



REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA

PETITION NO. 63 OF 2012

FRANNS INVESTMENTS LIMITED.....PETITIONER

VERSUS

THE REGISTRAR OF TITLES, MOMBASA.....RESPONDENT

KENYA REVENUE AUTHORITY.....1ST INTERESTED PARTY

ETHICS AND ANTI-CORRUPTION COMMISSION.....2ND INTERESTED PARTY

JUDGMENT

Issues for determination

[1] The only issue for determination in this judgment is the authority of the Registrar of Titles to revoke titles to land. An objection by the 2nd Interested Party to the Petition on the ground that it was filed as a constitutional petition outside the 6 months allowed for judicial review orders as a ruse to avoid the time limitation of Order 53 of the Civil Procedure Rules must be rejected because Article 23 of the Constitution, which trumps the Law Reform Act under which Order 53 derives authority has no time limitation for seeking redress for violation of breach of constitutional rights.

[2] In any event the 6month limitation for seeking certiorari under Order 53 Rule 1 (2) of the Civil Procedure Rules applies to judicial proceedings and not to administrative acts such as Registrar's revocation of title to land. Order 53 Rule (1) (2) of the Civil Procedure Rules is in terms as follows:

“[Order 53, rule 2.] Time for applying for certiorari certain cases.

2. Leave shall not be granted to apply for an order of certiorari to remove *any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired*”

[3] Attendant to the issue of setting aside of the Gazette Notice on revocation of titles was the question whether in view of pending court proceedings before the Environment and Land Court relating to the titles to the suit property herein, the Court would make any injunctive orders **in this suit** pending determination of the said suits before that Court.

The Petition

[4] The petitioner's cause of action is set out in the Petition dated 7th June 2012 as follows:

3. *The Petitioner is a registered owner of the properties situate at Mtwapa area of Kilifi*

i) Subdivision Number 3650 (Original number 2974 / 2) section III Mainland North;

ii) Subdivision Number 3652 (Original number 2974 / 2) section III Mainland North;

iii) Subdivision Number 3653 (Original number 2974 / 2) section III Mainland North;

iv) Subdivision Number 3654 (Original number 2974 / 2) section III Mainland North;

v) Subdivision Number 3655 (Original number 2974 / 2) section III Mainland North;

vi) Subdivision Number 3656 (Original number 2974 / 2) section III Mainland North;

vii) Subdivision Number 3657 (Original number 2974 / 2) section III Mainland North;

viii) Subdivision Number 3658 (Original number 2974 / 2) section III Mainland North;

ix) Subdivision Number 3659 (Original number 2974 / 2) section III Mainland North;

All registered under the Registration of Titles Act Cap 281 Laws of Kenya.

4. *Pursuant to the provisions of Section 23 of Chapter 281 of the laws of Kenya the Petitioner as proprietor of the aforementioned Plots / land is the absolute and indefeasible owner thereof subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon and the Titles can only be cancelled and or revoked after due process is followed.*

5. *The Petitioner states the Kenya Anti Corruption Commission did sometime in the year 2009 commence various suits against the Petitioner her herein and others parties seeking various reliefs over the suit properties and the matters are currently still pending in court to date. True copies of the pleadings in **HCCC NOS 215, 216,217,218,219,220,221,222,223,224 OF 2009.***

6. *The Petitioner states that while the foretasted suits are still pending in Court awaiting determination, the Registrar of Titles Mombasa did on 6th June, 2011 vide Kenya Gazette dated 8th June, 2011 make a decision purporting to cancel, revoke the Petitioners titles to the aforementioned suit properties on the basis that the same had been reserved for Kenya Revenue Authority.*

7. *The Petitioner states that no notice of the Registrars intention to revoke the Petitioner's titles has ever been given to it.*

8. *The Petitioner further avers there have never been any Court proceedings and or order revoking the Petitioner's titles and the only proceedings it is aware of are still pending in Court in awaiting full trial.*

9. *The Petitioner avers that the Registrars decisions of 6th June, 2011 purporting to revoke and or cancel the Petitioner's titles to the said properties is ultra vires, null and void as they were done in excess of powers of the Registrar since the said Registrar had null and void as they were done in excess of powers of the Registrar since the said Registrar had no power whether under the Constitution or the Registration of Titles Act Cap 281 (now repealed) to revoke Certificate of Titles issued under the said Act."*

[5] On the basis of these averments, the Petitioner sought the following orders:

a) A declaration that the Respondents' decision to arbitrarily and capriciously revoke the Petitioners titles to parcel of land numbers, [as set out above] is in breach of Article 3,10,27,40, 47 and 50 (1) of the Constitution of Kenya.

b) An Order of Certiorari to bring to the High Court and quash the decision of the Registrar of Titles Mombasa, dated 6th June, 2011 and contained in n the Kenya Gazette Volume CXI No. 51 Gazette Notice No.6332 purporting to revoke, and or cancel the Petitioner/s titles to Parcels Numbers:- [as set out above]

c) A declaration that the Certificate of Titles of the Petitioner to the parcel of land known as, [as set out above]remain valid and conferring legal and beneficial title thereto the Petitioner and until defeated by a decree of the high court upon due process.

d) An Order of mandamus directing the Registrar of Lands Mombasa to reinstate Petitioner's titles and maintain proper land records at the land registry Mombasa for the Petitioners titles to parcel of land known as:- [as set out above]

e) An order of prohibition does issue prohibiting the Registrar of Titles and / or County Land Registrar Mombasa County by themselves, their officers, employees, or agents from taking any act of furthering the purported revocation of titles and or making decision to evict the Petitioner and or take possession of the properties known as,[as set out above]

f) Costs of the proceedings be provided.

g) Such other order or reliefs as this Honourable Court shall deem just.

[6] The Petition was supported by the Affidavit of Francis Githui Wahome sworn on the 7th June 2012 attaching the Certificate of Titles on the suit properties and the pleadings in the nine suits pending before the Environment and Land Court and Gazette Notice No. 6332 of 6th June 2011 revoking the petitioner's titles among other titles.

Responses

[7] The Respondent did not file any response to the Petition.

[8] The 1st Interested Party filed a Replying affidavit sworn by Simon Mutua Mwaniki of 17th July 2012 emphasizing alleged illegality of the acquisition of title popularly called 'land grabbing' and urging the public interest cited in the revocation notice by the Registrar of Titles.

[9] The 2nd Interested Party filed a Replying affidavit sworn by Dedan Okwama on 20th July 2012 principally set out its defence that the suit property was public land which was not available for alienation and therefore the Commissioner of Lands had no legal authority to alienate the public property to private persons and that therefore the title was a nullity and there was no need for an order of the court to set it aside, citing **Macfoy v. United Africa Company** (1961) 3 ALL ER 1169.

Submissions

[10] For the Petitioner, Mr. Mogaka advocate, urged the position that the Registrar of Titles had no power to revoke titles without due process, with consequence that the Gazette Notice revoking the Petitioner's titles in this suit must be set aside. The decision of the High Court (Okwengu J. as she then was) in **Samu Limited v. Land Registrar, Mombasa & 2 Ors. Mombasa HC Misc. Civil Appl. No. 135 of 2010** was cited for that proposition. In the decision, the Court considered Gazette Notice NO. 11533 dated 1st October 2010 in similar terms as the present revocation notice and citing Article 40 of the Constitution held that:

“10. Thus the applicant is protected by the Constitution of Kenya and could only be deprived of the suit properties if it is established that he suit properties were unlawfully acquired. As observed in Paragraph 8, nothing has been laid before this court to prove that allegation. Therefore, the applicant is entitled to protection of his right to the suit properties. That right could only be taken away through public acquisition of the suit properties under the Constitution of Kenya, and the Land Acquisition Act. This process not having been followed, the purported revocation of the applicant’s titles to the suit properties is a violation of the applicant’s constitutional rights.

*11. Moreover, neither the constitution not the Government Lands Act not the Trust Land Ac, under which the respondent purported to act gives power to the Respondents to revoke title to land. Even assuming that the suit properties were unlawfully acquired by the applicant, the respondents ought to have sought redress in a court of law, it is only the court which could nullify or revoke the applicant’s titles to the suit properties. Therefore, the Respondent’s action was **ultra vires**, oppressive, an abuse of authority, null and void.”*

[11] Counsel for the 1st Interested Party, Mr. P. M. Matuku urged the Court to consider public interest asserting that the suit property belonged to the 1st Interested Party through its predecessor Department of Customs and it irregularly allocated to a private person. Urging the court to consider the matter beyond the action of the Registrar revocation of title, the Interested Party invited the Court to find that a claim to land cannot be sustained where the allocation was contrary to the Constitution. In the alternative, it was urged that should the court find the action of the Registrar to have been unlawful, the order be made only to the extent of revocation of the Gazette Notice because proprietary rights may only be determined in the suit pending before the Environment and Land Court.

[12] Mr. Kagucia, Counsel for the 2nd Interested Party, while conceding the position that the Registrar of Lands had no authority to revoke titles urged the Court to decline the orders sought on the ground that the petitioner’s title was under challenge in the suits filed in the Environment and Land Court, and he supplied the Court with decisions by Odunga J. in judicial review applications **Republic v Registrar of Titles & another Ex-parte David Gachina Muriithi & another** [2014] eKLR and **Republic v City Council of Nairobi & 3 others Ex Parte Wairimu Waiyaki (Suing in her Capacity as Administrator of the Estate of Zipporah Naisinya (Deceased))** [2013] eKLR, where the learned Judge declined to issue judicial review orders of certiorari and prohibition orders in view of disputed ownership and directed that the question of ownership be determined in appropriate civil proceedings. Counsel also cited the decision of Majanja J. in **Satima Enterprises Ltd vs. Registrar of Titles & 2 Others** [2012] eKLR where the learned Judge gave an order restraining disposal of disputed suit property despite holding that the Registrar had no authority to revoke title.

[13] In **ex parte Wairimu Waiyaki**, supra, Odunga, J. in refusing the judicial review orders sought held as follows:

67. “Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review applications do not determine ownership of a disputed property but only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts with a view to resolving the merits of the dispute the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits.

68. In the present case, it is not disputed that there are pending cases in which the suit parcel of land is the subject. Whether or not seeking the same orders sought herein, it is clear that ownership of the suit parcel is central to those proceedings. In this case it is alleged by the respondents that this dispute concerns Land which had not been surveyed and titles had not been issued and therefore were not available for allocation. That is an issue that can only be determined in an ordinary civil case where parties would be afforded an opportunity of being

heard. To grant the orders sought herein would have the effect of leaving the main dispute of ownership of the disputed land unresolved hence in my view the remedies sought herein would not be efficacious in the circumstances. I am persuaded to take this view by the fact that there are pending cases which if properly pursued would effectually bring this dispute to an end. Accordingly the power to grant judicial review orders being discretionary I in the circumstances of this case decline to exercise my discretionary jurisdiction in favour of the applicant/s and disallow the orders sought in the Notice of Motion filed herein on 31st January 2011. The order that commends itself to me is that the parties do fix the pending cases revolving around the suit land for hearing and determination.

69. Since I have found that the Registrar of Titles had no power to cancel the titles there will be no order as to costs.”

[14] The Respondent did not defend this matter, and Counsel merely urged that the civil cases in the Environment and Land Court be heard between the parties.

Determination

[15] There was no dispute that there were pending before the Environment and Land Court nine suits filed by the 1st Interested Party as plaintiff against the Petitioner and others as defendants alleging fraud and illegality, breach of statute and misfeasance of public office and seeking orders *inter alia* for rectification of the relevant land registers “by cancellation of the Certificate of Title” of the lands subject of the suits. Therefore, the matter of the merits of the contention by the Interested Parties that the titles in the Petition were unlawfully acquired by the Petitioner are not before this Court. They are properly for determination before the Environment and Land Court where the 1st Interested Party has already filed suits in that behalf. The worthy rival arguments as to whether the Court will eventually uphold the petitioner’s title to the suit property is for determination outside these proceedings.

[16] Indeed, the question of title to land or ownership of the suit property being one which oral evidence must be taken is best dealt with in a civil suit where procedure by *viva voce* evidence is the regular method of fact finding. Although, oral evidence may be taken in constitutional litigation pursuant to Rule 20 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, the fact that the civil suits in the Environment and Land Court are first in time and the question of title and ownership of land is proper province of the Environment and Land Court under Article 162 of the Constitution. That is the farthest the court may go in looking beyond the issue of revocation of petitioner’s title to the suit parcels of land.

[17] Apart from the decisions of Okwengu, J in *Samu*, Odunga, J. and Majanja, J. in the decisions cited above, I also note the decision of the Court in *REPUBLIC V COMMISSIONER OF LANDS & ANOTHER EX PARTE: SIMON KIMONDO MUBEA* [2013] eKLR, per Odunga, J. that-

“Accordingly, the title of a registered proprietor may be challenged on the ground of fraud or misrepresentation to which the proprietor is proved to be a party and this can only be done after the due process is adhere to. It must also be remembered that under the provisions of Article 40(6) of the Constitution, the rights under Article 40 do not extend to any property that has been found to have been unlawfully acquired. In arriving at that finding the due process stipulated under the foregoing Constitutional and Statutory provisions must be adhered to and that determination ought not to be arbitrarily made without affording the persons to be affected thereby an opportunity of being heard.”

[18] It is clear that it is now settled that Registrar of Tiles or the Land Registrar as the case may be does not have power to revoke title to land. In the case of *Republic v Land Registrar Taita Taveta District & another* [2015] eKLR, I made this observation and gave the way forward in the event that the Government through its agencies wished to challenge the title to land considered to have been unlawfully obtained, as follows:

34. “The Court must therefore uphold the Rule of Law with regard to the applicant’s rights, as a registered proprietor, under sections 27 and 28 of the Registered Land Act as then applicable to the suit property (now section 25 of the Land Registration Act, 2012), until fraud shall have been established in accordance with section 26 (1) of the Land Registration Act 2012 which provides as follows:

“26. Certificate of title to be held as conclusive evidence of proprietorship

*(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and **the title of that proprietor shall not be subject to challenge, except—***

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

35. Before any order may be made in terms of Article 40 (6) of the Constitution of Kenya 2010 and section 26 (1) (a) of the Land Registration Act 2012 that the title to land was acquired by fraud, misrepresentation and or illegally and it is therefore not protected by the Constitution, the fraud, misrepresentation and illegality in the acquisition of property must be proved to the required standard. The case of fraud and illegality in the acquisition of the suit property herein must, therefore, be proved in proceedings brought by the Government in that behalf under the civil procedure relating to filing of actions before the Court. The Government may, of course, in accordance with the law, as it may be advised, acquire the suit property for the purposes of use by the public school, the Interested Party herein.”

[19] Such proceedings for the determination of the title to the suit property in this case already exist and are pending determination before the Environment and Land Court. The revocation of the titles while these suits were pending, apart from being done without jurisdiction would be a usurpation of the mandate of the Court and a contempt of court if it were shown that the Registrar was aware of the proceedings before the Court. This aspect of the matter was, however, not fully canvassed before the Court although counsel for the petitioner submitted that the Registrar was by revoking the titles to the suit properties **stealing a march** on the petition.

[20] Whether this court should make an order restraining the petitioner from dealing with the suit property pending the determination of the dispute as to ownership in the Environmental Court. I respectfully note the position taken by Odunga J. in *ex parte Wairimu Waiyaki* supra, and by Majanja J. in *Satima*, supra, both which on account of pending litigation on the question of title to the suit property withheld judicial review orders in former, and in the latter made further orders restraining the petitioner from dealing with the suit property in the meantime despite declaring the revocation of title by the Registrar to be null and void.

[21] For my part, I take the view that once declare null and void the Registrar’s Gazette Notice on revocation of title, the registered proprietor remains the absolute owner thereof until his title is defeated in accordance with the due process of the law by the Registrar or by a decree of Court. The question of public interest urged by 1st Interested Party is resolved by reference to the public interest to observance to the Rule of Law. This is the effect of the Court of Appeal decision in *Emfill Limited v. The Registrar of Titles and 2 Ors.*, Court of Appeal at Mombasa Civil Appeal No. 312 of 2012, which is binding on this Court that -:

“22. Thus it was not disputed that the appellant had titles to the suit properties, which the 1st

respondent purported to revoke. In *Pastoli vs. Kabale District Local Government Council and Others* [2008] 2 EA 300 it was held:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.... Illegality is when the decision making authority commits an error of law in the process of taking or making the act the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality.”

The learned judge made a finding that the 1st respondent had no authority or power to revoke titles. Indeed, the learned judge at paragraph 17 of his judgment stated that the appellant had demonstrated that the gazette notice no. 6652 of 2011 was made without authority and in breach of the right to fair administrative action under Article 47 of the Constitution....

*27. On the issue of public interest, while we appreciate that the settlement of squatters in this country is a matter of public interest requiring urgent attention, the same must be done in accordance with the law. Thus if the original grantee had violated the terms of the grant the Government had the option to put in place the machinery to have the grant revoked through an order of the court. Alternatively, if the Government felt that there was a genuine need to settle squatters on the land, it could have invoked the provisions of the Constitution and the Land acquisition act to acquire the land. **The Government chose to follow none of these processes but acted in clear violation of the law. It is in public interest that the rule of law prevails, and it is for this purpose that the people of Kenya through the Constitution entrusted the Court with judicial power. The remedy of judicial review of administrative action is intended to check excesses of power to ensure that the rule of law prevails.***

*28. **The appellant having established its titles to the suit properties, backed with the order from the civil suit, it was unreasonable for the trial judge to refuse to exercise his discretion in the appellant’s favour.***

[22] Moreover, as pointed by Counsel for the petitioners, there was no cross-petition by the Respondents as would entitle the court to make orders to restrain the petitioner’s dealing with the suit property as sought by the 2nd Interested Party. I respectfully agree with Majanja, J in *Satima* that without a counter petition there is no basis for finding for the respondents on the contention of fraudulent acquisition of the disputed property, when he held that-

*“12. Serious allegations of fraud fraudulent acquisition have been raised but I have been circumspect in dealing or commenting on them for several reasons. Firstly, Article 40(6) as I have held contemplates a legal process to establish these kinds of issues (see **Chemei Investments Ltd v. The Attorney General & Ors.** Nairobi Petition No. 94 of 2005 (unreported). **In this case there was no counter petition upon which the court could make a finding or grant relief to the respondents on the basis of the fraud alleged.** Secondly, there is in fact a case pending between the parties in respect of the suit property to wit: Nairobi HCCC No. 663 of 2004 **Satima Enterprises Ltd. v. Kenya revenue Authority & Commissioner of Lands.** In that case the same issues of fraud alleged in this suit have been raised and the Court adjudicating over that suit will no doubt deal with them.*

13. I therefore find and hold that the issuance of the Gazette Notice No. 6332 in relation to the suit property was in fact an attempt to undercut the pending proceedings and also a breach of the petitioner’s rights under Article 40 and 47 (1) of the Constitution.”

[23] Of course, the orders for setting aside of the Respondent’s Gazette Notice on revocation of the titles subject of this petition do not affect the ownership dispute suits pending before the Environment and Land Court which must heard on the merits, and the plaintiffs therein may move that Court as appropriate

for the protection of the suit property, or their interest therein, as they may be advised by their Counsel.

Orders

[24] Accordingly, for the reasons set out above, the Petitioner's Petition dated 7th June, 2012 is granted with costs to the Petitioner to be paid by the Respondent.

[25] For avoidance of doubt, the Petitioner remains the registered proprietor of the suit properties until the titles are revoked in accordance with the due process of the law or until further orders of the Environment and Land Court in the suits pending before it, or further orders of any court of competent jurisdiction.

[26] Order accordingly.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED ON THE 7TH DAY JUNE 2017.

E. K. OGOLA

JUDGE

Appearances:-

M/S Mogaka Omwenga & Mabeya Advocates for the Petitioner

Ms. Lutta, Litigation Counsel for the Respondent

Mr. P. M. Matuku for the 1st Interested Party

Mr. Kagucia for the 2nd Interested Party.