



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

Miscellaneous Civil Application 4 of 2011

**IN THE MATTER OF AN APPLICATION BY SAMWEL MAYIENGA OPENDA FOR LEAVE
TO APPLY FOR JUDICIAL REVIEW (CERTIORARI, PROHIBITION & MANDAMUS)**

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 GOVERNMENT LANDS ACT, CHAPTER 280, LAWS OF KENYA

AND

IN THE MATTER OF ARTICLE 40 (1), (2) & (3) OF THE CONSTITUTION, 2010

AND

IN THE MATTER OF GAZETTE NOTICE NUMBER 15576 OF 26/11/2010

AND

IN THE MATTER OF LR NO. KISII MUNICIPALITY/BLOCK III/261

BETWEEN

REPUBLIC APPLICANT

VERSUS

THE DISTRICT LAND REGISTRAR, KISII 1ST RESPONDENT

THE ATTORNEY GENERAL 1ST RESPONDENT

EX-PARTE

SAMWEL MAYIENGA OPENDA

RULING

1. On 26th November 2010 the 1st Respondent published a notice in the Kenya Gazette which was as follows:-

Gazette Notice No.15576

Notification of revocation of land titles Whereas the parcel of land whose details are described under the schedule herein below were allocated and title 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 unconstituted. Under the circumstances and in view of the public need and interests the Government revokes the said titles which are:-

- *Kisii Municipality/Block 3/444*
- *Kisii Municipality/Block 3/443*
- *Kisii Municipality/Block 3/261*

O.M. Ocharo

District Land Registrar, Kisii.

2. The petitioner herein is the proprietor of Kisii Municipality/Block 3/261 hereinafter referred to as the (suit land) one of the parcels of land listed in the aforesaid Gazette Notice. He moved to court by way of notice of motion dated 26th January 2011 and seeking the following reliefs:-

- 1) *The application herein be heard on priority basis owing to the obtaining special and/or peculiar circumstances.*
- 2) *The honourable court be pleased to grant an order of judicial review in the nature of certiorari to issue to remove unto the High Court and quash the Gazette Notice No.15576 of 26th November 2010, touching and/or concerning revocation of title in respect of LR NO. Kisii Municipality/Block III/261 registered in names and belonging to the Ex-parte Applicant without complying with the due process of the law and in contravention of **Article 40 (3)** of the Constitution, 2010.*
- 3) *The honourable court be pleased to grant and order of Judicial Review in the nature of prohibition to issue prohibiting the respondents, jointly and/or severally from further publishing and/or gazetting notice(s) purporting to revoke and/or cancel the Ex-parte applicant's title in respect of the subject parcel of land without due process of law and in contravention of **Article 40 (3)** of the **Constitution, 2010**.*
- 4) *The honourable court be pleased to grant an order of judicial review in the nature of mandamus to issue to compel and/or direct the 1st Respondent to restore and/or reinstate the title instruments in favour of the Ex-parte applicant in particular the Register and the Green card in respect of LR No. Kisii Municipality/Block III/261.*
- 5) *Costs of this application be borne by the respondent jointly and severally.*
- 6) *Such further and/or other orders be made as the court may deem fit and expedient.*

3. The application was supported by an affidavit sworn by the applicant. The Notice of Motion and affidavit disclose that on 1st October 1978 the Commissioner of Lands for and on behalf of the county council of Gusii excised, alienated and allocated the suit land herein in favour of Dr. Zachary Theodore Onyonga (hereinafter referred to as the Allottee). Pursuant to the allocation and alienation in favour of the

Allottee a lease instrument was duly prepared by the office of the Commissioner of Lands for a period of 99 years and was subsequently registered on the 17th December 1979. Later the Allottee sold and transferred his interests in the suit land in favour of the Applicant. The Ex parte applicant was issued with a certificate of Lease on 24th July 1981 and such transfer and registration in the name of applicant was consented to and approved by the county council of Gusii, the Commissioner of Lands and the 1st respondent herein. Pursuant to the sale and transfer of the suit land, the applicant took possession and commenced development on same, culminating in the construction of a five storey building otherwise known as Sakawa Towers which has been operational since mid 1980's. That the suit property is currently rented to various tenants who run and/or conduct various businesses therein.

4. Prior to publication of the said Gazette Notice, the applicant had never been informed of any intention to revoke his title and even after publication of the Gazette Notice there has been no other communication from the respondent with regard to the suit land.

5. The applicant contended that the respondents do not have legal power to revoke his title and the purported revocation is illegal and amounts to taking of personal property without compensation. That the respondent made a decision to expropriate the applicant's land without according the applicant an opportunity to be heard, and that the applicant was not given any reason for the said decision. The applicant contended that the respondent's purported revocation of the applicant's title to the suit land also violates **Article 47 (1)** of the **Constitution** in that no reason was given for the aforesaid act or decision.

6. The 1st respondent was served with the court order and notice of judicial review on 31st January 2011 while the 2nd respondent was served on the 2nd February 2011. On 6th October 2011 counsel for the respondent one Miss Kamau stated that they are yet to receive instructions in the matter and that once instructions were received they would file a reply as soon as possible. She requested for 21 days.

7. Counsel for the applicant brought it to the court's attention that there is a bank in the premises of the suit land whose lease expires in December 2011 and he was requesting for an early date. By consent it was ordered that:-

1. *The application dated 20th January 2011 be taken out of today's cause list.*
2. *The respondent to file and serve their replying affidavit papers within 21 days.*
3. *A mention date on 29th October 2011 for further directions.*

But upto 28th October 2011 when the application was heard no response to the said application for judicial review had been filed by any of the respondents.

8. Mr. Oguttu-Mboya for the applicant filed written submissions and a list of authorities and chose to rely on the same entirely. None of the respondents filed written submissions.

9. The 1st issue for determination is whether the 1st respondent had power to revoke a certificate of lease under the Registration of Titles Act or any other law.

10. In Gazette Notice No.15576 through which the 1st respondent purported to revoke the petitioner's title to the suit land he did not indicate the provisions of the law under which he intended to invoke the said titles or to base his decision. Was that an omission? I do not think so. This is simply because there is no provision under the Registration of Titles Act or any other Land Act that bestows on the 1st respondent Commissioner of Lands or the Government power to revoke a registered title in the absence of a court order to that effect. I have carefully searched the Land Titles Act, the Registration of Titles Act, the Indian Transfer of Property Act, the Government Land Act, the Registered Lands Act and the Land Control Act (all of which acts have since been repealed by Act No. 3 of 2012) and 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 certificate of title to land.

11. In my view, the District Land Registrar exceeded his power and thus acted *ultra vires* in purporting to revoke the applicant's certificate of lease. There can be no dispute that an *ultra vires* act by a public authority is unlawful. In **Republic –vs- Kisumu District Lands Officer & another, Misc. Application No. 80 of 2010 e KLR 1**, the court held that:-

“It is clear that it is only the court that can cancel or amend a title where the court is of the view that registration has been obtained, made or omitted through fraud or mistake and only where it is not a first registration.”

12. The decision taken by the 1st respondent is contrary to the applicant's constitutional right to protection of his property as guaranteed under **Article 40** of the **Constitution. Article 40 (1) of the Constitution** provides as hereunder:-

“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.

13. **Article 40 (2)** states that Parliament shall not enact a law that permits the state or any person to arbitrarily deprive a person of property of any description or of any interest in or right over any property of any description or limit in any way the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in **Article 27 (4)**.

14. The 1st respondent's action amounted to the State taking the applicant's property without compensation contrary to the provisions of **Article 40 (3)** which stipulates that:-

“The State shall not deprive a person of property of any description or of any interest in, or right over property of any description unless the deprivation –

a) results from an acquisition of land or an interest in land or a conversion of an interest in land or title to land in accordance with Chapter Five or;

b) is for a public purpose or in the public interest and is carried out in accordance with this application and any Act of Parliament that –

i) requires prompt payment in full of just compensation to the person; and

ii) allows any person who has an interest in or right over that property a right of access to a court of law.”

15. The 1st respondent was well aware that the applicant was a lawful purchaser for value of the suit land. The 1st respondent issued a certificate of lease to the applicant on 24th July 1981. Under **section 23** of the **Registration of Title Act** a certificate of lease issued by the Registrar to any purchaser of land is to be taken by all courts as conclusive evidence that the person named therein as the proprietor of land is the absolute and indefeasible owner thereof. The Court in **Samuel Murimi Karanja & 2 others –vs- Republic – HCCC Criminal Application No.412 of 2003** cited with approval the holding made by the Court of Appeal in **Joseph arap Ngo'k –vs- Justice Moiwo Ole Keiwua – Nairobi Civil Application No. 60 of 1997** as follows:-

“Section 23 (1) of the Act gives an absolute and indefeasible title to the

owner of the property. The title of such power can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title.”

16. Even assuming there was fraud or misrepresentation in alienating the suit land to the original registered proprietor, the applicant was not party to such fraud or misrepresentation. The applicant lawfully purchased the suit land from Dr. Zachary Theodore Onyonka and obtained all the necessary papers on the suit land. The 1st respondent could not therefore purport to arbitrarily revoke its title without any reason and most important without following the due process of law. Due process must be adhered to by the State and its citizens.

17. **Article 47** of the **Constitution** grants every person a right to fair administrative action. **Subsections (1) and (2)** thereof state that:-

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) 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.”

18. In addition, **Article 50** guarantees every person a right to a fair hearing. **Article 50 (1)** provides that:-

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or; if appropriate, another independent and impartial tribunal or body.”

19. The 1st respondent ought to have given the applicant an opportunity to state his case before reaching the decision that has such far reaching ramifications. The applicant ought to have been called upon to explain how he had acquired the suit land notwithstanding the fact that the 1st respondent had himself issued a certificate of lease to the applicant.

20. The impugned decision by the 1st respondent not only violated the applicant’s aforesaid constitutional rights but is also unreasonable and contrary to its legitimate expectation. Referring to a party’s legitimate expectation, Lord Simon Brown in **R. -vs- Pevion County Council exparte P. Baker, [1995] 1 All ER** stated:

“It is the interest rather than the benefit that is the substance of the expectation. In other words the expectation arises not because the claimant asserts any specific rights to a benefit but rather because his interest in it is one that the law holds protected by the requirements of procedural fairness, the law that the interest cannot properly be withdrawn (or denied) without the claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decision.”

21. It is therefore clear that a benefit (but in this case a right) cannot be withdrawn until the reason for its withdrawal has been given and the person concerned has been given an opportunity to comment on the reason.

22. For the aforesaid reasons, the orders of certiorari, prohibition and mandamus sought by the applicant in terms of prayers 1, 2, 3 and 4 are hereby granted. It is further declared that the respondent’s purported revocation of the applicant’s title to the suit land is unconstitutional, null and void. Further, it is hereby declared that the certificate of lease to the applicant in respect to the suit land is conclusive evidence of ownership thereof and the applicant is the absolute and indefeasible owner of the suit land.

23. The respondents will bear the costs of this application.

Dated and delivered at Kisii this 12th day of September, 2012

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. Oguttu-Mboya (present) for Ex parte Applicant

A.G. (absent) for Respondent

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.