



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

JUDICIAL REVIEW APPLICATION NO. 12 OF 2017

IN THE MATTER FOR AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF PROHIBITION CERTIORARI & MANDAMUS

AND

IN THE MATTER OF ARTICLE 2, 10,19,40,47,48 AND 50 OF TE CONSTITUTION OF KENYA,2010

AND

IN THE MATTER OF SECTIONS 24,26 AND 79 OF THE LAND REGISTRATION ACT 2012

AND

IN THE MATTER OF SECTIONS 8 & 9 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF SECTIONS 7 & 8 OF THE FAIR ADMINISTRATIVE ACTIONS ACT 2015

BETWEEN

REPUBLIC.....APPLICANT

AND

DISTRICIT LAND REGISTRAR THIKA LANDS REGISTRY.....RESPONDENT

AND

SUSAN MUTISO.....1ST INTERESTED PARTY

GATUNDU NYAJKINYUA COMPANY LIMITED.....2ND INTERESTED PARTY

FREDRICK MULWA.....3RD INTERESTED PARTY

EX PARTE MICHEAL KAMANDE GACHUKIA

JUDGMENT

The matter for determination is **Notice of Motion** Application dated **13th November 2017** by the Ex parte Applicant seeking for the following orders;

1. That an order of Certiorari do issue to quash the decision of the Respondent in revoking Title No.Gatuanyaga/ Ngoliba

Block 1/1400, on 25th August 2017 from the name of the Exparte Applicant herein to the name of the 3rd Interested Party as proprietor.

2. That an Order of Mandamus do issue compelling the Respondent herein to reinstate the Ex-parte Applicant Michael Gachukia Kamande as the duly registered proprietor of the suit property being Title No. Gatwanyanga/ Ngoliba Block 1/400.

3. A declaration that the decision and conduct of the respondent and in particular the impugned revocation of title No. Gatwanyanga/ Ngoliba Block 1/400 on 25th August 2017 is ultra vires, unlawful, wednesbury unreasonable, unfair, manifestly unjust and in blatant disregard to the rules of natural justice.

4. That any other and further relief that this Honourable court may deem fit and just to grant in the circumstances.

5. That this cost of the Application be provided for.

The Application is based on the grounds stated in the statement of facts dated **30th October 2017**, in which the Applicant averred that the Respondent revoked the suit title without the requisite powers and jurisdiction in blatant disregard of **Section 79 of the Land Registration Act** and the Respondent's act of revoking the title without due compliance with the law manifests breach of principles of natural justice, right to fair administrative action and breach of legitimate expectation.

The Ex-parte Applicant further averred that the decision to revoke the title is highly prejudicial to him as the Respondent condemned him unheard. That despite addressing the Respondent vide a letter dated **4th September 2017**, no response has been forthcoming and the only way of curtailing arbitrariness, abuse of powers and jurisdictional errors is by order of *Certiorari* and *Mandamus*.

Further in his Verifying Affidavit, the Exparte Applicant averred that he is the registered owner of the suit property having acquired it as a bonafide purchaser for value **without Notice** from the 1st Interested Party in the year 2016. He averred that the 1st Interested Party was allotted the suit property by the 2nd Interested Party on account of her shares evidenced by the certificate of share marked as **annexture MK-2**. Consequently, she was issued with a title deed by the 2nd Respondent and around **April 2016**, he purchased the suit property from 1st Interested Party at **Kshs.5,000,000/=** and he obtained the requisite consents from the **Land Control Board**, after carrying out an official search and as a result the transfers were duly registered in his favour by the Respondent and a title deed was issued to him without encumbrance which is a conclusive evidence of ownership.

He further averred that the 1st Interested Party subsequently delivered vacant possession to him and he has been in occupation over a period of one year uninterrupted. However around **18th April 2017**, he was served with summons by the Respondent to appear before him in relation to the suit property, on **23rd May 2017** and that is when he heard of the dispute over the suit property and around **25th August 2017**, the Respondent illegally directed that the title deed in his name be expunged from the records and further ordered that a register be reconstructed to reflect the 3rd Interested Party as the proprietor of the suit property citing provisions of **Section 79(c)** of the **Land Registration Act**.

It was his contention that he was not a party to the proceedings and was condemned unheard. It was his further contention that he has been advised by his Advocates that the Respondent has no jurisdiction and acted in excess of the powers conferred to him under **Section 79(c)** and the ruling did not take into consideration the existence of a title duly registered in his name and as such the said revocation smacks of impropriety. He also contended that though he has raised his concerns and demanded for information through his Advocates, the Respondent has ignored the said demand letter. He averred that as such there is no other mechanism of enforcing compliance for the sought orders.

The Application is opposed and the 3rd Interested Party filed a **Replying Affidavit** on **6th February 2018** and averred that he bought shares in **Gatundu Nyakinyua Company Limited** on **24th January 1996**, and he paid for ballot paper and Certificate of ownership and he was issued with a ballot certificate **No. 1400** and Certificate Number **.3033** and on **2nd January 2003**, he was issued with a title deed by the **Land Registry Thika** and he took possession of the suit land and has been enjoying quite possession of the same. He also averred that in **2014**, when he was developing the property, he tried to have a search availed to him but it was not possible as he was informed that the file was unavailable. However, in **2016** he paid for the search and it reflected **Mr. Micheal Kamande Gachukia** as the owner of the suit land with a title having been issued on **10th May 2016**.

It was his contention that upon further inquiry, he was informed that the entire file had no records reflecting his ownership and the same had been reconstituted afresh and he then lodged his complaint with the **District Land Registrar Thika**, who summoned them severally and each party presented their case and during hearing, it became apparent that his records on ownership had been removed and the proceedings were done fairly with each one of them accorded an opportunity to present their case and after the hearing they came back for ruling on **25th August 2017**, wherein all the other parties did not attend and the Registrar delivered the ruling in their absence.

The Application was canvassed by way of written submissions and the Applicant through the **Law Firm of H. Kago & Company Advocates** filed his submissions on the **15th March 2018**, and submitted that that the Ex parte Applicant was not accorded fair Administrative action as envisaged in the Constitution. It was further submitted that the Applicant being the registered proprietor of the suit property had a legitimate expectation that his rights would be protected under **Articles 40, and 47** of the Constitution and as such the decision to revoke the Ex parte Applicant title by the Respondent was not in compliance with the rules of natural justice. The Ex parte Applicant further submitted that the orders issued to expunge his title were *ultra vires* and the Land Registrar had no powers to do the same. The Ex parte Applicant relied on various decided cases amongst them the case of **Republic... v... The Registrar of titles Mombasa & 2 others Ex parte Emfill Ltd (2012) eKLR**, where the Court of Appeal held that;

“For these reasons, I find that the government cannot revoke title to land even “for public need or interest “ or for alleged illegality. The government is obliged to move the court for appropriate orders to revoke, cancel or rectify title in such circumstances. A unilateral decision published in the Gazette will not do. The considerations of public interest such as presented by the Respondent in this proceedings may only be used by the Court in appropriate case in making an order for cancellation of title or in authorizing, subject to due compensation, the compulsory acquisition or takeover of the private property.”

The 3rd Interested Party on the other hand, through the **Law Firm of Kalwa & Company Advocates** filed his submissions on the **11th of April 2018**, and submitted that the Applicant was accorded fair and reasonable opportunity to ventilate his case and that the decision of legitimate expectation was or was not fulfilled was properly answered when the registrar summoned all the concerned parties and directed them to avail their evidence wherein upon deliberation a decision was reached upon analyzing all evidence.

The Court has now carefully considered the evidence placed before it

and the pleadings and written submissions of the parties and the Court finds that the issues for determination are as follows:-

- 1. Whether the Applicant was accorded fair Administrative action**
- 2. Whether the Respondent’s decision to revoke the Ex parte Applicant’s title contravened the rules of natural Justice and the Ex-parte Applicant’s right to be heard as well as his legitimate Expectation**
- 3. Whether the District land Registrar, Thika had jurisdiction to revoke the Exparte Applicant’s title**
- 4. Whether the orders sought in the Notice of Motion are merited.**

1. Whether the Applicant was accorded fair Administrative action.

The Ex parte Applicant in his pleadings has acknowledged that on the **18th of April 2017**, he was served with summons from the Respondent to appear before him on the **23rd May 2017**, and as such he appeared before the Respondent to which he heard about the complaint for the first time. It is not clear whether all the other parties were present on **23rd May 2017**. However, from the Land Registrar’s Ruling, it is evident that the hearing was done on **15th June 2017** in the presence of the Complainant who is **Fredrick Mulwa** and his wife **Susan Mutiso** the 1st and 3rd Interested Parties. The 1st Interested party allegedly sold the suit land to the Exparte Applicant. From the Land Registrar’s Ruling, it is clear that the Applicant herein was not present on **15th June 2017** when the hearing was conducted and that hearing culminated in the decision to revoke his title.

Thus the court would not be wrong to hold that the Exparte Applicant was condemned unheard which is against the cardinal rule of natural justice. See **Halbury Law of England, 5th Edition 2010 Vol.61 at para 639**, which states:-

“The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alterman partem rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court:.

Fair Administrative action is described in **Article 47 of the Constitution** as follows:

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

The Land Registrar Thika in rendering his ruling stated that he relied on **Section 79 of the Land Registration Act**. The said **Section 79 (a) & (b) of the Land Registration Act of 2012** provides as follows:-

“No alteration affecting the title of the proprietor may be made pursuant to sub section(1) without the proprietor’s consent unless:

- a. The proprietor has by fraud or lack of proper care caused or substantially contributed to the error, mistake or omission or;**
- b. It would for any other reason be unjust for the alteration not to be made;**

Provided that a written notice of ninety days shall be given to the proprietor of such intention to make the alteration.”

It is evident from the above provision of law that a written notice of ninety days should be given to the proprietor before such an intention of alteration is made.

The Exparte Applicant was summoned vide a letter dated **18th of April 2017** for a hearing on the **23rd of May 2017**. It was not clear whether a hearing took place on this material day. However, it is evident from the Land Registrar’s letter dated **25th August 2017** that a hearing took

place on **15th June 2017**. If the Registrar had made a finding that there should be any alteration on the title, then he ought to have given the Ex parte Applicant a **Notice** of 90 days which he did not issue but just delivered a Ruling revoking the Applicant's title.

It is apparent **Article 47** of the **Constitution** requires just fair administrative action should be lawful reasonable and procedurally fair. This Court finds that it is not clear whether the Applicant was given a right to be heard and further he was not issued with a **Notice** on Intended **revocation** of his title deed and therefore the right procedure was not followed.

This Court therefore finds that the Ex parte Applicant was not accorded a Fair Administrative action as required by law.

2. Whether the Respondent's decision to revoke the Ex parte Applicant's title contravened the rules of natural Justice and the Ex arte Applicant's right to be heard as well as his legitimate Expectation.

In the case of *Sceneries Limited v National Land Commission (2017) eKLR*, the Court held that;

“ the right to a fair hearing under Article 50(1) of the Constitution encompasses several aspects. these includes, the individual being informed of the case against her/him, the individual being given an opportunity to present/her/his side of the story or challenge the case against her/him and the individual having the benefit of a public hearing before a court or other independent and impartial body.”

This Court finds that on **15th June 2017**, when the hearing was conducted, the Applicant was not present and drastic orders were issued against him. He was therefore not accorded a fair hearing as provided by **Article 50** of the **Constitution**.

3. Whether the District land Registrar, Thika had jurisdiction to revoke the Ex parte Applicant's title.

Though duly served the Respondent failed to appear before court to set forth its case. However, the 3rd Interested Party has averred that the registrar cancelled the title to the property when both parties produced as evidence documents and it was noted that the title held by the Ex parte Applicant had been acquired illegally. This Court has considered the Ruling dated **25th August 2017** and also noted that the Land Registrar noted that that the property had been transferred **illegally** while the owner still retained his original title deed and he thus revoked the Applicant's title deed. But did the Land Registrar have power to revoke the said registered title deed? Before the Ex parte Applicant's title was revoked was the right procedure used? The only way that a determination would have been arrived as to whether or not the title deed that was held by the Ex parte Applicant would have been found to be illegally obtained would have been through a suitable judicial proceeding and in essence that would mean that there was a court process that determined this. There has been no allegation nor have there been documentation on this and therefore this court finds that there was no such judicial process. In this regard therefore there was no way that the title deed would have been legally revoked nor was there any due process in revoking the said title. See the case of *Republic v Registrar of Titles Mombasa & 4 others Ex-Parte A.K. Abdulgani Limited [2018] eKLR*, where the Court held that;

“what was the right procedure to follow in asserting the respondent's and interested parties' interest in the suit land? Surely, not by ultra vires action of revocation of grant of title but by suitable judicial proceedings in that behalf.

In a recent decision, *Franns Investments Limited v. The Registrar of Titles, Mombasa & 2 Ors., Mombasa Petition No. 63 of 2012* this Court has ruled on the issue as follows: “It is clear that it is now settled that Registrar of Titles or the Land Registrar as the case may be does not have power to revoke title to land”.

Consequently this court finds that without a legal judicial process determining the legality of the title issued to the Ex parte applicant, the Land Registrar had no jurisdiction to determine the matter and therefore had no powers to revoke the title. The action of the Land Registrar was *ultravires* and he acted beyond his given mandate.

4. Whether the orders sought in the Notice of Motion are merited.

This Court has already come to a conclusion that the Land Registrar acted without powers in his action and therefore the same was *ultra vires* and therefore that the Ex parte Applicant is entitled to Judicial Review Orders sought. See the case of *Pastoli ...vs... Kabale District Local Government Council & Others, (2008) 2 EA 300* at pages 303 to 304 the court held that;

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service [1985] AC 2*; and also *Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, miscellaneous application number 643 of 2005 (UR)*.

Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality..... “

Further, it is evident that an Order of Mandamus is given directing a party to do some duties to which he is supposed to do while an order of *certiorari* is given to quash a decision that is already made and to which that party has acted in excess of that jurisdiction or without jurisdiction. See the case of *Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996* to which the court stated that;

“...The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way... These principles mean that an order of *mandamus* compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply

for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done... Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.”

In the instant case the court has already found that the Land Registrar acted in excess of his powers by revoking the title deed issued to the Ex parte Applicant without following due process and therefore this Court would not shy away from quashing the said decision which was made without Jurisdiction.

What then should happen after the decision has been quashed? It would therefore mean that the exparte Applicant would remain as a registered proprietor of the suit land and in so doing the Land Registrar must then be compelled to reinstate the Exparte Applicant as the registered owner and holder of the said revoked title deed.

The Upshot of the foregoing is that the Notice of Motion Application dated 13th November 2017, is merited and the exparte Applicant having sought orders of *Certiorari* and *Mandamus* and having found that the Respondent acted *ultra vires*, the court finds that the Applicant is entitled to the Orders sought. These are Orders of *Certiorari* to quash the impugned decision of the Respondent in the Ruling dated 25th August 2017, and an Order of *Mandamus* restoring the Exparte Applicant as the holder of the revoked title deed.

The parties can therefore follow the right channel in seeking a determination of whether the Exparte Applicant is a holder of a genuine title deed or not and/or who is the rightful owner of the suit property. The decision made on 25th August 2017 by the Land Registrar in revoking title deed for **Gatwanyaga/Ngoliba 1/1400** is *ultra vires* and cannot stand.

It is so ordered.

Dated, Signed and Delivered at Thika this 24th day of *May* 2019.

L. GACHERU

JUDGE

24/5/2019

In the presence of

M/s Nguru holding brief for Mr. Kago for Exparte Applicant

No appearance for Respondent

No appearance for 1st Interested Party

No appearance for 2nd Interested Party

No appearance for 3rd Interested Party

Lucy - Court Assistant

Court – Ruling read in open court.

L. GACHERU

JUDGE

24/5/2019