



No. 234

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

ENVIRONMENT AND LAND MISC. CIVIL APPL. NO. 38 OF 2010 (JR)

**IN THE MATTER OF AN APPLICATION BY RAMJI MEGHJI GUDKA LTD AND KAUSHIK
RAMJI**

GUDKA FOR JUDICIAL REVIEW IN THE NATURE OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF REGISTERED LAND ACT CHAPTER 300 LAWS OF KENYA

AND

IN THE MATTER OF TRUST LAND ACT CHAPTER 288 LAWS OF KENYA

AND

IN THE MATTER OF GOVERNMENTS LAND ACT CHAPTER 280 LAWS OF KENYA

AND

IN THE MATTER OF GAZETTE NOTICE 2654 OF 19TH MARCH 2010

BETWEEN

REPUBLIC.....APPLICANT

AND

LAND REGISTRAR KISII DISTRICT.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

EXPARTE

RAMJI MEGHJI GUDKA LTD.....1ST EX PARTE APPLICANT

KAUSHIK RAMJI GUDKA.....2ND EX PARTE APPLICANT

JUDGMENT

1. At all material times, the 1st ex parte applicant was the registered proprietor of all that parcel of land known as **LR No. Kisii Municipality/Block II/222** while the 2nd ex parte applicant was the registered proprietor of all that parcel of land known as **LR No. Kisii Town/Block III/211**. The two parcels of land shall hereinafter be referred to as “**the suit properties**”. By a Gazette Notice No. 2654 published in the Kenya Gazette of 19th March 2010 and purportedly issued under the Constitution of Kenya, the Government Lands Act Cap. 280 Laws of Kenya and the Trust Land Act Cap 288 Laws of Kenya, the 1st respondent purported to revoke among others, the titles of the suit properties on the grounds that the said properties were reserved for private purposes under the relevant provisions of the Constitution of Kenya, the Government Lands Act Cap 280 and the Trust Land Act Cap 288 and as such the allocation thereof to the ex parte applicants were illegal and unconstitutional. The ex parte applicants were aggrieved by the said action on the part of the 1st respondent and have moved this court by way of Notice of Motion application dated 20th April 2010 seeking two principal prayers namely:

1. An order of judicial review in the nature of certiorari to remove into this court and quash Gazette Notice No. 2654 of 19th March 2010 touching and/or concerning revocation of titles in respect of LR No. Kisii Municipality/Block II/222 and LR No. Kisii Town/Block III/211 registered in the names of the ex parte applicants without complying with the due process of the law.

2. An order of judicial review in the nature of prohibition, prohibiting the respondents jointly and severally from further publishing and/or gazetting notices purporting to revoke and/or cancel the ex parte applicants titles in respect of the subject parcels of land without due regard to the due process of law.

3. Costs of the application.

2. The applicants’ application was supported by the verifying affidavit of the 2nd ex parte applicant sworn on 16th April 2010, statutory statement dated 16th April 2010 and what was described as a supporting affidavit sworn by the 2nd ex parte applicant on 20th April 2010. In his affidavits aforesaid, the 2nd ex parte applicant deposed that the 1st ex parte applicant was allocated LR No. Kisii Municipality/Block II/222 by the Commissioner of Lands and after making payment of the requisite statutory charges and fees, the Commissioner of Lands drew, prepared executed and engrossed the lease instrument in favour of the 1st ex parte applicant which lease was duly registered at the lands office at Kisii on 8th October 2002. The 1st ex parte applicant was thereafter issued with a certificate of lease of the same date with respect to the said parcel of land, namely, Kisii Municipality/Block II/222 (herein after referred to as “Plot No. 222”). The 2nd ex parte applicant deposed further that pursuant to the terms and conditions of the said lease, the 1st ex parte applicant has been making the necessary payments of land rates, rent and other property charges to the local authority concerned namely Municipal Council of Kisii. With regard to LR No. Kisii Town/Block III/211 (hereinafter referred to as “**Plot No. 211**”), the 2nd ex parte applicant deposed that the said parcel of land was formerly known as un-surveyed plot No. 31 and that the same was allocated by the Commissioner of Lands to one, Barnabas Aranga who thereafter sold the same to the 2nd ex parte applicant. The 2nd ex parte applicant deposed further that following that allotment and sale of the said property to the 2nd ex parte applicant by the said Barnabas Aranga, the Commissioner of Lands prepared and issued the lease instrument in respect thereof that was duly executed, engrossed and registered at lands office at Kisii on 2nd August, 1992 after which a certificate of lease of the same date was issued in favour of the 2nd ex parte applicant. The 2nd ex parte applicant annexed to his said affidavits in support of the application among others, a copy of a certificate of lease dated 8th October 2002 issued in favour of the 1st ex parte applicant with respect to Plot No. 222 and a certificate of lease dated 2nd August 1982 issued in favour of the 2nd ex parte applicant with respect to Plot No. 211. The 2nd ex parte applicant also annexed to his said affidavit in support of the application a copy of the Gazette

No. 2654 which was published in the Kenya Gazette of 19th March 2010 pursuant to which the titles of the suit properties were purportedly revoked by the 1st respondent.

3. The ex parte applicants application was brought on the grounds that the in purporting to revoke the ex parte applicants titles to the suit properties, the 1st respondent abused the provisions of the Registered Lands Act Cap 300 Laws of Kenya (now repealed) (hereinafter referred to as “**the RLA**”) and that the decision by the 1st respondent to revoke the ex parte applicants titles over the suit properties was oppressive, vexatious and a nullity in law and further that the 1st respondent acted *ultra vires* the powers conferred on it by law and finally that the decision aforesaid was in breach of the rules of natural justice. The ex parte applicants’ application was served upon the respondents. For some unknown reason, the respondents decided only to file grounds of opposition to the said application. The respondents’ grounds of opposition dated 6th June, 2012 were filed on 9th July, 2012. In their grounds of opposition to the application, the respondents contended among others that the ex parte applicants had acquired the titles to the suit properties illegally because the suit properties were not available for alienation. The respondents contended further that the alienation of the suit properties to the ex parte applicants did not comply with the Government’s Disposal Act, the Town Planning Act and the Government Lands Act.

4. In conclusion, the respondents contended that the ex parte applicants’ application was, misconceived, irrelevant, lacked merit, frivolous, vexatious and an abuse of the process of the court and should be dismissed. On 30th July 2013 the advocates for the parties agreed to argue the ex parte applicants’ applications by way of written submissions. The court gave the ex parte applicants fourteen (14) days to file their written submissions and the respondents fourteen (14) days from the date of service of the said submissions to file their written submissions in reply. The matter was thereafter fixed for mention on 27th November 2013 for a judgment date. When the matter came up for mention on 27th November 2013 the ex parte applicants had filed their written submissions but the respondents had not done so. The respondents therefore failed to put in their written submissions to the application.

5. I have considered the ex parte applicants’ application together with the statutory statement and the affidavits filed in support thereof. I have also considered the grounds of opposition filed by the respondents in opposition to the application. Finally, I have considered the written submissions filed by the ex parte applicants on 7th August 2013 togetherwith the authorities cited therein. In my view, the only issues presenting themselves for determination in the present application are the following;

i. Whether the 1st respondent had the power in law to revoke the ex parte applicants’ titles to the suit properties.

ii. Whether in the process of revoking the said titles, the 1st respondent observed the rules of natural justice.

6. Issue No. I

It is not in dispute that the 1st ex parte applicant is the registered proprietor of Plot No. 222 and that it holds of a certificate of lease dated 8th October 2002 in respect of the said property issued under the RLA. According to the said certificate of lease, Plot No. 222 was let to the 1st ex parte applicant by the Gusii County Council for a term of 99 years from 1st August 1999 at a rent of kshs. 15, 624/=. It is also not in dispute that, at all material times, the 2nd ex parte applicant was the registered proprietor of Plot No. 211 and that the 2nd ex parte applicant was issued with a certificate of lease under the RLA dated 2nd August 1982. According to the said certificate of lease, Plot No. 211 was let to the 2nd ex parte applicant by the County Council of Gusii for a term of 99 years from 1st August 1975 at rent of kshs. 80 (revisable). I am fully in agreement with the submission by the ex parte applicants that the ex parte applicants’ titles to the suit properties could not be revoked without following the due process of law. As I have already stated above, the suit properties were registered under the RLA. Under the RLA only a court of law had the power pursuant to the provisions of section 143 thereof to order for the rectification

of the register by the cancellation of an entry therein. The 1st respondent had power under section 142 of that Act to rectify the register. However, such power was limited only to formal matters that do not affect the title of any proprietor. In the Gazette Notice No. 2654 which was published on 19th March 2010, the 1st respondent purported to revoke the ex parte applicants titles in respect of the suit properties under the powers allegedly donated to the 1st respondent under the Constitution of Kenya, the Government Lands Act Cap 280 Laws of Kenya and the Trust Land Act Cap 288 Laws of Kenya. The revocation of the ex parte applicants titles complained of herein was carried out before the promulgation of the Constitution of Kenya 2010. The Constitution that was in force then was the repealed Constitution. I have gone through the repealed Constitution of Kenya, the Government Lands Act Cap 280 Laws of Kenya and the Trust Land Act Cap 288 Laws of Kenya. I have not come across any provision conferring upon the 1st respondent the power to revoke land titles issued under the RLA or under any other law for that matter. I am in agreement with the decision of Musinga J. (as he then was) in the **High Court of Kenya at Nairobi, Petition No. 107 of 2010, Kuria Greens Ltd vs. Registrar of Titles & Another** in which he held citing with approval the case of, **Republic vs. Kisumu District Land Officer & Another, Misc. App. No. 80 of 2010 (eKLR)** that: ***“only a court of law can cancel or amend a title where the court is of the view that the registration has been obtained, made or omitted through fraud or mistake and where it is not a first registration.”*** It is therefore my finding that the 1st respondent had no power to revoke the ex parte applicants’ titles over the suit properties.

7. Issue No. II

In their grounds of opposition, the respondents had contended that the ex parte applicants had acquired titles to the suit properties illegally contrary to the Government Disposals Act, The Town Planning Act and the Government Lands Act since the said properties were not available for alienation. As I have stated at the beginning of this judgment, the respondents did not file a replying affidavit to the application herein. In the circumstances, the respondents’ grounds of opposition are not supported by any factual basis and are at best mere allegations. The respondents have not explained to this court in what manner or in what respect the titles held by the ex parte applicants can be said to be illegal and in what manner the aforesaid statutes were breached in the acquisition of the said titles.

8. I am unable therefore to place any weight on the allegations by the respondents concerning the alleged illegality of the titles held by the ex parte applicants over the suit properties. However, even if it is assumed for argument sake that the ex parte applicants acquired titles over the suit properties illegally or fraudulently, the question that begs for an answer is whether the respondents had the right to revoke the said titles without giving the ex parte applicants an opportunity to be heard on the alleged illegalities in their titles. In the Gazette Notice complained of, the 1st respondent had contended that the allocation of the suit properties to the ex parte applicants was illegal and unconstitutional. I am of the opinion that before the 1st respondent arrived at the decision that the allocation of the suit properties to the ex parte applicants was illegal and unconstitutional, assuming that it had the power to do so, the ex parte applicants ought to have been given an opportunity to be heard on how they acquired the said titles before their titles were revoked on that account. The ex parte applicants’ complaint is that their titles were revoked through the said Gazette Notice without them being given an opportunity to be heard. I am in agreement with the submissions by the ex parte applicants that in arriving at a decision that was prejudicial to the ex parte applicants without giving them an opportunity to be heard; the respondents breached the rules of natural justice.

9. Conclusion

I have held hereinabove that the 1st respondent had no power to revoke the ex parte applicants’ titles over the suit properties. It follows therefore that the respondents acted *ultra vires* the powers conferred upon them by law in purporting to revoke the ex parte applicants’ titles over the suit properties. I have also found hereinabove that the respondents acted in breach of the rules of natural justice in purporting to revoke the ex parte applicants’ titles without affording them an opportunity to be heard. Any decision which is arrived at by a public authority or body in excess of or without jurisdiction and/or in breach of the rules of natural justice is null and void. It follows therefore that the purported revocation of the ex

parte applicants' titles over the suit properties herein was anullity. This court has power under section 13 of the Environment and Land Court Act, 2011 to issue prerogative orders. As I have stated above, the ex parte applicants have sought an order of certiorari to quash the Gazette Notice No. 2654 which was published on,19th March 2010 as it relates to Plot No. 222 and Plot No. 211 and an order of prohibition to prohibit the respondents from further publishing and/or gazettement and/or purporting to revoke or cancel the applicants titles in respect of the suit properties. I am satisfied that the ex parte applicants have made out a case for granting of the orders of certiorari and prohibition sought. The Government of the Republic of Kenya represented herein by the Attorney General as the 2nd respondent can revoke and/or cancel the titles held by the respondents herein over the suit properties provided the due process of law is followed and not otherwise.

10. I would therefore allow the ex parte applicants application by way of Notice of Motion dated 20th April 2010 and make the following orders:

a. An order of Judicial Review in the nature of certiorari be and is hereby issued to remove into this court and quash the decision of the respondents contained in Gazette Notice No. 2654 published on 19th March 2010 revoking the ex parte applicants titles in respect of LR No. Kisii Municipality/Block II/222 and LR No. Kisii Town/Block III/211 which are registered in the names of ex parte applicants.

b. An order of judicial review in the nature of prohibition is hereby issued prohibiting the respondents jointly and/or severally from further purporting to revoke and/or cancel the ex parte applicants' titles in respect of LR No. Kisii Municipality/Block II/222 and LR No. Kisii Town/Block III/211 without following the due process of law.

c. The ex parte applicants shall have the cost of this application.

Delivered, dated and signed at Kisii this 16th day of May 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Ochwang'i for the ex parte Applicants

N/A for the Respondents

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE