



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW NO. 62 OF 2011

REPUBLIC.....PLAINTIFF

VERSUS

NAKURU DISTRICT LAND REGISTRAR.....1ST RESPONDENT

HON ATTORNEY GENERAL.....2ND RESPONDENT

EX-PARTE JANE WANJIRU GATU

JUDGMENT

(Judicial review motion for orders of certiorari to quash a gazette notice that purported to cancel the title of the ex-parte applicant; applicant not given any hearing before the gazette notice was published; imperative for rules of natural justice to be obeyed; motion allowed; gazette notice quashed)

1. This judgement is in respect of a judicial review motion filed by the ex-parte applicant seeking the following orders :-

(a) An order of certiorari to bring to this court and to quash the decision of the Nakuru District Land Registrar issued vide Gazette Notice No. 15574 in the Kenya Gazette issue of 26th November 2010 purporting to revoke the title to the applicant's parcel of land known as Nakuru Municipality Block 12/277.

(b) An order of prohibition prohibiting the respondents and the Government of Kenya from acting on the aforesaid decision of the Nakuru District Land Registrar contained in Gazette Notice No. 15574 in the Kenya Gazette issue of 26th November 2010.

2. Leave to file the substantive judicial review proceedings was granted on 30 May 2011 and the substantive motion was filed on 17 June 2011.

3. The case of the ex-parte applicant is that she purchased the property comprised in the land parcel Nakuru Municipality Block 12/227 (hereinafter referred to as "the suit property") from the previous owner, one Amos Kibe Njogu, in the year 2003 at a consideration of Kshs. 400,000/= which she paid. She has annexed a copy of the sale agreement, the banker's cheque for the purchase price, the duly executed transfer of lease forms, the consent to transfer from the Municipal Council of Nakuru who are the head lessors, and payments in respect of stamp duty and registration fees. She has averred that all pending land rents and rates were paid and clearance certificates issued by the Municipal Council of Nakuru and following the purchase, she became registered as proprietor of the leasehold title comprised in the suit property on 24 February 2004. She has stated that upon purchase of the suit property, she put up a house of which the building plans were approved by the Municipal Council of Nakuru, and she has continued to pay land rates and land rents. However, through a Gazette Notice No.15574 published on 26 November 2010, the District Land Registrar, Nakuru, purported to cancel the title of the ex-parte applicant, alongside other titles, on the basis that the said parcels of land were reserved for public purpose and the allocations were therefore illegal and unconstitutional.

4. In this suit, the ex-parte applicant has contended that the Land Registrar has no legal authority to revoke a title to registered land and only the courts have such authority. She has further averred that she was never heard before her title was revoked and she was therefore condemned unheard. It is also her case that her title could not be unilaterally revoked without her being compensated.

5. The respondents filed a replying affidavit sworn by Daniel Kimori Nyantika, the District Land Registrar, Nakuru. He has deposed that the suit property was initially registered under the Municipal Council of Nakuru who leased it out under unclear circumstances. He has deposed that it is within his knowledge that next to the property is Moi Primary School which is a public Municipal Council school. He has stated that the Kenya Anti-Corruption Commission investigated illegally alienated public land and one of the properties identified is the suit property. It

is his position that the suit property and others were illegally excised out of land reserved for Moi Primary School. They then proceeded to cancel the ex-parte applicant's title pursuant to a letter written by the Kenya Anti-Corruption Commission.

6. I gave directions for the suit to be dispensed of by way of written submissions, but only Mr. Wambua Musembi, learned counsel for the ex-parte applicant filed submissions. At the hearing of the motion, I invited Ms. Cheruiyot, learned counsel for the respondents to make any oral submissions, but she had none to make and left it to the court.

7. I have assessed the suit. This is a judicial review motion and it has repeatedly been held that judicial is concerned with the decision - making process, not with the merits of the decision itself. In the Court of Appeal decision in the case of **Municipal Council of Mombasa vs Republic & Another (2002) eKLR** the court pronounced itself as follows on this point :-

“The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review.”

8. Therefore, in the matter before me, I need to confine myself to what would be termed as due process considerations, rather than the merits of the decision itself. In her suit, the ex-parte applicant has averred that she was never heard before the decision to revoke her title was made. This indeed has not been controverted by Mr. Nyantika, in his replying affidavit. It is a cardinal principle of law that a person ought not to be condemned unheard. It is clear to me that in the case before me, the ex-parte applicant was never given audience before the decision to revoke her title was made. On that sole ground alone, that the ex-parte applicant was not given a hearing before the decision was made to revoke her title, this judicial review motion must succeed. Having so held, it is not necessary for me to look into the other issues raised, including the ground that the Land Registrar had no jurisdiction to make the order of revocation of the ex-parte applicant's title.

9. Given that I have held that the ex-parte applicant was not heard before her title was cancelled, I do issue an order of certiorari, quashing the Gazette Notice No. 15574 of 26 November 2010, in so far as the same relates to the title Nakuru Municipality Block 12/277.

10. I also issue an order of prohibition, prohibiting the respondents from taking any action that has its root in the said Gazette Notice.

11. For the avoidance of doubt, I have not held on the merits of the case, as I am bound not to do so in a suit such as this. Therefore, the issue of whether or not the title of the ex-parte applicant ought not to have been procured and the issue of whether or not the suit property forms part of Moi Primary School, and all other issues surrounding the veracity of the title held by the ex-parte applicant, are not matters that I have made any substantive determinations on. Those may have to await a substantive suit for determination if ever one is filed.

12. On costs, I do award costs to the ex-parte applicant.

13. Orders accordingly.

Dated, signed and delivered in open court at Nakuru this 16th day of October 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Mr. Wambua Musembi for the ex-parte applicant.

No appearance for the respondents.

Court Assistant: Nelima Janepher .

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU