



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**MISC. APPLICATION (JR) NO.66 OF 2010**

**IN THE MATTER OF AN APPLICATION BY PETER KATHURIMA MIRITI FOR THE JUDICIAL REVIEW ORDERS OF CERTIORARI MANDAMUS AND PROHIBITION.**

**AND**

**IN THE MATTER OF THE GAZETTEMET NOTICE NO 3450 DATED THE 1<sup>ST</sup> APRIL 2010 EMANATING FROM THE DISTRICT LAND REGISTRAR- MERU CENTRAL DISTRICT.**

**AND**

**IN THE MATTER OF PLOT NO. MERU MUNICIPALITY/BLOCK II/774**

**AND**

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

**BETWEEN**

**PETER KATHURIMA MIRITI ..... APPLICANT**

**VS**

**THE DISTRICT LAND REGISTRAR**

**MERU CENTRAL DISTRICT ..... RESPONDENT**

**JUDGMENT**

1. The Exparte Applicant commenced his application upon obtaining leave of the honourable court on the 28.9.2010 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 Court be pleased to issue the Judicial Review orders of Certiorari to remove into this Honourable Court and quash forthwith the decision of the District Land Registrar, Meru Central District, under Gazette Notice No. 3450 of 1<sup>st</sup> April 2010 in which he purports to revoke the ex-parte Applicant's title to that Land Parcel and/or plot known and/or described as Plot No. MERU MUNICIPALITY/BLOCK II/774.

b) 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 re-instate the ex-parte Applicant's title to the said plot NO. MERU MUNICIPALITY/BLOCK II/774 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 the entry No. 5 made on 23/03/2010 in the register for Plot No. MERU MUNICIPALITY /BLOCK II/774 and to forthwith re-instate the registration of the ex-parte Applicant herein as the owner 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 Applicant's title to Plot No. MERU MUNICIPALITY/BLOCK II/774 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 Applicant avers that he is the registered owner of the said suit land having acquired through purchase from the original allottee one Julius Kathurima Ikiba as seen by the allotment letter ref TP42/1/XII/89 dated 11.12.1996. 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 Applicant.

4. The exparte Applicant avers that he became registered as owner of the suit land on 7.6.2000 as shown in the certificate of lease annexed to the application. That he bought the suit land from the previous owner Julius Kathurima Ikiba, the original allottee. He has annexed the letter of allotment in the name of Julius Kathurima Ikiba, sale agreement and the acknowledgement of the purchase price. 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 such as relevant consent upon which he duly paid land rent and rates and levies including stamp duty to the relevant Government agencies and took possession of the same.

5. He stated that in March 2009 the District Building Surveyor in the company of administration officers invaded the suit land and harvested mature cypress trees. Similarly, on the 22.6.2009, the Respondent unlawfully filed a restriction on the title which provoked a suit Meru HCCC No 150 of 2009 which is still pending hearing and determination.

6. Further the Applicant states that on the 1.4.2010 the Respondent published the aforesaid Gazette Notice purporting to revoke the title of the suit land. He contends that the suit land is private property which had been earmarked for residential houses and shown on the Physical Plan of the area. That he is a purchaser for value without notice and obtained good title from the Respondent.

7. He further contends that the Respondent has no powers in law to revoke a title and 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 exparte Applicant application, the Respondent through the District Land Registrar Meru Central, one Harrison Musumiah, deposed that the suit land is Government land reserved for public purposes and was allocated without authority and hence the original allottee 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 administration Police line which is a protected area. 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 his further replying affidavit to the averments of the Respondent the exparte Applicant denied that the plot is a Government property reserved for public utility. That the Plot is available on the ground 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 attached the minutes of the Town Planning Works and Housing Committee meeting on the 14.11.1995 where the then District Commissioner and the Town Engineer are members. Further that the said allocation was approved by the Ministry of Lands and annexed a letter dated 25.9.96.

11. He asserted that he took possession of the plot upon purchase and continued in such occupation till the year 2009 when the Respondents invaded the suit land. 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. He averred that the suit plot is clearly demarcated on the Survey Map and has been fenced off and it is therefore untrue that the said plot is not surveyed or beacons.

13. Further he 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 Applicant 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 Applicant reiterated that he is the duly registered owner of the suit land as seen in the copy of title on record issued on 7.6.2000. That the process of allocation and registration was duly approved and carried out by the Respondent and its officers at various stages. He submitted that the suit land was earmarked for residential houses and annexed a copy of the part development plan and survey map to support his averments. Relying on Article 61 of the Constitution, the Applicant submitted that the suit land is classified under private land and not public land. That the Respondent did not table any evidence to prove to the contrary.

16. Further the Applicant submitted that according to section 24 and 25 of the Land Registration Act the Applicant is the rightful owner of

the suit land and the said title can only be challenged as provided by law that is to say by fraud, misrepresentation for which the party was involved. He submitted that the Respondent has not adduced any evidence to challenge the title.

17. Further that the Applicant submitted that he was in occupation of the suit land up until 2009 when he was unlawfully evicted. He referred to receipts of payments of rent and rates and relied on the case of **M'Mukanya Vs M'Mbijiwe (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.

18. He further submitted that the Respondent has no powers in law to revoke title as such powers are vested only to the Court. That the Court in **The Kuria Green case** 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. He cited the case of **Power Technics Limited Vs The Attorney General & 2 others (2012) EKLK** which stated 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 ex parte Applicant submitted that the Respondent in revoking the title without notice violated his rights to natural justice and the right to be fair hearing as enshrined under Article 47 & 50 of the constitution. He urged the Court to grant the reliefs sought in his application.

### **The Respondents submissions**

20. The Respondent took issue with the fact that the ex parte Applicant has not sued the Attorney General instead of suing the office of the District Land Registrar contrary to Section 129 (10) of the Government Proceedings Act. 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 ex parte Applicant is challenging the decision and not the process and therefore the application should fail in that regard. The ex parte Applicant 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 Ex parte Applicant's right to fair administrative action violated?
- C. is the ex parte 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 Applicant as seen in the copy of title deed issued on 7.6.2000. 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 it .....By ‘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 it .....I 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 he 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 Applicant 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 Register 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. From the above paragraphs, the law is clear. The Respondent is not vested with the power to revoke title. That power vests with the Court.

31. 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 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.”

32. Whereas Article 40(6) expressly excludes the protection of the proprietary rights to properties which have been found to 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.

33. 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.

34. 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.

35. There is no evidence on record to show that the Respondent accorded the exparte Applicant to right to be heard nor an explanation before taking the action to revoke the letter of allotment as it did. This action violated the right to fair administrative action guaranteed to the exparte Applicant by the Constitution. I hold and find that the exparte Applicant’s rights of natural justice were not adhered to by the Respondent.

36. Accordingly, the Exparte Applicant’s case succeeds firstly on the ground 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 Applicant was not heard nor an explanation rendered before the decision was taken.

37. 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.

38. The order of prohibition is declined as will not serve any purpose at this stage given that the action has already taken place.

39. 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 exparte Applicant's title to the land known as MERU MUNICIPALITY/BLOCK II/774 situated within the Municipal Council of Meru.

a. An Order of Mandamus directing the District Land Registrar Meru Central District to forthwith reinstate the exparte Applicant's title MERU MUNICIPALITY/BLOCK II/774 situated within the Municipal Council of Meru and cancel the entries itemized as No 3, 4 and 5 made on 22.4.2009 and 23.3.2010 in the register (green card).

b. The costs of this application shall be met by the Respondents.

Orders accordingly.

**DATED, DELIVERED AND SIGNED THIS 28<sup>TH</sup> JUNE, 2018.**

**J.G. KEMEI**

**JUDGE**

**In the presence of:**

C/A Mutua

Nyamu Nyaga for exparte Applicant

Kiongo for Respondent