



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO 226 OF 2015

SOROYA INVESTMENTS LIMITED.....PETITIONER

VERSUS

THE REGISTRAR OF TITLES.....1ST RESPONDENT

THE CHIEF LAND REGISTRAR.....2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

Introduction

1. Through Gazette Notice Number 1507 dated 11th February 2011 and published on the same day, the Registrar of Titles gave notice of revocation of the Title in respect of Land Reference Number 209/12317 (the **Suit Property**). The Gazette Notice reads as follows;

GAZETTE NOTICE NO. 1507

THE CONSTITUTION OF KENYA

THE GOVERNMENT LANDS ACT

(CAP 280)

THE TRUST LAND ACT

(CAP) 280)

REVOCAION OF LAND TITLES

Whereas the parcel of land whose details are described under the schedule herein below was allocated and title issued to a private developer, it has come to the notice of the Government that the said parcels of land were reserved for public purpose under the relevant provisions of the Constitution, the Government Lands Act (Cap 280) and the Trust Land Act (Cap 288). The allocations were therefore illegal and unconstitutional.

Under the circumstances and in view of the Public need and interest, the Government revokes the said titles.

Nairobi

LR No. 209/12317

The above land was an open space reserved for Nairobi City Council.

Dated the 11th February 2011

G.G. Gachihi

Registrar of Titles, Nairobi.

2. Land Reference Number 209/12317 measures approximately 0.1602 of a hectare and is situated in Pangani Area within Nairobi City County. It is comprised in Grant Number IR 639554 dated 27/11/1994 registered on 29/11/1994 as leasehold Title No IR 63954/1 for a period of 99 years from 1/10/1994. At the time of revocation, it was registered in the name of Soroya Investments Limited.

3. Aggrieved by the revocation, the Petitioner herein, Soroya Investments Limited brought a petition dated 1/12/2014 seeking the following orders:

a) a declaration that the purported revocation of the petitioner's Title to all that piece of land known as LR No 209/12317 comprised in Grant Number L R 63954 is unconstitutional, null and void.

b) An order of certiorari do issue to bring into this Honourable Court Gazette Notice No 1507 of 2011 for the purposes of quashing the purported revocation of the petitioner's Title to all that piece of land known as LR No 209/12317.

c) IN THE ALTERNATIVE to (a) and (b) above, an order that the petitioner be compensated by the Respondents for the unlawful and illegal deprivation of its property on a full indemnity basis.

d) Costs of the Petition

Petitioner's Case

4. The case of the Petitioner is that through the said Grant, the President of the Republic of Kenya, in consideration of stand premium of Kshs 380,000 granted to the petitioner the suit property on 27/11/1994. The registered Grant was issued to the petitioner on 29/11/1994 and the petitioner holds the Title. It was and remains the petitioner's intention to develop the property into a commercially viable enterprise. On 11/2/2011, without any prior notice to the petitioner, the Registrar of Titles, G G Gachihhi, issued Gazette Notice No 1507 of 2011 by which she purported to revoke the petitioner's Title on the basis that the allocation of the property was illegal and unconstitutional and that the suit property was public land reserved for use by the City Council of Nairobi.

5. The petitioner contends that the revocation of its Title without notice and without compensation violated its right to acquire and own property under Article 40 of the Constitution. Secondly, it contends that the contention that the suit property is public land is not supported by any factual or legal basis nor is there any finding by a judicial body of competent jurisdiction. Thirdly, the petitioner contends that the Registrar of Titles had absolutely no power to revoke the petitioner's Title either in the manner she purported to do it or at all and that the purported revocation was plainly *ultra vires*. It adds that it is only this court which has the power to revoke title through a judicial pronouncement. Fourthly, the petitioner contends that the revocation did not comply with the mandatory provisions of Article 47 of the Constitution which relates to the right to a hearing before an administration action such as revocation of title is taken. Consequently, the petitioner pleads for the orders outlined above.

6. The record before this court does not contain any replying affidavit from the respondents. Similarly, the written submissions by the respondents do not make reference to any replying affidavit filed by them. It does therefore appear from the record that, for reasons known to themselves, the respondents elected not to challenge the petition through a replying affidavit.

Submissions

7. In its written submissions dated 10/6/2017, the petitioner relied on Articles 40 and 47 of the Constitution and Section 60 of the Registration of Titles Act (repealed) and submitted that the Registrar had no powers to revoke a registered proprietor's title to land without the registered proprietor being afforded the opportunity of being heard. The petitioner relied on among others: **Republic v Registrar of Titles & Another Exparte David Gachina Muriithi & Another [2014] eKLR's** and **Eatima Enterprises Ltd v Registrar of Titles & 2 Others [2012] eKLR.**

8. The petitioner urged the Court to grant the prayers sought in the Petition on the ground that the Registrar lacked powers to revoke a registered title and that the Registrar violated the requirements of Article 47 of the Constitution. It relied on, among others; **Associated Provincial Picture Houses v Wednesbury Corporation (1968) 1 KB233** and **R v Secretary of State for Education and Science Exparte Avon County Council (1991) 1 All ER 282.**

9. In their written submissions dated 4/12/2017, the respondents opposed the application. They submitted that under Article 40 (6) of the Constitution property that has been found to have been unlawfully acquired is not protected. She added that Section 79(2) of the Land Registration Act allows the Registrar to rectify a register or document which has been obtained through fraud. They further submitted that the petitioner had neither demonstrated how he acquired the suit property nor exhibited copies of receipts to show that he paid stand premiums, stamp duty and annual rent. The respondents relied on **Munyu Maina v Hiram Gathira Maina, Civil Appeal No 233 of 2009.**

10. Secondly, the respondents submitted that since the sanctity of the title held by the petitioner is in issue, the petition ought to have brought proceedings through a plaint to facilitate interrogation of the process through which it acquired the impugned Title. They relied on **Republic v Registrar of Titles & Another Exparte David Gachine Muruthi (2014) eKLR.**

11. The respondents further submitted that under Order 53 rule 2 of the Civil Procedure Rules and Section 8 and 9 of the Law Reform Act, an order of *certiorari* is available only if the same is applied for within six months from the date of the impugned decision. They contended that the prayer for an order of *certiorari* was statute-barred. They relied on **Fredrick Mworira v Distric Land Adjudication Officer Tigania West/East & 3 Others (2016)eKLR.**

Determination

12. I have considered the petition together with the supporting affidavit, the parties' rival submissions, the relevant constitutional provisions and the relevant statutory framework. Because the respondents did not file and serve a replying affidavit to the petition, the single issue which falls for determination in the petition is whether the petitioner is entitled to the reliefs sought in the petition.

13. The plaintiff contended that it obtained the suit property as a grant from the President of the Republic of Kenya through the Commissioner of Lands on 27/11/1994. The impugned Gazette Notice indicated that the suit property was reserved for public purpose under the provisions of the repealed Constitution of Kenya, the Government Lands Act (now repealed) and the Trust Land Act (now repealed) and that the allocation was therefore illegal and unconstitutional.

14. At the hearing, the petitioner elected not to lead any oral evidence. It opted to solely rely on the supporting affidavit of Mohammed Yunis Soroya. Annexed to the affidavit were: (i) copy of Grant No. IR 63954; (ii) copies of drawings; (iii) copies of plaint and verifying affidavit in Nairobi ELC Civil Suit No 378 of 2010; and (iv) copy of Gazette Notice No 1507. No evidence was tendered on how the Grant was procured. Similarly, no evidence was tendered to demonstrate compliance with Special Condition No 2 which required the Grantee to within 24 months of the actual registration of the Grant complete erection of approved buildings on the suit property.

15. The material Grant was issued and registered under the provisions of the Registration of Titles Act. The impugned Gazette Notice was issued on 11/2/2011 under the provisions of the Constitution of Kenya 2010, the Registration of Titles Act (now repealed) and the Trust Land Act (now repealed). The present petition was filed on 21/1/2015 after the repeal of the Registration of Titles Act, the Government Lands Act and the Trust Land Act. It is not in doubt that under Section 60 of the repealed Registration of Titles Act, the Registrar was required to move the court for an order permitting cancellation of a title. The law has since changed to the extent that under Section 79 (2) of the Land Registration Act, the Registrar now has power to rectify or direct the rectification of a land register or document where the document in question has been obtained by fraud.

16. The petitioner invited the court to exercise its jurisdiction under Articles 22 and 23 of the Constitution and find that its rights and fundamental freedoms relating to the right to property under Article 40 of the Constitution and the right to fair administrative action under Article 47 of the Constitution were violated and on that basis grant the prayers sought in the petition.

17. There is no gain-saying that Article 40(1) of the Constitution grants and protects the right to acquire and own property. Similarly, Article 40(3) forbids the state against depriving of any person of property of any description. Article 40(6) however expressly provides that property which has been found to have been acquired unlawfully does not enjoy the constitutional safeguards provided under Articles 40(1), (2), (3), (4) and (5) of the Constitution. It is in light of this express constitutional framework that a petitioner seeking protection in respect of public property acquired and converted into private property has a mandatory obligation to demonstrate to the court that the title held by it was procedurally acquired hence it is entitled to protection.

18. In the petition before court, all that the petitioner has waved is the Grant. The Petitioner admits that until 1994, the suit property was public property. The petitioner does not however demonstrate how the suit property became private property. Owing to the petitioner's failure to place before court materials and evidence to demonstrate that it properly acquired title to the suit the property, the authenticity of the Title being waved by the petitioner remains unclear. Secondly, the omission has denied the court the evidence upon which it would interrogate the constitutionality of the impugned Gazette Notice.

19. Our courts have in a myriad of decisions maintained that a private title unprocedurally or allegedly acquired over public property does not enjoy the sanctity and sacrosanctity of Title that our Constitution and Land Laws confer upon legitimate title. The Court of Appeal recently reiterated this principle in **Chemey Investment Limited v Attorney & 2 others** thus:

Decisions abound where courts in this land have consistently declined to recognise and protect title to land, which has been obtained illegally or fraudulently, merely because a person is entered in the register as proprietor. See for example

Niaz Mohamed Jan Mohamed v Commissioner for Lands & 4 Others [1996] eKLR; Funzi Island Development Ltd & 2 Others v County Council of Kwale (supra); Republic v Minister for Transport & Communications & 5 Others ex parte Waa Ship Garbage Collectors & 15 Others KLR (E&L) 1, 563; John Peter Mureithi & 2 Others v Attorney General & 4 Others [2006] eKLR; Kenya National Highway Authority v Shalieu Masood Mughal & 5 Others [2017] eKLR; Arthi Highway Developers Limited v. West End Butchery Limited & 6 Others [2015] eKLR; Munyu Maina v Hiram Gathiha Maina [2013] eKLR and Milan Kumarn Shah & Others v City Council of Nairobi & Others, HCCC No. 1024 of 2005. The effect of all those decisions is that sanctity of title was never intended or understood to be a vehicle for fraud and illegalities or an avenue for unjust enrichment at public expense.

20. More importantly, the impugned Gazette Notice was issued on 11/2/2011

The petitioner did not deem it necessary to challenge the Gazette Notice during the subsistence of the Registration of Titles Act. It waited for four years. In the intervening period, the Registration of Titles Act was repealed and replaced by the Land Registration Act, which at Section 79(2) gives the Registrar powers to rectify a land register without recourse to the court in a case where registration has been obtained through fraud. The petitioner waved a title without any explanation as to how public property was converted into private property. In the impugned Gazette Notice the Registrar observed that the suit property was an open space reserved for Nairobi City council, a Public entity. It was therefore the duty of the petitioner to demonstrate to the court that its acquisition of public property was devoid of fraud. The Petitioner has not discharged that duty.

21. The second limb of the Petition seeks an order of certiorari premised upon the ground that the petitioner's right to a fair hearing prior to the revocation of its title was violated. This is an administrative law remedy. Prior to the enactment of the Fair Administrative Action Act in 2015, the court's jurisdiction was exercised in accordance with the framework under the Law Reform Act, Order 53 of the Civil Procedure Rules and the law and practice in the High Court of England at the time. It was a mandatory requirement that a party seeking an order of

certiorari had to move the court within six months from the date of the impugned decision. The impugned Gazette Notice was issued on 11/2/2011. The six months period lapsed in August 2011. No explanation has been tendered as to why the decision was not challenged within 6 months. Instead, the petitioner has elected to bring judicial review proceedings under the framework on enforcement of the Bill of Rights about 4 years after the impugned decision was made and implemented. This is not only irregular but an abuse of the process of the court.

22. Even if the court were to ignore the mandatory requirements on judicial review remedies and treat this as a proper plea under the Bill of Rights, the same would not lie without an explanation as to how public land was converted into private property. The burden to render the explanation lay with the petitioner and the petitioner has not discharged that burden.

23. The upshot of the above findings is that the prayers sought in the petition herein are unmerited. In light of that, the petition herein is dismissed. Because the respondent did not file a response to the petition, there will be no order as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 21ST DAY OF SEPTEMBER 2018.

B M EBOSO

JUDGE

In the presence of:-

Ms Nyawira Advocate for the Respondent

Mr Agina Advocate for the Petitioner

June Nafula - Court Clerk