



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

MISC. APPLICATION (JR) NO.67 OF 2010

IN THE MATTER OF AN APPLICATION BY LAWRENCE KIAUTHA ARITHI FOR JUDICIAL REVIEW ORDERS OF CERTIORARI MANDAMUS AND PROHIBITION

AND

IN THE MATTER OF THE GAZETTEMET NOTICE NO 3450 DATED THE 1ST APRIL 2010 EMANATING FROM THE DISTRICT LAND REGISTRAR- MERU CENTRAL DISTRICT

AND

IN THE MATTER OF PLOT NO. MERU MUNICIPALITY/BLOCK II/818

AND

IN THE MATTER OF THE LAW REFORM ACT, CAP 26 LAWS OF KENYA

BETWEEN

LAWRENCE KIAUTHA ARITHI.....1ST APPLICANT

ZIPPORAH KAGURI KIAUTHA.....2ND APPLICANT

VS

THE DISTRICT LAND REGISTRAR MERU CENTRAL DISTRICT.....RESPONDENT

JUDGMENT

1. The Exparte Applicants commenced their application upon obtaining leave of the honourable Court on the 4.10.2020 and thereafter filed the substantive motion on the 15.10.2010 seeking reliefs for judicial review orders for certiorari, mandamus and prohibition as follows;

a) That this Honourable be pleased to issue the Judicial Review orders of Certiorari to remove into this Honourable Court and quash forth with the decision of the District Land Registrar, Meru Central District, under Gazette Notice No. 3450 of 1st April 2010 in which he purports to revoke the ex-parte Applicants' title to that land parcel and/or plot known and/or described as Plot No. MERU MUNICIPALITY/BLOCK II/818 situated within the Municipal Council of Meru.

b) That this Honourable Court be pleased to issue the Judicial Review orders of Mandamus directed to the District Land Registrar, Meru Central District, Plot No. MERU MUNICIPALITY/BLOCK II/818 situated within the Municipal Council of Meru.

c) That this Honourable Court be pleased to issue the Judicial Review orders of Mandamus directed to the District Land Registrar, Meru Central District, requiring him to forthwith cancel the entry itemized as entry No. 6 made on 23/3/2010 in the register for Plot No. MERU MUNICIPALITY/BLOCK II/818 and to forthwith re-instate the registration of the ex-parte Applicants herein as the owners of the said plot.

d) That this Honourable Court be pleased to issue the Judicial Review orders of Prohibition directed to the District Land Registrar, Meru Central District, prohibiting any other attempts and/or further or future attempts to revoke, once re-instated, the ex-parte Applicants' title to Plot No. MERU MUNICIPALITY /BLOCK II/818 situated within the Municipal Council of Meru.

e) That the costs of these proceedings be provided for.

2. This application was provoked by a Gazette Notice No 3450 issued by the District Land Registrar Meru Central District vide VOL CXII-NO.35 dated 1.4.2010 revoking the suit land on grounds that it was reserved for public utility purposes. The exparte Applicants aver that they are the registered owners of the said suit land having acquired through purchase from the previous registered owner Joseph M'Ngaruthi M'Rintaugu as seen by agreement of sale of land on record dated the 1.3.2008. The sale and purchase having been consented by the Commissioner of Lands Vide the letter dated the 22.5.1997.

3. The application is anchored on the grounds stated in the Notice of Motion, the statement of facts and the affidavit verifying the statement of facts all deposed by the exparte Applicants.

4. The exparte Applicants aver that they became registered as owners of the suit land on 31.12.2008 as shown in the certificate of lease annexed to the application. That prior to concluding the purchase aforesaid the Applicant carried out due diligence as to the status of the suit land. That the transfer to him of the suit land was done in accordance with the lawful procedures including relevant consent and paid land rent and rates and levies including stamp duty to the relevant Government agencies and took possession of the same.

5. They stated that on 9.5.2009, one Joseph Kariuki Simon t/a Haneka Enterprises, a contractor moved onto the plot and attempted to fence off but was restrained by way of Court orders issued in CMCC No 225 of 2009. That they later realized that the said contractor was acting on instructions of certain agents of Government of Kenya.

6. Further the Applicants state that on the 1.4.2010 the Respondent published the aforesaid Gazette Notice purporting to revoke the title of the suit land. That prior to the said publication, the Respondent had unlawfully and arbitrarily made an entry on 11.5.2009 purporting to revoke the title to the suit land. They contend that the suit land is private property which had been earmarked for residential houses and shown on the Physical Plan of the area as such. That they are purchasers for value without notice and obtained good title from the Respondent. That they have duly paid all the rents and rates due on the suit land.

7. They further contend that the Respondent has no powers in law to revoke a title and that the actions of the Respondent were unprocedural, arbitrary, illegal and unlawful and in violation of the rules of natural justice and his right to property under the Constitution for which the Court should quash and nullify.

8. In opposing the application, the Respondent through the District Land Registrar Meru Central, one Harrison Musumiah, deponed that the suit land is Government land reserved for public purposes and was allocated without authority and hence the original registered owner could not have conveyed an interest that did not vest in him. That the transfer did not confer any legal right to the Applicant. That, similarly, the suit land was not available for alienation by the Municipal Council of Meru.

9. That the plot was curved out of the compound of the Ministry of Housing. That no formal survey was carried out by the Survey department on the plot and thus the plot is not beacons. That the subdivision of the plot was not authorized by the physical planning department and that the Part Development Plan does not exist in respect to the alleged subdivision and if the Exparte Applicant is in possession then it can only have been procured through forgery.

10. In their further replying affidavit to the averments of the Respondent the Exparte Applicants denied that the plot is a Government property reserved for public utility. That the Plot was available and the same is properly demarcated and surveyed on the ground. That the Council being a trustee of all trust land had power to reserve and allocate the land and referred to the minutes of the Town Planning Works and Housing Committee meeting where the then District Commissioner and the Physical Planner are members.

11. They asserted that they took possession of the plot upon purchase and continued in such occupation till this day notwithstanding the interference by the Respondents. That the judicial review proceedings are premised on the cancellation of his title and therefore the Respondent is misguided that these proceedings have been overtaken by events.

12. They averred that the suit plot is clearly demarcated on the Survey Map and has been fenced off it is therefore untrue that the said plot is not surveyed or beacons.

13. Further they stated that the allegations of forgery in respect to the Part Development Plans are untrue and baseless and unsupported as the same was approved by both the Physical Planner and the Commissioner of Lands.

14. On the 13.3.18 the parties intimated to the Court in writing their desire to canvass the matter by way of written submissions which I have carefully considered.

Exparte Applicants Submissions

15. As to whether the title to the suit land is private land or a Government land reserved for public utility and if registered what is the nature of the registration if any and is its proposed use, the Applicants reiterated that they are the duly registered owners of the suit land. That the process of allocation and registration was duly approved and carried out by the Respondent and its officers at various stages. They submitted that the suit land was earmarked for residential houses and annexed a copy of the Part Development Plan and survey map to support their averments. Relying on Article 61(2) of the Constitution, the Applicant submitted that the suit land is classified under private and not public land. That the Respondent did not table any evidence to the contrary in that regard.

16. Further the Applicants submitted that according to section 24 and 25 of the Land Registration Act the Applicants are the rightful owners of the suit land and according to section 26 the said title can only be challenged as provided by law that is to say by fraud, misrepresentation for which the party is proven to be a party. They submitted that the Respondent has not adduced any evidence to challenge the title.

17. Further the Applicants submitted that they are in occupation of the suit land up today. They referred to receipts of payments of rent and rates and relied on the case of **M'Mukanya Vs M'Mbijwe (1984) KLR 761** which held that as long as a plot has been allocated and the allottee has paid rent to the local council the allottee is deemed to be in lawful possession. In this case they assert that they are registered owners.

18. They further submitted that the Respondent has no powers in law to revoke title as such powers are vested only in the Court. That the Court in **Kuria Greens Limited Vs The Registrar of Titles & Anor (2011) EKLR** held that there is no provision under the law that bestows the Respondent or the commissioner of Lands (then) to revoke a registered title in the absence of a Court order. They cited the case of **Power Technics Limited Vs The Attorney General & 2 others (2012) EKLR** which stated that even where property is acquired unlawfully the finding of the unlawful acquisition contemplated under Article 40(6) of the Constitution must be legally established through a legally established process and not by whim or revocation by Gazette Notice.

19. The Exparte Applicants submitted that the Respondent in revoking the title without notice violated their rights to natural justice and the right to fair administrative action and fair hearing as enshrined under Article 47 & 50 of the Constitution. They urged the Court to grant the reliefs sought in their application.

The Respondents submissions

20. The Respondent took issue with the fact that the Exparte Applicants have not sued the Attorney General instead of suing the office of the District Land Registrar contrary to Section 129 of the Government Proceedings Act. That that the section of the law is mandatory and therefore the pleadings in their current state are incompetent.

21. The Respondent avers that judicial review proceedings are concerned with the process of decision making and not the decision itself. That the Exparte Applicants are challenging the decision and not the process and therefore the application should fail in that regard. That the Exparte Applicants should have filed a suit instead of judicial review.

Analysis and determination

22. Having considered the pleadings, rival affidavit evidence, the written submissions and the attendant legal authorities relied on by the parties herein, the issues for determination are;

A; Did the Respondent have power to revoke the titles for the suit land.

B; Was the Exparte Applicant's right to fair administrative action/fair hearing violated?

C; is the Exparte Applicant entitled to the reliefs sought?

23. But first some background on the case. It is not in dispute that the suit land was registered in the name of the Applicants. Going by the copy of title deed on record issued on 23.3.2009, prima facie they are the registered owners of title according to section 26 of the Land Registration Act and section 32(2) of the Land Registration Act, Cap 300 (now repealed). It is also not in dispute that the original allottee was one Julius Kathurima Ikiba. It is not in dispute that the Respondent issued a gazette notice No 3450 dated 1.4.2010 under the Constitution of Kenya, the Government Lands Act Cap 280, The Trust Land, Cap 288 revoking *inter alia* the suit land. The reason for the revocation was stated to be that the suit land was reserved for public purposes.

24. Judicial Review is concerned not with private rights or the merits of the decision being challenged but with the decision-making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. **See R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285**

25. Lord Diplock in the case of **Council for Civil Service Unions vs. Minister for Civil Service [1985] A.C. 374, at 401D** stated that:-

“Judicial review has I think developed to a stage today when.....one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call ‘illegality’, the second ‘irrationality’ and the third ‘procedural impropriety’.....By ‘illegality’ as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to itBy ‘irrationality’ I mean what can now be succinctly referred to as “Wednesbury unreasonableness’it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at itI have described the third head as ‘procedural impropriety’ rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.”

26. Guided by the above and judicial review being concerned with the lawfulness of the decision-making process, I will not venture into the merits of the decision.

27. From the record it is clear that the Respondent has not pointed to the Court the provisions of the law which empowered the Respondent to revoke the said title, other than to persuade the Court that the Judicial review proceedings are not appropriate and that the Applicants should have filed a civil suit to challenge the decision instead. With respect this Court disagrees with this line of argument.

28. It is not disputed that prior to the impugned action of revocation, the suit land was registered in the name of the Applicants under the Land Registration Act, Cap 300 (now repealed). Sections 142 and 143 provides as follows;

“142. (1) The Registrar may rectify the register or any instrument presented for registration in the following cases - (a) in formal matters and in the case of errors or omissions not materially affecting the interests of any proprietor; (b) in any case and at any time with the consent of all persons interested; (c) where, upon resurvey, a dimension or area shown in the register is found to be incorrect, but in such case the Registrar shall first give notice to all persons appearing by the register to be interested or affected of his intention so to rectify. (2) Upon proof of the change of the name or address of any proprietor, the Registrar shall, on the written application of the proprietor, make an entry in the register to record the change.

143. (1) Subject to subsection (2), the Court may order rectification of the register by directing that any registration be cancelled or amended Notice and effect of restriction 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 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.

29. The above clauses detail the circumstances under which the Registrar of Lands may effect rectification of a title. Nothing confers to the Registrar the power to cancel title which is the preserve of the Court. The action of the Respondent complained of arises from the purported revocation of title of the suit land carried out in the Gazette Notice aforesaid.

30. The Gazette Notice was issued under the Constitution of Kenya, the Government Lands Act Cap 280 and The Trust Land, Cap 288. I have not found any provision in the Government Lands Act that empowers the Respondent to revoke title in land. Needless to say, Sections 60 and 61 of the Registration of Titles Act provide the mechanism to be followed in rectification of errors in titles and any other instruments.

31. I will reproduce the said sections for emphasis as follows;

“ 60 (1) Where it appears to the satisfaction of the Registrar that a grant, certificate of title or other instrument has been issued in error, or contains any misdescription of land or of boundaries, or that an entry or endorsement has been made in error on any grant, certificate of title or other instrument, or that a grant, certificate, instrument, entry or endorsement has been fraudulently or wrongfully obtained, or that a grant, certificate or instrument is fraudulently or wrongfully retained, he may summon the person to whom the grant, certificate or instrument has been so issued, or by whom it has been obtained or is retained, to deliver it up for the purpose of being corrected.

(2) If that person refuses or neglects to comply with the summons, or cannot be found, the registrar may apply to the Court to issue a summons for that person to appear before the Court and show cause why the grant, certificate, or other instrument should not be delivered up to be corrected, and, if the person when served with the summons neglects or refuses to attend before the Court at the time therein appointed, the Court may issue a warrant authorizing and directing the person so summoned to be apprehended and brought before the Court for examination.

61. Upon the appearance before the Court of any person summoned or brought by virtue of a warrant the Court may examine that person on oath or affirmation, and may order him to deliver up the grant, certificate of title or other instrument, and, upon refusal or neglect to deliver it up pursuant to the order, may commit him to prison for any period not exceeding six months, unless the grant, certificate of title, or instrument is sooner delivered up; and in that case, or where the person has absconded so that a summons cannot be served upon him as hereinbefore directed, the Court may direct the registrar to cancel Wrongful or fraudulent entries or retention of documents or correct any certificate of title or other instrument, or any entry or memorial in the register relating to the land, and to substitute and issue such certificate of title or other instrument, or make such entry, as the circumstances of the case may require.

32. From the above paragraphs, the law is clear. The Respondent is not vested with the power to revoke title. That powers vests with the Court.

33. In the case of **Satima Enterprises Ltd vs. Registrar of Titles & 2 Others [2012] eKLR**, Majanja, J. expressed himself thus:

“first, the Registrar of Titles has no authority under the Registration of Titles Act to revoke a title by way of Gazette Notice in the manner he did. Second, such revocation is a breach of Article 40(6) of the Constitution as it constitutes an arbitrary acquisition of property without compensation. Third, it is also a breach of Article 47(1) where it is clear that the petitioner was not given a hearing to contest the allegations subject of the revocation.”

34. Whereas Article 40(6) expressly excludes the protection of the proprietary rights to properties which have been found to have been unlawfully acquired, the use of the phrase “found to have been unlawfully acquired”, necessarily means that for that protection to be lost there must be a finding that the property in question was “unlawfully acquired”. That finding, can only be arrived at where a determination is made as required under the provisions of Article 47 of the Constitution. In other words, the prima facie proprietor of the land in question must be given an opportunity to be heard before such a decision is made.

35. Whether the properties were lawfully or unlawfully acquired is a matter that must be determined through a process and in a forum that allows all the parties to present their respective cases on their merits. As Majanja J observed in **Power Technics Limited –vs- The Attorney General & Others (supra)** in reliance on the decision in **Chemei Investments Limited -vs- The Attorney General & Others**, even where property is acquired unlawfully, the finding of “unlawful acquisition” contemplated in Article 40(6) must be through a legally established process. It cannot be by whim or revocation by Gazette Notice.

36. In answer to issue No B, the Constitution under Article 47 states as follows;

“(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.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a Court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.

37. There is no evidence on record to show that the Respondent accorded the *ex parte* Applicants the right to be heard before taking the action to revoke the title of the suit land as it did. This action violated the right to fair administrative action guaranteed to the *ex parte* Applicants by the Constitution. I hold and find that the *ex parte* Applicant’s rights of natural justice were not adhered to by the respondent.

38. Accordingly, in the case before me, the *Ex parte* Applicants case succeeds on two grounds. The first ground is that the Respondent did not have the power to revoke the title of the suit land without following due legal process under the law. Secondly, the Applicants were not heard before the decision was taken.

39. As stated earlier I am unable to pronounce myself whether or not the title in the suit land is held in accordance with the Constitution. I hasten to state that judicial review is not the proper forum to determine that question.

40. The order of prohibition is declined as it will not serve any purpose at this stage as the decision to revoke title is already taken.

41. The application is meritorious and grant the following orders;

a. An Order of Certiorari removing into this Court for the purposes of being quashed the decision of the District Land Registrar Meru Central District under Gazette Notice No 3450 of 1.4.2010 in which he purports to revoke the *ex parte* Applicants’ title to the land known as MERU MUNICIPALITY/BLOCK II/818 situated within the Municipal Council of Meru.

b. An Order of Mandamus directing the District Land Registrar Meru Central District to forthwith reinstate the *ex parte* Applicants’ title MERU MUNICIPALITY/BLOCK II/818 situated within the Municipal Council of Meru and cancel the entries itemized as No 5 and 6 in the green card (land register).

c. The costs of this application shall be met by the Respondent.

Orders accordingly.

DATED, DELIVERED AND SIGNED AT MERU THIS 28TH JUNE 2018.

J.G. KEMEI

JUDGE

In the presence of:

C/A Mutua

Nyamu Nyaga for *ex parte* Applicants

Kiongo for Respondent