

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ELC JR NO. 4 OF 2022

**REPUBLIC
APPLICANT**

VERSUS

DISTRICT LAND REGISTRAR KWALE.....
.....RESPONDENT

AND

LEISURE LODGES LIMITED.....EX-PARTE
APPLICANT
ATTORNEY GENERAL.....INTERESTED
PARTY

JUDGMENT

1. By a notice of motion dated 03.08.2010 filed pursuant to leave of court granted on 16.07.2010, *Order 53 rules 3, 4 and 5 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act (Cap 21) and Sections 8 and 9 of the Law Reform Act (Cap 26)*, the *exparte* applicant (*the applicant*) sought the following orders;
 - a) *That an order of certiorari be issued to remove to this honorable court the decision of the district land registrar, Kwale contained in the Kenya Gazette Notice No.7752 dated 09.07.2010 revoking the land title Kwale/Diani Beach/856 for the reason that the same was illegally and unconstitutionally allocated to the applicant Leisure Lodges Limited, for the purposes of quashing the said decision.*
 - b) *That an order of prohibition be issued prohibiting the district land registrar from recalling, cancelling and or impeaching the applicant's title to land parcel Kwale/Diani Beach/856 and or making any entry in the register in respect of land parcel*

Kwale/Diani Beach/856 and or acting in any other way prejudicial to and or inconsistent with the applicant's registered proprietorship of land parcel Kwale/Diani Beach/856.

c) That an order of prohibitions be issued prohibiting the district land registrar Kwale from disseminating, publishing, placing advertisements, making notification and or public in any form of media, expressing, making representations and or verbal utterances, to anyone in any way or manner or at all, of any matter or material which may be construed as being inconsistent or which is inconsistent with the legality of the registered proprietorship of Leisure Lodges Limited over land parcel Kwale/Diani Beach/856.

2. The application was based upon the grounds contained in the applicant's statutory statement dated 15.07.2010 and a verifying affidavit of even date. The applicant pleaded that it was the registered proprietor of title No. Kwale/Diani Beach Block/856 (*the suit property*) and was in possession of a valid certificate of lease for it. It was pleaded that vide Gazette Notice No. 7752 dated 09.07.2010 the respondent had purported to revoke its title to the suit property on the ground that it was public land reserved for public purposes which had been illegally allocated to the applicant.
3. It was the applicant's contention that the respondent did not give it prior notice of the intended action and neither was it accorded an opportunity of being heard on the matter. It was further contended

that the suit property never formed part of government land and that the respondent had no legal authority under the constitution, the Government Lands Act (now repealed) or any other law to revoke its certificate of title.

4. The applicant pleaded that the respondent purported to revoke its title to the suit property after the applicant had obtained a decree against the respondent and other government officials in *Nairobi HCC NO. 188 of 2008 - Leisure Lodges Ltd vs the Commissioner of Land and 3 others* whereby it was determined that the suit property lawfully belonged to the applicant. It was thus contended that the respondent's said action was made in bad faith and in contempt of court.
5. There is no indication on record of the respondent having filed a replying affidavit in answer to the application for judicial review. However, the Attorney General filed a statement of grounds of opposition dated 07.03.2012 raising the following grounds;
 - a. *THAT the matters herein are sub-judice as the petitioner has filed a similar suit being Mombasa HC CONST. PET No. 21 of 2010.*
 - b. *THAT there are other parties who have settled on the suit property who are likely to be affected by the decision of this court yet they have not been enjoined in these proceedings.*

- c. *THAT land reference No. Kwale/Diani Beach/Block 856, 850, 852, 860, 859 & 859 were originally part of Land reference 131 & 560 Diani Beach.*
- d. *THAT land reference No.131 belonged to the Ministry of Livestock while LR No.560 belonged to Darad Farm, a Sister Company to Leisure Lodge LTD.*
- e. *THAT in or about 1990, the two parcel of land were amalgamated and subdivided into 7 portions.*
- f. *THAT parcels mentioned at paragraph above according to subdivision approval letter ref.46029/93 of 19th January, 1990 were to be shared/used as follows: - (see letter 1 attached).*
- i. *Parcels 850 (c), 852(A), 853(B) & (F) surrendered to the Government in exchange of parcel 858 (J).*
- ii. *Parcels 859(H) and 858(B) to be used for the purposes of Leisure Lodge Club and Golf apartment only*
- iii. *Parcel No. 856 (D) to remain as Darad Farm.*
- iv. *Parcel No.860 to remain as Veterinary Farm. (See attached map).*
- g. *THAT in or around 1988, the officials of Kwale Agricultural Society cleared a piece of Land adjacent to Leisure Lodge Hotels with a view of staging an agricultural show on a portion of land that was part of Ministry of Livestock Development land as stated above*
- h. *THAT when the management of Leisure Lodge noticed the clearing of the land, they wrote to District Development Committee with a proposal to exchange the portion of land in question with an alternative portion near Ukunda road junction saying the show activities would interfere with their Hotel business. (See Letter 2 attached).*

- i. *The proposal for exchange was discussed by Kwale District Development committee on 25th September, 1989 and the Committee agreed to exchange the 20 Acres of Parcel 858) with 48 Acres parcel 853) offered by Darad Farm a subsidiary or sister company to leisure lodge. That the applicants request above was approved and parcel No.853 (B) became the show ground.*
- j. *THAT the applicants request above was approved and parcel No.853 (B) became the show ground (see letter 3 attached)*
- k. *THAT around 1991 Leisure Lodge Hotels applied and requested for the parcel No.860 belonging to Veterinary Farm of the Ministry of livestock Development on which the intended to develop a Golf Course.*
- l. *THAT Since the said Land (parcel 860) had some squatters the management of leisure lodge proposed to surrender plot No. 8517/10 Kwale to settle the squatters to give room for development of Golf Course (see letter 4 ref. I-8/14/1341 of 23rd July 1993)*
- m. *THAT However and unfortunately, the management of Leisure Lodge instead of allowing plot 8517/10 to be settled by the squatters they later disposed that land leaving the squatter with nowhere to go and because of this, they were asked to surrender parcel No. Kwale/Kwale/Diani Complex 856 the suit property herein to the government for purposes of settling the squatters.*
- n. *THAT the government has prevailed upon Leisure Lodge vide letter ref. 46029/189, of 21st July, 2006, 46029/207 of 15th February, 2008 and 46029/2008 (see letter 5) to surrender what is due to the Government for settlement of displaced squatter without positive response.*

- o. THAT the refusal by Leisure Lodge Management to surrender the land in question, is unconscionable as they got all the wanted form the agreements with the government yet gave nothing in return.*
- 6. Although the Attorney General did not file any affidavit in the matter, he attached some letters to the grounds of opposition in a bid to introduce factual evidence in opposition to the application for judicial review. The court takes the view that grounds of opposition are merely points of law on which a party may oppose on application, suit or other proceedings. They cannot take the place of, or replace, factual evidence which can only be introduced through a sworn affidavit.
- 7. The material on record shows that the applicant filed its written submissions on 12.06.2020. However, the Attorney General's submission were not on record by the time of preparation of the judgment.
- 8. The court has considered the application for judicial review, the grounds of opposition as well as the submissions on record. As indicated before, the AG's grounds of opposition do not articulate points of law. They seek to introduce matters of evidence which can only be placed on record through a sworn affidavit. The court is

of the view that the main questions which arise for determination herein are as follows;

- a) *Whether the applicant has substantiated its application for judicial review.*
- b) *Whether the applicant is entitled to the reliefs sought in the matter.*

9. It has been held that the purpose of judicial review is to ensure that public authorities and officials act within the four corners of the law and that they do not exceed their authority. It is essentially a tool for judicial control of administrative action. Thus, a judicial review court may intervene where there is demonstrated procedural impropriety, breach of the rules of natural justice, abuse of power, illegality, bad faith, irrationality or *ultra vires*.
10. In the case of *Municipal Council of Mombasa vs Republic & Umoja Consultants Ltd Civil Appeal 185 of 2001*[2002] KECA 8 (KLR) (Civ) (1 November 2002) (Judgment) the Court of Appeal it was held, *inter alia*

*“...That is the effect of this Court’s decision in the **KENYA NATIONAL EXAMINATION COUNCIL** case and as the Court has repeatedly said, judicial review is concerned with the decision -making process, not with the merits of the decision itself. Mr. Justice Waki clearly recognized this and*

stated so; so that in this matter, for example, the court would not be concerned with the issue of whether the increases in the fees and charges were or were not justified. The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision - and that, as we have said, is not the province of judicial review."

11. The question of whether or not a land registrar has legal authority to cancel, revoke, or recall a title document where he believes the subject property was illegally or unprocedurally alienated has previously been considered and determined by superior courts. See, for instance, the case of *Satima Enterprises Ltd vs Registrar of Title and 2 Others [2012] eKLR*. In the case of *Republic v Land Registrar, Nakuru District & another; Nakuru War Memorial Hospital*

Ltd (Exparte Applicant) (Environment and Land Judicial Review Case 1 of 2024) [2024] KEELC 5368 (KLR) (18 July 2024) (Judgment) this court held that;

“27. The court agrees with the Applicant’s submission that the 1st Respondent had no legal authority to revoke a certificate of lease duly issued upon an extension of lease by the relevant authorities. The court accepts as good law the authorities cited by the Applicant to the effect that a land registrar has no legal authority to revoke, cancel or nullify a certificate of lease or other title document on the basis that it was obtained through fraud or improper and unlawful means. The court is satisfied that the 1st Respondent acted without or in excess of jurisdiction and that his action of publishing Gazette Notice No. 6309 was ultra vires. As a result, the court is satisfied that the Applicant has demonstrated at least one of the grounds for judicial review set out in its application.”

12. The court is of the view that the respondent herein had no legal authority under the Kenyan legal framework to arbitrarily revoke the applicant’s title to the suit property supply because he believed it to have been illegally or irregularly obtained. The respondent ought to have submitted the issue of the alleged illegality or irregularity in the allocation of the suit property to a competent authority for adjudication and determination. The court is further of the opinion that even if the respondent had granted the applicant an opportunity of being heard on the issue such opportunity would

not have conferred jurisdiction upon him to revoke the title. The respondent simply had no legal authority to revoke the certificate of title for the suit property hence he acted *ultra vires* and outside the power of a registrar. As a result, the court is satisfied that the applicant has demonstrated or substantiated the requisite grounds for judicial review against the respondent.

13. The second issue is on the applicant's entitlement to the reliefs sought in the application for judicial review. In view of the fact that the applicant has demonstrated its claim, it is entitled to an appropriate remedy to vindicate its property rights over the suit property. The court has no hesitation in granting an order of *certiorari* to remove into this court and quash the offending decision of the respondent. That is the action which precipitated the instant application for judicial review.
14. The court is also persuaded that the first order of prohibition sought in the application to prevent the respondent from recalling, impeaching or cancelling the applicant's title to the suit property is necessary. However, the court is not persuaded the second order of prohibition is necessary since the things sought to be prevented are vague and speculative in nature.

15. The upshot of the foregoing is that the court finds and holds that the application for judicial review is merited. As a consequence, the court makes the following orders for disposal thereof;

- a) An order of certiorari be and is hereby issued to remove into this court for the purpose of quashing the decision of the respondent contained in Gazette Notice No. 7752 dated 09.07.2010 revoking the ex parte applicant's title No. Kwale/Diani Beach/856.***
- b) An order of prohibition be and is hereby issued prohibiting the respondent from recalling, cancelling or impeaching the applicant's title No. Kwale/Diani Beach/856.***
- c) There shall be no order as to costs.***

It is so decided.

Judgment dated and signed at Mombasa and delivered virtually via Microsoft Teams on this **16th day of October 2025.**

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Y. M. ANGIMA

JUDGE

In the presence

Court assistant Gillian

Mrs. Eunice Njeru for the ex parte applicant

No appearance for the respondent

No appearance for the interested party