



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 863 OF 2011

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR PREROGATIVE ORDERS
OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF: SECTION 23 OF THE REGISTRATION OF TITLES ACT CAP 281 LAWS OF
KENYA ESTABLISHING THE ABSOLUTE AND INDEFEASIBLE INTEREST IN PROPERTY OF A
REGISTERED OWNER

AND

IN THE MATTER OF: THE CIVIL PROCEDURE ACT CAP 21 LAWS OF KENYA AND ORDER 54
OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF: THE LAW REFORMS ACT CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF: ARTICLE 40 OF THE CONSTITUTION GUARANTEEING THE RIGHT TO
PROTECTION OF A CITIZEN'S PROPERTY

AND

ARTICLE 47 GRANTING EVERY PERSON THE RIGHT TO FAIR ADMINISTRATIVE ACTION

AND

ARTICLE 50 WHICH GUARANTEES A RIGHT TO A FAIR HEARING

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

1. THE REGISTRAR OF TITLES MOMBASA DISTRICT LANDS REGISTRY

2 .COMMISSIONER OF LANDS.....RESPONDENTS

AND

1. JUSTUS MULWA NDUYA

2. ANDREW MUGAMBI.....EX PARTE APPLICANTS

AND

1. MILFAN DEVELOPERS LIMITED

2. FOUR FARMS LIMITED.....INTERESTED PARTIES

RULING

1. This Ruling relates to four Notices of Motion (collectively Applications -

(a) **Judicial Review (JR) Application No. 94 of 2011**, Republic vs. (1) Registrar of Titles, (2) the Commissioner of Lands, ex parte Patbon Investments Company Limited,

Milfan Developers Limited and]

Four Farms Limited] Interested Parties

(b) **Judicial Review Application No. 95 of 2011**, Republic vs. (1) Registrar of Titles, Mombasa, (2) Commissioner of Lands, ex parte (1) Regina Wairimu Thara (2) Rev. Tee Oruya Nalo, (3) Kennedy Mwangi, (4) Fenosa Holdings Limited (5) Gatanna Enterprises Limited

Milfan Developers Limited and]

Four Farms Limited] Interested Parties

(c) **Judicial Review Application No. 106 of 2011**, Republic vs. Registrar of Titles, Mombasa and Commissioner of Lands

ex parte –

(i) Alice Githere

(ii) Mary W. Muigai

(iii) Laurian Mkala

and

Milfan Developers Limited]

Four Farms Limited] Interested Parties

(d) **Judicial Review Application No. 863 of 2011**, Republic vs. Registrar of Titles Mombasa, & Commissioner of Lands, ex parte –

(i) Justus Mulwa Nduya

(ii) Andrew Mugambi

and

Milfan Developers Limited

Four Farms Limited] Interested Parties

2. Counsel for the various ex parte Applicants agreed and the court directed that the four applications be determined together because they raised the same issue, and sought the same remedies, namely –

(1) An order of certiorari to bring into this court and quash the decision of the Respondents herein dated 1st July, 2011 purporting to call for the purposes of revocation of the ex parte Applicants titles registered as Numbers CR 48014, 48019, 48024, 48030, 48032, 48015, 48029, 48028 and 48025 (collectively “*the suit lands*”); and

(2) An order of prohibition to prohibit the Respondents by themselves, their officers, employees or agents from taking any act of furthering the purported call for the ex parte Applicants’ titles to the suit lands for the purposes of revocation of the said titles and for purporting to cancel, cancelling or restraining any dealings in the ex parte Applicants’ titles to the suit lands and/or decision to evict the ex parte Applicants and/or take possession of their properties aforesaid;

(3) A declaration that the title deeds of the ex parte Applicants to the aforesaid titles remain valid and conferring legal and beneficial title thereto, to the respective ex parte Applicants unless and until defeated by a decree of the High Court upon due process of law;

(4) That costs of these Applications be paid by the Respondents and the Interested Parties respectively.

3. The respective Notices of Motion were filed pursuant to leave of court granted on 8th September, 2011 (in respect of JR 94 of 2011), on 8th September, 2011 (in respect of JR 95/2011), on 3rd October, 2011 (in respect of JR 106 of 2011) and on 29th October, 2011 (in respect of JR 863 of 2011). The Notices of Motion (Applications) are founded respectively upon the Statutory Statements and Affidavits Verifying the Facts, filed with the Chamber Summons seeking leave to commence judicial review proceedings by the respective Applicants. In addition, respective counsel for the respective ex parte Applicants filed written submissions, together with lists of authorities.

4. For the Respondents, no Replying Affidavit was filed but the Attorney-General filed Grounds of Opposition dated 6th January, 2012 and contended that the applications were frivolous, vexatious and an abuse of the process of the court, that the decision to revoke the ex parte Applicants’ titles was lawful, that no rules of natural justice were breached, and that the Respondents acted in accordance with the law and orders made were not *ultra vires*.

Background to the Applications

5. The genesis of the applications is not disputed. Four Farms Limited, the Second Interested Party in all the Applications (and hereinafter referred to as the “*Debtor Company*”) was the original registered owner of the suit properties known as –

(a) Sub-Division No. 3465 (Original No. 544/3), Section III Mainland North under Title Number 48028.

(b) Sub-Division No. 3460, Section III Mainland North under Title No. CT 48025.

6. The Debtor Company had charged the suit properties to **Agricultural Finance Corporation (AFC)** by a charge dated 17th December, 1985, (and duly registered)

7. Following default in payment of the loan, the AFC, in exercise of its statutory power of sale auctioned the suit properties in a public auction where the First Interested Party (Milfan Developers Limited), was the highest bidder on 26th June, 2009. Subsequently, the ex parte Applicants purchased the suit properties as follows –

(a) Firstly ex parte Applicant – sub-division No. 3465 (original Number 544/41 Section III Mainland North under Title No. 48028;

(b) Secondly ex parte Applicant sub-division No. 3460 Section III Mainland North under Title No. CR 48025, and had their names duly registered by the First Respondent on 7th October, 2010 and Certificates of Title duly issued by the First Respondent in accordance with Section 22(1) of the Registration of Titles Act Cap 281, Laws of Kenya.

(c) Thirdly, ex parte Applicant sub-division Number 544 (original No. 482), Section III Mainland North under Title No. CR 33735.

(d) Fourthly, ex parte Applicant's

- (1) Regina Wairimu Thara
- (2) Rev. Tee Oruya Nalo
- (3) Kennedy Mwangi
- (4) Fenosa Holdings Limited
- (5) Gatanna Enterprises Limited

(e) Fifthly ex parte Applicant's

- (1) Alice Githere
- (2) Mary Waceke Muigai
- (3) Laurian Mkala

in respect of –

- Sub-division 3436 (original No. 544/12) Section III, Mainland North under Title No. CR 48015, (Alice Githere)
- Sub-division No. 34359 (original No. 544/44) Section IV Mainland North under Title No. CR 48031, (Mary W. Muigai)
- Sub-division No. 3466 (original No. 544/42 Section III, Mainland North), under Title No. CR 48029

and had their names duly registered by the First Respondent on 7th October, 2010 and Certificates of Title duly issued by the First Respondent in accordance with Section 22(1) of the Registration of Titles Act Cap 281, Laws of Kenya.

8. The respective ex parte Applicants say that they were alarmed by the contents of a letter dated 18th July, 2011 written by the District Land Registrar, Mombasa, directing the ex parte Applicants to return their titles for cancellation. The Applicants seek judicial review orders of certiorari to quash the decision in the said letter, and issue orders of prohibition to prohibit the issue of such letters in the future, and

declaration that their titles are valid.

The Applicants' Case

9. The Applicants' case is simply that the Respondents lack the jurisdiction to call for and cancel a title once registered in the name of the ex parte Applicants or any other person. To do so, the Applicants say the Respondents must follow the due process of the law, for once title is issued, it is indefeasible unless fraud, mistake or misrepresentation is shown in terms of Section 23(1) of the Registration of Titles Act. The ex parte Applicants argue that that is an indirect way of depriving them of their property respectively, and is contrary to Article 40 of the Constitution of Kenya 2010.

The Law and the Authorities

10. The side note to the Registration of Titles Act, says –

“Certificate of title to be held conclusive evidence of proprietorship.”

and Section 23(1) says -

“23(1) 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 grounds of fraud or misrepresentation to which he is proved to be a party.”

11. It is clear from the said Section that a registered proprietor's title is only liable to challenge on two grounds, **firstly** fraud to which the proprietor was a party, and **secondly** misrepresentation. For the Registrar to call for cancellation of a proprietor's title to land there must be shown fraud, or misrepresentation. It is not to be merely stated in a letter to the proprietor, but by subjecting such claim to due process. That is what courts have held in the authorities cited by the Applicants' counsel.

12. In **KURIA GREENS LIMITED VS. REGISTRAR OF TITLES, & ANOTHER [2015] eKLR**, Musinga J (as he then was, now Judge of Appeal) said –

“I have carefully searched the Land Titles Act, the Government Lands Act and the Land Control Act, and I have not come across any provision that grants power to a Registrar of Titles or the Commissioner of Lands, to arbitrarily revoke a valid land title. In my view therefore, the Registrar of Titles exceeded his power and thus (acted) ultra vires in purporting to revoke the Petitioner's title. There can be no doubt that an ultra vires act by a public authority is unlawful ...”

13. A similar decision was reached by Tuiyott J in the case of the **REPUBLIC VS. CHIEF LAND REGISTRAR, ex parte Kenga Kirao Nyundo and others [2012] eKLR** where at page 9 of his Ruling the learned Judge said –

“...quite clearly the power of the Respondents to rectify the Register is very limited and does not extend to cancellation of title. The only occasion when the Registrar of Titles can cancel title is under the provisions of Section 142(b) (of the Registered Land Act, Cap 300, repealed) where all persons interested give their consent. No such consent has been given by the Applicants. By dint of Section 143 only a court of law can direct the cancellation of title. The law is so well settled that it is unnecessary to cite any of the many past decisions which have reiterated it. The Respondents are overstepping their power and acting ultra vires if they were allowed to cancel applicants' titles.”

14. With respect, I entirely agree with the above rendition of the law by the said learned Judges.

15. In the English case of **ATTORNEY-GENERAL VS. RYAN [1980] AC 718**, Lord Diplock said –

“It has long been settled, that a decision affecting the legal rights of an individual which is arrived at by procedure which offends against the principles of natural justice is outside the jurisdiction of the decision-making authority.”

16. In the early case of **DAVID ONYANGO VS. ATTORNEY-GENERAL [1987] KLR** where the Commissioner of Prisons purported to deprive Onyango Oloo, a prisoner remission of his sentence as by law provided Nyarangi J said –

“There is a presumption in the interpretation of statutes that the rules of natural justice will apply. In this case the rule in question was the one concerning the right to be heard.”

17. The decision by the Respondents that the registration of the ex parte Applicants parcel of land was **“by way of misrepresentation”** per the First Respondent’s order dated 18th July, 2011, was a matter which needed due inquiry or process. To require the ex parte Applicants to surrender their land titles within seven (7) days for cancellation is a power or jurisdiction which none of the Respondents had.

18. In the circumstances I am satisfied that the Respondents acted illegally and outside of their jurisdiction in purporting to revoke the Applicants’ titles to the suit properties. The Respondents breached the rules of natural justice by not affording the Applicants an opportunity to be heard in respect of the decision to revoke their titles to the suit properties. As the Respondents’ letter of July, 1 2011 was issued after coming into force of the Constitution of Kenya 2010, the Respondents also breached the Applicants constitutional right to fair administrative action as provided for under Article 47(1) of the Constitution rendering the purported revocation also unconstitutional.

19. For all those reasons there shall be orders to bring to this court, and quash by orders of certiorari, the decision of the Respondents concerned in their letter of 1st July, 2011, in relation to –

(1) Title No. 48014; in respect of JR No. 94, Republic vs. (1) Registrar of Titles, (2) Commissioner of Lands & Others, ex parte Patson Investments Company Limited;

(2) Title Nos. 48019, 48020, 48024, 48030 and 48032, in respect of JR No. 95 of 2011, Republic vs. (1) Registrar of Titles, (2) Commissioner of Lands ex parte:

(a) Regina Wairimu Thaara

(b) Rev. Tee Oruya Nalo

(c) Kennedy Mwangi

(d) Fenosa Holdings Limited

(e) Gatanna Enterprises Limited

(3) Title Nos. CR 430115, 480311 and 48029, in respect of JR No. 106 of 2011 between Republic vs. (1) Registrar of Titles, (2) the Commissioner of Lands, ex parte:

(a) Alice Githere

(b) Mary Waceke Muigai

(c) Laurian Mkala

and

(4) Title Nos. CR 48020 and 48025 in respect of JR No. 863 of 2011, Republic vs. Registrar of Titles and commissioner of Lands, ex parte:

(a) Justus Mulwa Nduya

(b) Andrew Mugambi

20. The orders of certiorari having been issued, there is nothing to prohibit. The orders of prohibition are therefore declined.

21. The Applicants also sought a declaratory order that the title deeds to the suit lands remain valid and beneficial titles to the Applicants.

22. This order does not lie principally because it is contrary to Section 8 of the Law Reform Act, (Cap 26, Laws of Kenya) which only provides for issue of the judicial review orders of certiorari, prohibition and mandamus. A declaration is not one of the judicial review orders provided under that provision, though it is provided for under Article 23 as of the Constitution as one of the remedies the court may issue an enforcement of the Bill of Rights, (Chapter V) of the Constitution. This prayer is therefore declined.

23. This being essentially public law litigation, I direct that each party shall bear its own costs.

24. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 5th day of April, 2016.

M. J. ANYARA EMUKULE, MBS

JUDGE

In the presence of:

Mr. Sitonik for Applicant

Miss Lutta for Respondent

Miss Onesmus for Interested Party

Mr. Silas Kaunda Court Assistant