Titles Act and the Registered Land Act. There was no attempt by the respondents in this suit to demonstrate that the 3rd respondent had powers to revoke the impugned title in the manner he did without an order of the court.

20. The second complaint of the petitioner is that the 1st respondent revoked the title without giving the petitioner a hearing. This complaint has similarly not been answered. The impugned decision was taken in 2011 when the framework in Article 47 of the Constitution was in force although the enabling statute had not been enacted. The requirement for fair hearing and fair administrative action was nonetheless there. The requirement for fair hearing and fair administrative action was there notwithstanding the defects in the impugned title. The court is therefore in agreement with the petitioner and finds that the revocation of the impugned title without giving the petitioner a hearing and without a court order was unprocedural.

21. The third issue relates to the appropriate reliefs, if any, available to the petitioner. Prayers (a) and (b) are judicial review orders which are discretionary in nature. They are issued when it is practicable to do so and when the circumstances render them efficacious. Prayer (c) is a declaratory plea to the effect that the revocation was unconstitutional, null and void. Prayers (d) is an alternative plea for compensation in the sum of Kshs 41,820,000. Prayer (e) is a plea for general damages. Prayer (f) relates to costs.

22. This petition was brought at a time when road construction works on the Nairobi Western Ring Roads was ongoing. Construction had commenced in June 2011 and was due for completion in September 2012. The works were indeed completed and the roads are in place. The suit property is now part of a fully developed public road as earlier planned. Secondly, the court has found that the suit property was at all material times a public road irregularly and unprocedurally alienated to the petitioner. The only wrong disclosed in this petition is the 1st respondent's failure to follow the proper procedure when revoking the impugned title. In the above circumstances, I do not think prayers (a), (b) and (c) are appropriate remedies in this suit.

23. Similarly, prayer (d) would not be available because the court has made a finding to the effect that the suit property was at all material times a public road irregularly and unprocedurally alienated to the plaintiff. Even if the court were to find that the petitioner is entitled to compensation, the plea for Kshs 41,820,000 was completely unsupported. No iota of evidence relating to the value of the suit property was tendered to support that plea. For those reasons, prayer (d) fails.

24. The only relief available to the petitioner is in form of general damages in relation to the unprocedural revocation of the impugned title. No evidence was, however, tendered to assist the court assess reasonable general damages in that regard. In the circumstances, the court will assess and award the petitioner nominal damages of Kshs 3,000,000 (Kenya Shillings Three Million) for the unprocedural revocation of the impugned title.

25. Because the dispute in this suit was caused by both the petitioner and the defunct Office of the Commissioner for Lands during the land-grabbing spree of the 1990s, each part shall bear their respective costs of the petition.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12TH DAY OF MAY 2020.

B M EBOSO

JUDGE

In the presence of:-

Court clerk - June Nafula