



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

MISC. APPLICATION (JR) NO.71 OF 2010

IN THE MATTER OF AN APPLICATION BY WILSON MBURUGU MAGIRI FOR THE JUDICIAL REVIEW ORDERS OF CERTIORARI MANDAMUS AND PROHIBITION

AND

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

AND

IN THE MATTER OF PLOT NO. T.185 MERU MUNICIPALITY

AND

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

REPUBLIC.....APPLICANT

VERSUS

THE DISTRICT LAND REGISTRAR

MERU CENTRAL DISTRICT.....RESPONDENT

WILSON MBURUGU MAGIRI.....EXPARTE

JUDGMENT

1. The Exparte Applicant commenced his application upon obtaining leave of the Honourable Court on the 13/10/2010 and thereafter filed the substantive motion on the 18/10/2010 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 1st 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. T 185 MERU MUNICIPALITY 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, requiring him to forthwith re-instate the ex-parte Applicant's title to the said plot No. T. 185 MERU MUNICIPALITY situated within the Municipal Council of Meru.

c) 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-instate the ex-parte Applicant's title to Plot No. T.185 MERU MUNICIPALITY (hereinafter referred to as "the suit land") situated within the Municipal Council of Meru.

d) 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-NO35 dated 1/4/2010 revoking the title to 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 Matias B. Mbaabu as seen by the allotment letter ref 7696/XIV dated 12/5/92. The sale and purchase having been consented by the then Meru Municipal Council vide its letter dated the 18/4/1984.

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 carried out due diligence on the suit land and upon satisfaction acquired the suit land and a letter of allotment was issued in his name. That he complied with all the conditions of allotment to wit payment of the stand premium, stamp duty, land rents and rates and all other levies stipulated in the allotment letter. That he took possession and commenced the construction of a family home where he resides with his family. He avers that the building plans were duly approved by the Municipal Council of Meru then on 21/10/2004.

5. He contends that the suit land is private property which had been earmarked for residential development and which is depicted as such in the plans at the Physical Planning Department and also in the letter of allotment referenced above. In any event, he avers that he has been paying rent and rates to the Government since allotment of the plot and the Council and the relevant Government agencies fully and openly sanctioned the process of allotment and acquisition.

6. It is his case that the act of the Respondent in purporting to revoke the title is un-procedural, illegal and unlawful and is a violation of the rules of natural justice and his right to property as enshrined in the Constitution, 2010. That the Respondent has no powers under the law to revoke title as purported in this case. He urged the Court to declare the action a nullity and quash the decision.

7. In opposing the Exparte Applicant's 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 not available for alienation by the Municipal Council of Meru. The Respondent further stated that a party cannot transfer legal title of a property that he does not hold and says that the transfer herein of the suit land to the Exparte Applicant did not confer any legal rights to him.

8. That the plot was curved out of a Government housing compound and the said plot is adjacent to the regional Commissioners residence. That no formal survey was carried out by the Survey Department on the plot. 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.

9. 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 nor was it part of the Regional Commissioner's residence. That the acquisition and allotment were consented by the Municipal Council of Meru in writing. That the Council being a trustee of all trust land had power to reserve and allocate the land.

10. He asserted that he is in occupation and possession of the plot as he resides therein with his family since 1995. He averred that the suit plot is clearly demarcated on the Government plans and maps and it is therefore untrue that the said plot is not surveyed or beacons. He attached a letter from the Director of Survey directing the District surveyor to survey the plot and confirmed that the same was surveyed accordingly in 1997 and the beacons were pointed out to him by a survey, one Mr. Muriuki from the District Survey office.

11. Further, he stated that the allegations of fraud and forgery in respect to the plans are untrue, baseless, and unsupported.

12. On the 20/6/2012, the parties intimated to the Court in writing their desire to canvass the matter by way of written submissions, which I have carefully read and considered.

Exparte Applicant's submissions

13. As to whether the title to the suit land can be invalidated or revoked, the Exparte Applicant maintained that the suit land was reserved and earmarked for residential purposes as shown on the survey plan marked as WMM3. The construction of the house was approved by the relevant Government agencies as seen in annexures WMM5. That the plot is also described in the allotment letter dated the 12/5/1992 as unsurveyed residential plot. That the Respondent has not challenged the facts as set out herein by way of contrary documentary evidence before the Court.

14. Relying on Articles 61-64 of the Constitution, he reiterates that the suit land is private land having been alienated by the way of allotment and that a lease interest was contemplated under the then Registered Land Act, Cap 300. That it is therefore not Government land. He cited the case of **Peter Njuguna Gitau & John Mucheru Kibe Vs The Town Clerk Municipal Council & Municipal Council of Nakuru (2006) ECLR** to buttress his point.

15. Citing the case of **Kuria Greens Limited Vs The Registrar of Titles & Anor (2011) ECLR** the Exparte Applicant submitted that he is a bonafide purchaser for value without notice and his title is protected by the law and any challenge to the same can only be mounted on the basis of proved fraud for which the owner is adjudged to be a party. He reiterated the fact of long occupation and possession of the suit land. That his constitutional right to property is protected under Article 40 of the Constitution and the action of the Respondent in revoking the title is unconstitutional.

16. 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) ECLR** 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.

17. The Exparte Applicant submitted that the Respondent in revoking the title without notice violated his rights to natural justice and the right to fair hearing as enshrined under Articles 47 & 50 of the Constitution. He urged the Court to grant the reliefs sought in his application.

The Respondent's submissions

18. The Respondent took issue with the fact that the Exparte Applicant has not sued the Attorney General instead of suing the office of the District Land Registrar contrary to Section 129 (1) of the Government Proceedings Act. That the section of the law is mandatory and therefore the pleadings in their current state are incompetent.

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

Analysis and determination

20. 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/ letter of allotment for the suit land?

B. Was the Exparte Applicant's right to fair administrative action violated?

C. Is the Exparte Applicant entitled to the reliefs sought?

21. First, some background of the case. It is not in dispute that the suit land was allocated to the Exparte Applicant vide a letter of allotment dated the 12/5/1992. It is also not in dispute that the original allottee was one Matias B Mbaabu (no letter of allotment was produced). It is not in dispute that the Exparte Applicant acquired by purchase the suit land from the original allottee, albeit no documentary evidence was produced. 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 title to the suit land. The reason for the revocation was stated to be that the suit land was reserved for public purposes.

22. The President had power to alienate land by way of lease under the Government Lands Act, which came into force on 18th May 1915. His powers relate to Government Land as defined in Section 2 of the same Act, this includes the land described in the Kenya Independence Order in Council 1963 by section 204 and 205 of the Constitution (see schedule 2 of the order) and sections 21,22,25 and 26 of the Constitution of Kenya (Amendment) Act 1964. Thus, under section 3 of the Act, the President, in addition to, but without limiting any other right, power or authority vested in law under the Act, may subject to any other written law, make grants or disposition of any estates, interests or rights in or over unalienated Government land. The President's powers under this section were delegated to the Commissioner in some cases for example in respect of land for religious, charitable, educational or sports purposes and for general purposes of the Government. Unalienated Government land means Government Land which is not for the time being leased to any other person or in respect of which the Commissioner has not issued any letter of allotment – see section 3 of the Act. The President had powers under section 12 to grant leases of town plots to individual and companies. Under section 19, he had power to alienate land available for agricultural purposes to be surveyed and subdivided into farms. He could direct the Commissioner in this regard. He could grant leases of farms under section 20. His powers under section 3 except as provided, sections 12 and 20 were not delegable to the Commissioner.

23. The allotment letter referenced 7696/XIV and dated the 12/5/1992 was issued to M. Mbaabu & Wilson Murugu. But there is a letter dated 20/11/1992 from the Municipal Council of Meru to the Commissioner of Lands stating that the transfer of suit land from Mbaabu to Murugu had been consented by it and directing the Commissioner of Lands to issue the lease to the said Mburugu, the Exparte Applicant. The letter of allotment aforesaid is issued under the Government Lands Act Cap 280 (now repealed) and it states that the title will be issued either under the Registration of Titles Act or the Land Registration Act (all repealed).

24. It must be observed that though the gazette notice referred to revocation of titles and included the suit land therein, the suit land is yet to be registered and issued with a title deed. It is vide a letter of allotment.

25. Does a letter of allotment confer the same rights like a title under the law? The Court of Appeal in the case of **Wreck Motors Enterprises –vs- The Commissioner of Lands and 3 Others Nairobi Civil Appeal No. 71 of 1997 (Unreported)**, stated as follows:

‘Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of a title document pursuant to provisions held.’

26. Similarly, in the case of **Joseph Arap Ng'ok –vs- Justice Moiwo Ole Keiwua NAI Civil Application No. 60 of 1997**, the Court of Appeal observed as follows:

‘It is trite that such title to landed property can only come into existence after issuance of letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of title document pursuant to provisions in the Act under which the property is held.’

27. It is on record that the Exparte Applicant did accept the terms of the letter of allotment on the 3/7/1992 and undertook to abide by the covenants therein. In fulfilment of the said covenants he has exhibited evidence of payment of stand premium rents and other outgoings demanded in the said letter of allotment vide receipt No 20524 dated 7/7/1992 and 11/2/1992.

28. I associate myself with the decision of Warsame J. [as he then was] in the case of **Rukaya Ali Mohamed vs. David Gikonyo Nambacha & Another Kisumu HCCA No. 9 of 2004** where stated that;

“...once allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a **letter of allotment confers absolute right of ownership or proprietorship unless** it is challenged by the allotting authority or is acquired through fraud mistake or misrepresentation or that the allotment was out rightly illegal or it was against public interest. In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled.”

29. Guided by the above decision, it is to be noted that even though the Exparte Applicant did not hold title to the suit land given that he had met the conditions of the allotment including payment of consideration, the letter of allotment conferred absolute right of ownership or proprietorship through which he acquired an interest in the suit land, subject to the determination on its propriety or otherwise. That right of ownership is afforded the due protection of the law under section 75 of the old Constitution and under Article 40 of the Constitution, 2010. It must be noted that Art 40 (6) does not protect title that is tainted with impropriety.

30. In that regard, I find the gazette notice misplaced in that it purported to revoke title in the suit land while the same has not been registered as stated above.

31. Nevertheless 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**

32. 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.”

33. In the case of **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others Civil Appeal No 266 of 1996** the Court of Appeal held, *inter-alia*, as follows:-

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...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.”

34. As to the whether the Respondent has power to revoke the titles for the suit land, recourse will be had to the Government Lands Act. I have not found any provision in that Act that empowers the Respondent to revoke title in land or for this case the letter of allotment. Section 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.

35. 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 Mode of rectification. 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”

36. From the paragraphs, the law is clear. The Respondent is not vested with the power to revoke title and in this case the letter of allotment. That power vests with the Court.

37. 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.”

38. Whereas the events complained happened before the enactment of the new Constitution 2010, it may not be entirely improper to refer to it. I say so because the provisions relating to protection of the right to property expressed in the old Constitution (repealed) are carried into the new Constitution 2010 and the relevant land laws enacted pursuant thereto. 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 Articles 47 and 50 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.

39. The Respondent is a Public Officer at the material time engaged in public functions. He has correctly stated that Judicial Review does not deal with the decision made but the procedure undertaken to reach the decision. This statement calls upon the Respondent to explain the procedure he followed to decide that allocation of the suit land to the Applicant ought to be cancelled. He has not done so.

40. Notwithstanding the express provisions in the Constitution stated in paragraph 38 above, the principles of natural justice applied to the Respondent while dealing with the Applicant in respect of the suit land. The rules of natural justice embody the stated due process ideals. These are intended to secure parties fair and just treatment from bodies to which they are subjected. The right to be heard emphasizes the need for fair hearing. It entails ideals such as need for prior notice before adverse proceedings are taken against a person and the need to give the affected party fair opportunity to defend himself. The Respondent gazetted cancellation of the title/letter of allotment to suit land without recourse to the Applicant, thereby falling in error in the functions of his public duty.

41. 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 as the Respondent purported to do in respect of the suit land.

42. Similarly, Nyamu, J (as he then was) made the same sentiments in the case of **Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443**

43. 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.

44. There is no evidence on record to show that the Respondent accorded the Exparte Applicant to right to be heard 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 and common law. I hold and find that the exparte applicant's rights of natural justice were trampled upon by the Respondent.

45. Accordingly, in the case before me, the Exparte Applicant's case succeeds on two grounds. The first ground is that the Respondent did not have the power to revoke the letter of allotment without following due legal process under the law. Secondly, the Applicant was not heard before the decision was taken.

46. The order of prohibition is declined, as it is speculative and juristic and will not serve any purpose.

47. The application is meritorious and I 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 it purports to revoke the exparte Applicants letter of allotment to the land and or plot known as Plot No. T. 185 Meru Municipality situated within the Municipal Council of Meru (Now Meru Town).

b. An Order of Mandamus directing the District Land Registrar Meru Central District to forthwith reinstate the exparte Applicant's letter of allotment to the said plot.

c. The costs of this application to be met by the Respondents.

DATED, DELIVERED AND SIGNED IN OPEN COURT THIS 24TH DAY OF OCTOBER, 2018

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of;

C/A: Galgalo

Mburugu holding brief for Nyamu Nyaga for Exparte Applicant