



REPUBLIC OF KENYA

High Court at Kakamega

Judicial Review 20 of 2012

IN THE MATTER OF REVOCATION OF TITLES KAKAMEGA MUNICIPALITY/BLOCK II/252, 292, 294, 205 & 206 THROUGH KENYA GAZETTE NOTICE NO. 1619 PUBLISHED ON 17.2.2012

BETWEEN

REPUBLIC APPLICANT

VERSUS

THE LAND REGISTRAR, KAKAMEGA DISTRICT RESPONDENT

AND

THE CHAIRMAN, SCHOOL COMMITTEE

KAKAMEGA PRIMARY SCHOOL INTERESTED PARTY

EX-PARTE

1. KITO PHARMACEUTICAL LTD.
2. YAKO SUPERMARKET (K) LTD.
3. DICKSON TEYIE MUTOKA

J U D G M E N T

In their notice of motion dated 16.3.2012, the three ex-parte applicants are seeking an order of certiorari to be issued and remove into this court and quash the decision of the Land Registrar, Kakamega to revoke the applicants' titles to plot numbers **KAKAMEGA TOWN BLOCK 2/252, 292, 294, 295** and **296** vide a Kenya Gazette Notice No. 1619 published on 17th February 2012. The application is supported by the statements and supporting affidavits of the three applicants. The interested party filed a replying affidavit sworn by Mr. David Ikonza, the headmaster of Kakamega Primary School.

The applicants contend that they are the registered proprietors of the suit properties. Plot number **Kakamega Municipality Block II/252** belong to the 1st applicant, plot number **Kakamega Block II/292** belongs to the 2nd applicant while plot numbers **Kakamega Block II/294, 295** and **296** belong to the 3rd applicant.

The applicants contend that they learnt of the revocation of their respective titles through the press. They were not accorded any hearing. The 1st applicant contends that it bought its property from Bukhungu Women Group of Kakamega on **13/03/2007 for KShs.2.7 million**. The property is currently charged to

Southern Credit Banking Corporation for KShs.13 million.

On its part, the 2nd applicant contends that it bought plot number Kakamega Town Block II/292 from **Michael Oduoma on 5/2/2011 for KShs.17 million.** The property is a leasehold for 99 years from 01/03/1994. The applicant has started a foundation for a six floor building and the ground floor is almost complete. The 2nd applicant annexed documents in form of survey maps showing the historical background of its property.

The third applicant avers that he bought his plot numbers **Kakamega Town Block/294, 295 and 296** from **Josephine Gageha Khaniri for KShs.2,400,000/= on 13th November 2006.** The properties are 99 year leasehold from 1/09/1994.

The interested party Kakamega Primary School contends that the suit properties were excised from plot number Kakamega Town Block II/32. The school was originally owned by the Hindu Community and it was allocated plot number Kakamega Town Block/31 and 32 respectively. The interested party's position is that Block/32 was sub-divided in early 1990s to reward politicians who had defected from Ford Asili to Kanu.

Parties filed written submissions in support of their respective positions. The submissions by counsel for the applicants expounds on the information contained in the pleadings. Counsel contends that the nullification of the applicants' titles is not supported by the statutes cited in the gazette notice.

Mr. Onyiso, State Counsel, on behalf of the respondent submits that the suit properties were reserved for public purposes. Counsel contends that the properties were not available for alienation as they are public land. It is further submitted that the action by the applicants to be allocated the suit land amounts to grabbing of public land. The grabbing took place during the advent of multi-party democracy in Kenya.

It is further submitted by counsel for the respondent that **Section 120** of the Government Land Act empowers the Registrar to revoke a title deed. Further **Section 121** of the Act allows the Land Registrar to cancel a registered document. Counsel contends that the allocation of the suit land is depriving the school its land contrary to the provisions of Article 40 of the Constitution. Counsel relies on the cases of **BOGONKO V NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY, (WEMA) Nairobi Misc. Application No. 1535 of 2005** and that of **REPUBLIC V SENIOR REGISTRAR OF TITLES, MOMBASA & OTHERS: Mombasa Misc. Application No. 70 of 2010.**

The Kenya Gazette Notice number 1619 reads as follows:-

GAZETTE NOTICE NO.1619

THE CONSTITUTION OF KENYA

THE GOVERNMENT LANDS ACT

(Cap. 280)

THE TRUST LAND ACT

(Cap. 288)

REVOCATION OF LAND TITLES

WHEREAS the parcels of land whose details are described under the Schedule herein below were allocated and titles issued to private developers, it has come to the notice of the Government that the said parcels of land were reserved for public purposes under the relevant provisions of the Constitution, the Government Land Act (Cap 280) and the Trust Land Act (Cap 288). The allocations were therefore illegal and unconstitutional.

Under the circumstances and in view of the public need and interest, the Government revokes the said titles.

SCHEDULE

Kakamega

Block/2/251

Block/2/293

Block/2/295

Block/2/252

Block/2/294

Block/2/296

Block/2/292

The respondent issued the above Gazette notice and it was published on 17/2/2012. The contention is that the above land belongs to Kakamega Primary School. According to the pleadings, Kakamega Primary School was formerly owned by the Hindu Community. The Hindu Community constructed Mahatma Gadhi Memorial Hall on the school land and the Hall was left on its own with a separate title being plot number Kakamega Block II/30.

The 2nd applicant annexed some survey maps that show three separate plots namely, Kakamega Town Block II/30, 31 and 32. Plot number Kakamega Town Block II/30 (1407/210) measures about **1.617 acres**. Plot number Kakamega Town Block II/31 (L.R. No.1407/322) is **4.98 acres** while the acreage of plot number Kakamega Town Block II/32 (L.R. No.1407/208) is not stated on the survey maps. From the survey maps, the three blocks were surveyed from between 1957 and 1956. The three plots are separate and distinct on the maps with boundaries properly drawn. According to the applicants, the school is located on plot number Kakamega Town Block II/31. The suit land was created from Block II/32 that was not part of the school. A Hindu Temple stands on Block II/30 and it is being used as a library. Plot number Kakamega Town Block II/32 was formerly used as a municipal yard and later sub-divided into the suit properties.

The extracts annexed by the interested party from the Land Registry shows that plot number Kakamega/Municipality Block II/294 is approximately 0.070 Ha. It was created on 16/2/1995 and allocated to Newton Nicodemus Khaniri. The 3rd applicant was issued with his certificate of lease on 9/3/2007. Plot number Kakamega Municipality Block II/295 is also **0.066 Ha**. and gives a same history. Plot number 294 was opened on the same date 16/2/1995 and it is **0.070 Ha**. It was also allocated to Newton Nicodemus Khaniri and now belongs to the 3rd applicant.

The extract also shows that plot number Kakamega Town Block II/292 is approximately **0.33 Ha**. and was opened on 31/10/1995. It was allocated to Jamima Khavere Kaisho who according to the interested party used to work at State House. The official search for plot number Kakamega Municipality Block II/252 shows that it is **0.30 Ha**. and it was transferred to the 2nd applicant on 17/5/2007.

From the pleadings herein, it is established that the respondent simply issued the Kenya gazette without giving the applicants a hearing. It is the same 2nd respondent who issued the official searches that show that the applicants are the registered owners of the suit properties. The applicants' titles were registered under the Registered Land Act Cap 300 Laws of Kenya (now repealed). Section 8 of the above Act gives the power of the Land Registrar. Unfortunately such powers do not include the revocation of a title deed. There is no allegation that the applicants obtained their titles fraudulently or through unlawful means. The gazette notice simply states that the land belongs to Kakamega Primary School.

From the pleadings herein, it is clear that there are three separate plots namely:-

- i. LR. 1407/210**
- ii. LR. 1407/322 (plot No.31)**
- iii. LR. 1407/208 (plot No. 32)**

The above three plots are distinct and the survey plans provided show that there are boundaries separating

the three plots. The Kakamega Primary School is located on LR. Number 1407/322 (plot No.31) while the applicants' plots were created from LR number 1407/208 (plot number 32). These are two separate plots and the two plots are quite big in size. Plot number 31 is **4.9 acres** while the acreage for plot number 32 is not stated although the survey plans in the measurements show that it could be more or less of the same size as plot number 31. This can be confirmed by the fact that the total acreage for the three plots owned by the 3rd applicant, Dickson Teyie Munyoki, i.e. plot number 294 – **(0.070 Ha.)**, 295 **(0.066 Ha.)** and 296 **(0.066 Ha.)** combined with the other two plots owned by the 1st and 2nd applicants plot number 292 **(0.33 Ha.)** and plot number 252 **(0.30Ha.)**, add up to **0.832 Hectares (over two acres)**. The location plan marked as SS166 annexed to the affidavit of Sudhir S. Khotia shows that the above five plots do not constitute the entire original plot number Kakamega Block II/32.

Section 120 of the Government Lands Act (Cap 280) states as follows:

120: The registrar may, upon such evidence as appears to him sufficient, subject to any rules made under this Act, correct errors and supply omissions in the register or in any entry therein, and may call in any outstanding instrument for that purposes.

Section 121 of the same Act states as follows:

121: (1) The registrar may at any time, after such inquiry and notices, if any, as he may consider proper, and upon production of such evidence as may be prescribed or as he may deem necessary, withdraw from the register by cancellation or otherwise any document or entry which he is satisfied has determined or ceased or been discharged, or for any other reason no longer affects or relates to land registered under this Part.

(2) The registrar may also direct the destruction of any document in his possession or custody which has become altogether superseded by any entry in the register, or has ceased to have any effect.

Counsel for the respondent and interested party contends that the above sections empower a Land Registrar to cancel or nullify a title deed. A simple interpretation of the above two sections shows that the correction of errors and withdrawal of a document from the register does not include cancellation of a title deed. The suit property herein was registered under the Registered Land Act. **Section 142** of the now repealed Registered Land Act Cap 300 allows a Land Registrar to make rectification on the register but still that section does not allow cancellation of a title deed. **Section 143** of the Registered Land Act states as follows:-

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 a 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.

It is clear from the provisions of section 143 that a decision by a Land Registrar to make rectifications on the register should not affect the title deed of a registered proprietor who has purchased his property. All the applicants herein purchased their respective plots for value and were not given notice or a hearing before the cancellation was made.

Article 40(1) & (2) of the Constitution states as follows:-

40. (1) Subject to Article 65, every person has the right either individually or in association with others, to acquire and own property-

(a) of any description; and

(b) in any part of Kenya

(2) Parliament shall not enact a law that permits the State or any person-

(a) to arbitrarily deprive a person of property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this article on the basis of any of the grounds specified or contemplated in Article 27(4).

The decision of the respondent to cancel the applicants' title deed has the effect of depriving them of their property. **Article 40(3)** of the Constitution does provide for circumstances under which a citizen can be deprived of his property and whenever that happens then legal procedures have to be followed. Such procedures start from the commencement of acquisition of the land up to compensation of the owner. **Article 40(6)** does indicate that the rights under that article do not extend to any property **that has been found** to have been unlawfully acquired. In my view before a property is found to have been unlawfully acquired the legal process has to be followed. It is the court that can decide as to whether a property has been unlawfully acquired. The respondent cannot simply degazette a title on the basis that it was unlawfully acquired without the owner being given a hearing. **Article 47** of the Constitution gives every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Similarly Article 47 of the Constitution does provide that 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. In the current case the gazette notice simply indicates that the applicants' property is public land.

Article 61 of the Constitution classifies land in Kenya as public, community or private. **Article 62** of the Constitution explains what public land is. Article 64 of the Constitution describes private land to include a land registered or held by any person under any freehold or lease hold tenure or land declared to be private under an Act of Parliament. Before the gazette notice was issued the suit property was registered as private land. the only way out for the respondent was to file a case in court and have the land declared to be public having been acquired unlawfully if that is to be the case or compulsorily acquire the land through the relevant law and paid compensation to the owners.

The gazette notice was made without giving the applicants any hearing. The 2nd applicant contends that he has partly developed his land. The applicants have title deeds that were processed at the respondent's office. Given the above scenario, I do find that the respondent did contravene the rules of natural justice. It is unfair for the respondent to cancel the title deed without giving a hearing to the applicants. Indeed there is no evidence in form of an allotment letter, title deed or minutes from the local municipal council to show that plot numbers 31 and 32 were allocated to Kakamega Primary School as contended by the interested party and the respondent. No document was annexed to prove that contention. The affidavit of the Headmaster of the school, Mr. David Ikunza is not supported by any documentary evidence. It is clear from the affidavit of Mr. Ikunza that the school is located on plot number 31 and there is no reason given as to why part of the school was not built on plot numbers 32. Further, Kakamega Primary School appears to have been originally owned by the Hindu Community. There is no affidavit from a member of that community giving the historical background of the above three plots explaining how the school came to be built on plot number 32.

I do agree with the submissions by counsel for the applicants that although the respondent quoted the Constitution of Kenya, the Government Land Act and the Trust Land Act as his authority to revoke the title deeds, none of the above legislation empowers the respondent to cancel a title deed that has been validly issued to a registered proprietor without giving a hearing to that owner. The respondent's action amounts to appropriation of private property.

There are several cases where the court has found that cancellation of an individual's title deed through the Kenya Gazette is unconstitutional, null and void. In the case of **KURIA GREENS LIMITED V**

REGISTRAR OF TITLES & ANOTHER [2011] eKLR the court was faced with a similar situation where the petitioner's title deeds were revoked through a Kenya Gazette Notice. Justice Musinga held that the nullification of the petitioner's titles was unconstitutional null and void. The court went on to state as follows:-

“Even assuming there was fraud or misrepresentation in alienating the suit land to the original registered proprietor, the proprietor was not party to such fraud or misrepresentation. The petitioner lawfully purchased the suit land”

The court went on to indicate that *“whereas unlawful acquisition of public property by citizens must be lawfully resisted, the court will be failing in its constitutional duties if it failed to protect citizens from unlawful acquisition of their property by the State through unlawful decisions taken by public officers”*.

Similarly in the case of **ISAAC GATHUNGU WANJOHI & ANOTHER V THE A.G & OTHERS [2012] eKLR** Justice D. S. Majanja declared a gazette notice that had nullified the petitioner's title as null and void. I do find that the respondent's decision to nullify the applicants' titles was made without jurisdiction and cannot be allowed to stand.

In the end, I do find that the applicants do merit the order of certiorari as prayed in their notice of motion dated 16th March 2012. An order of certiorari shall issue as prayed and the decision of the respondent to revoke title numbers Kakamega **Town Block 2/252/, 292, 294, 295 and 296**, vide Kenya Gazette Notice No. 1619 published on 17th February 2012 is hereby quashed. The gazette notice is hereby declared as null and void. The respondent is hereby ordered to remove the revocation notice against each respective title from the records held at the Kakamega Land Registry. Each party shall meet his/its own costs.

Delivered, dated and signed at Kakamega this 9th day of May 2013

SAID J. CHITEMBWE

J U D G E