



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

JUDICIAL REVIEW NO. 2 OF 2014

(FORMERLY JUDICIAL REVIEW NO. 40 OF 2010)

KIMUMU SERVICE STATION LIMITED.....APPLICANT

VERSUS

LAND REGISTRAR NAIROBI.....RESPONDENT

AND

KENYA ANTI-CORRUPTION COMMISSION.....INTERESTED PARTY

JUDGMENT

Kimumu Services Station Limited (*hereinafter referred to as the exparte applicant*), a Limited Liability Company incorporated under the provisions of the Company Act Cap. 486, Laws of Kenya has brought this application for Judicial Review against the Land Registrar, (*hereinafter referred to as the respondent*) stating that the applicant has hitherto been the registered proprietor of land parcel L.R. 20927 and that on 1st October, 2010 without any prior notice of any such intention or lawful cause the respondent published a notice in the Kenya Gazette revoking the said title.

The application is based on grounds that the respondent has acted without jurisdiction and/or in excess of jurisdiction and is contrary to the provisions of Section 40 of the constitution and that the respondent has acted unilaterally in breach of the Rules of Natural Justice by making a decision without giving the applicants a hearing. Moreover that the respondent has acted unreasonably and against the legitimate expectation of the applicant to a right to be heard before any adverse action is taken against him and therefore the action is unlawful as it interferes with a valid title issued.

The relief sought by the applicant in the statement is an order of *Certiorari* to quash the decision of the respondent revoking title No. 20927 and quash any subsequent alienation of land. The exparte applicant filed a verifying affidavit and a supporting affidavit, which I find unnecessary as Order 53 only provides for an affidavit verifying the fact relied upon and therefore, it is the affidavit verifying the facts that should be relied upon which in essence is the supporting affidavit and therefore there was no need to file two affidavits. However, this irregularity is not fatal as facts relied upon are in the affidavits.

Japheth K. Magut, the director of the applicant states that the applicant company was at all material times the registered proprietor of land L.R. 20927 (I.R. 5356) as per title documents annexed and marked JM/1. That the allocation of this land was made by the Government of Kenya to one Wildred Kimalat upon his application which he then instructed the Commission of Lands to issue the title in the name of the applicant company. That upon allotment, the allottee proceeded to pay the necessary dues to the Commissioner of Lands. On the 1st October, 2010, the respondent issued a Notice in the Kenya

Gazette revoking this title deed for this land. He is informed by his advocates on record and verily believes the same to be true that the revocation is unconstitutional and in breach of the Applicants constitutional rights to property and protection of that property under Section 40 thereof. The allotment of the above land to the applicant by the said Government was preceded by a valid vigorous process of inquiry from all relevant Departments of Government who issued their letters of non objection. These departments include the District Surveyor, District Public Works, the District Commissioner, the Town Clerk and Chief Engineer Roads as per annexed documents marked JM/3.

The applicant believes that the Government is therefore estopped in law from reversing its own position earlier taken without any good reason and notice to the applicant of that intention to change and/or reverse the position. The applicant has on the representation of good title to the land taken possession and expended over Kshs.2 million in preparation of building plans, architectural fees and preparation of grounds. That in any event the question of the validity of the subject title is subjudice and in issue in Hccc No. 1204 of 2006 at Nairobi and that the respondent's conduct of revoking the title during the currency of the said suit is an abuse of the process of the court. No notice was issued by the respondent to the applicant before revocation or any opportunity given to the applicant to be heard in any regard to the revocation.

Leave was obtained on 15.11.2010 and the substantive Notice of Motion was filed on 6.12.2010 within the stipulated time as required by law. In the Notice of Motion, the exparte applicant prays for the following orders namely:-

1. **Certiorari to remove into this court and quash the decision by the respondent to revoke title No. 20927 and/or any subsequent alienation and/or titles issued thereto pursuant to the revocation aforesaid contained in the Kenya Gazette published on 1st day of October, 2010 on page 3470.**
2. **Prohibition to prohibit the respondent and/or any other person and/or agent of the respondent from implementing and/or effecting the purported revocation of title No. 20927 in the name of the applicant herein.**
3. **Prohibition to prohibit the respondent and/or any other person acting and/or agent of the respondent from interfering with the possession and/or enjoyment of the subject property title No. 20927 till determination of these proceedings.**
4. **That there be stay of enforcement and/or implementation of the purported revocation of title No. 20927 as published in the Kenya Gazette on the 1st day of October, 2010 contained on page 3470 of the said Gazette notice.**
5. **That such further and/or other orders as may be just and expedient in the circumstances to grant.**
6. **That the costs of this motion and those of the application for leave which preceded this motion be borne by the respondent.**

The grounds in the Notice of Motion are summarised as follows:

(a) ----- That the revocation by the respondent contained in the Gazette notice of 1.10.2010 is contrary to section 40 of the constitution of Kenya.

(b) ----- That the revocation was done against the Rules of National Justice as the applicant was not given an opportunity to be heard.

(c) ----- That the decision for revocation of title No. 20927 was done in excess of the powers conferred to the respondent hence ultra vires.

(d) ----- That no notice was given and/or applicant notified of the intended revocation of title No. 20927 as reasonably expected.

(e) ----- That no hearing and/or date was ever set for hearing the applicant on the subject matter before the revocation of title No. 20927 could be effected.

(f) ----- That the respondent had no legal basis and/or capacity to effect the revocation ... of the said title.

(g) ----- That no party and/or person is to be condemned unheard.

(h) ----- That the property in issue whose title No. 20927 which was revoked by the respondent legally belong to the applicant.

(i) ----- That the powers and/or duty conferred to the respondent is not unfettered.

The Kenya Anti-Corruption Commission filed a replying affidavit sworn by Dedan Okwama stating that the Interested Party, pursuant to its mandate under the provisions of the Act, investigated allegations that LR. No. 20927 (IR NO. 5356) situated in North East of Eldoret town (hereinafter, “the suit property”) has been illegally alienated by Wilson Gacanja, the then Commissioner of Lands to the applicant. He was part of the team that carried out investigations into the said allegations which revealed that the suit property was curved out of a road and/or a road reserve at the junction of Eldoret-Iten and Chepkoilel Campus Road and that in making the grant, the then Commissioner of Lands, cited Government as the authority to alienate the suit property. The investigations further revealed that no Presidential approval was obtained prior to the alienation of the land to the applicant. On the contrary, one Japheth Magut sought permission from the President to construct a petrol station for his plot at Kimumu and the purported approval was used as authority to alienate land to the applicant.

That a letter of allotment dated 10th May, 1994 was issued to the applicant. The said letter required the applicant to accept the allotment and to make payments totalling Kshs.85,302/= within 30 days from the date of the letter failing which the offer would lapse. The applicant was incorporated on the 8th June 1994, one month after the offer of allotment was made to it and the offer was purportedly accepted on the 5th September, 1994 a period of 4 months since the letter of allotment was issued. When the grant was finally made to the applicant, the same was purported to be issued on behalf of Wareng County Council.

The investigations revealed that Wareng County Council did not issue any instructions to the then Commissioner of Lands to make the grant on its behalf and that the said Council was not consulted at all in the course of the entire process and that the suit property being part of a public road was not available for alienation at the instance of the then Commissioner of Lands or any other person whatsoever. The Chief Engineer, Roads has complained about the alienation and voiced his concerns as to the safety of motorists as a result of the curving out of the suit property. The District Planning Officer, after doing a ground inspection, similarly concurred and stated that the allocation of the suit property is a future traffic hazard.

That one, Phoebe Amiani, the then Senior Lands Officer, Rift Valley Province, has recorded a statement with the Commission in which she admits that she issued the letter of allotment on the instructions of the then Commissioner of Lands and that she was misled into issuing the letter of allotment as she did not know that the suit property was a road reserve or a road as the Commissioner of Lands has no authority to alienate a road or a road reserve. She does not know why the title was issued in the name of Wareng County Council but she knows that the land allocated was government land. There was misrepresentation as to the status of the land before alienation. There was no ground report before the allocation was made to the applicant and that there was no valuation of the suit property before allocation was made to the applicant. At the time of issuing the letter of allotment, she assumed that the company was in existence. That he is informed by the Advocate on record for the Plaintiff which information he verily believe to be true that on the basis of the foregoing, the allocation of the suit property and the issuance of title to the applicant was null and void and conferred not interest whatsoever to the applicant as the suit property comprised a public road and was not available for alienation whatsoever. The offer of allotment was made to a non-existent entity. The suit property was alienated on the false premise that the same was trust land vested in Wareng County Council and that even if the suit property was vested in Wareng County Council, it was alienated without the authority of the said Council. Further, even if the

land was unalienated Government land, which she denies, only the President could authorize its alienation. The offer of allotment was purportedly accepted long after the validity period had passed.

Surprisingly, the respondent never filed a replying affidavit.

The applicant submits that he is the registered proprietor of land L.R. No. 20927 as shown by the title documents. Nothing has been brought to this court to the contrary. The allocation of this land was made by the Government of Kenya to one Wilfred Kimalat who then made an application requesting the Commissioner of Lands to issue title in the name the applicant. That upon allotment, the allottee proceeded to pay the necessary dues. There is no dispute as to the applicant being the registered proprietor of land L.R. No. 20927.

The applicant argues that the respondent did not have the ***power to revoke the Certificate of Title*** by Gazette Notice No. 11536 by which the respondent purported to revoke the applicant's title to the land. The provisions of law that was invoked as the basis for the decision was not indicated. There is no provisions under the Registration of Titles Act (Cap. 281) which was the governing law but was repealed in 2012 or any other Act that bestows on the respondent or the Government power to revoke a registered title in the absence of a court order to that effect. There is no law that grants power to the government to arbitrary revoke a valid land title.

The respondent submits that the respondent as a public officer is entitled to publish his decision in the Kenya Gazette so that the said decision can have legal force and hence the respondent acted within the law as a applicable to public administration. Secondly, he argues that where the act in issue is a nullity in law, a hearing will not change the facts regarding the said nullity as the hearing would be superfluous and a waste of time. He further submits the Acts of the applicant in acquiring the title to the suit land were clearly wrong and informed public interest.

The interested party through learned ***Counsel Natome*** argues that the suit property was public property and was illegally alienated and therefore not protected by Article 40(6) of the Constitution.

She relies on the case of **Macfoy Vs United Africa Company Ltd [1951] 3 All E.R 1169**, where, *Lord Denning* stated at page 1172 that;

“If an act is void, then it is in law a nullity. It is not only bad, but it is incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

The letter of allotment was issued to the applicant on the 10th May, 1994 and required the applicant to accept the allotment and to make payments totalling Kshs.85,302/= within 30 days from the date of the letter failing which the offer would lapse. The applicant was incorporated on the 8th June 1994; one month after the offer of allotment was made to it. It is therefore crystal clear, according to Natome that the letter of allotment was issued to non-existence body and there was no other allotment letter offered to the applicant after its incorporation. Consequently, no allotment letter was thus issued to the applicant as required by law. It is submitted therefore that land cannot be alienated without issuance of allotment letter.

In support thereof, they rely on the case of **Joseph N. K. Arap Ngok Vs Moijo Ole Keiwua & 4 Others [1997] E KLR**, where the Court of Appeal held that;

“...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 letter and actual issuance thereafter of title document pursuant to provisions in the act under which the property is held.”

Further, it is their contention that the laid down procedures were not followed in alienation of the suit property. It is evident from **KACC 3** that the Director of the applicant one Japheth Magut sought permission from the President to construct a petrol station on his plot in Kimumu and alleged to have been granted approval by the President. Their submission that, that in itself does not amount to approval for any alienation.

She relies on the decision of the Court of Appeal in *Wreck Motor Enterprises Vs Commissioner of Lands & 3 Others* (1997) Eklr WHILE CITING WITH APPROVAL Joseph N. K. Arap Ngok's case (supra) stated;

“In our view, the endorsement or the appending of his signature by H.E. The President on the applications to the Commissioner of Lands for the suit plot or for that matter any other unalienated Government Land is not sufficient to grant title over any land to anyone. H. E. the President only approves the application for consideration by the Commissioner of Lands for allocation of any such property. It does not amount to the applicant's obtaining title to such lands. 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 of title document pursuant to provisions held...”

and submits that It would be against public policy for the court to lend a hand to illegal acquisition of Public Property:

It is submitted that the issuance of the title deed to the exparte applicant was an illegality. It is the court's duty and role to protect public interest and let the suit property revert back to the rightful owners, that is the public to be used as a public road. We urge the honourable court not to allow the applicant use this court to enforce an illegality. The Court of Appeal in *National Bank of Kenya Vs Ayah* [2009] KLR, 762, held, regarding public policy and illegalities that; **“it is public policy that courts should not aid in perpetuation of illegalities...”**

It is further submitted that the applicant's submissions on record are drawn and filed by an Advocate who is not properly on record hence the same should be struck out. The firm of R. M. Mutiso & Company Advocates is on record for the applicant. However, the submissions dated 28th May, 2015 have been filed by the firm of Nyairo & Co. Advocates without any notice of change of Advocates filed as required. This is contrary to Order 9 of the Civil Procedure Rules.

It is clear from the above that the said rules do not allow advocates to represent parties to litigation who previously had advocates on record without filing a Notice of Change of Advocates.

Indeed, *Justice Anyara Emukule* in ***Outdoor Advertising Association of Kenya – Vs Nairobi City council and 2 Others***, [2005] *EKLR*, held;

“I am keenly aware that courts are enjoined under section 3 of the Judicature Act Cap 8 Laws of Kenya to decide cases according to substantial justice without undue regard to technicalities and dismissal of suit on technicality leaves a very sour taste in the mouth of litigant(s). rules of law must however be observed....”

The pleadings filed by the firm of Nyairo & Co. Advocates are thus incompetent. This was the holding of the court in the case of ***Mbogo Vs Asikoyo & 3 Others*** (2004) **1 KLR 697** (copy attached) where the court stated that pleadings filed by an advocate who is improperly on record are incompetent and struck them out from the court's record.

I have considered the submissions of all counsel respectively for the applicant, Interested Party and the Respondent and do find the interested party should have raised the issue of representation in an application to strike out the pleadings and therefore having acquiesced in the representation of the exparte applicant by the firm of Nyairo and company they are estopped from raising an objection at the last minute in the final submissions. Moreover this court is guided by article 159 of the constitution of Kenya

2010 not to put undue regard to procedural technicalities at the expense of substantive justice.

The main issues for determination is whether the decision to revoke the registration of the disputed parcel of land in the name of the applicant was fair and lawful and not whether the suit property was properly acquired as judicial review deals with the decision making process and not the merits of the decision. For an order of *Certiorari* to be granted the applicant must satisfy the court that there is illegality and or procedural irregularity or unreasonableness in the decision making process on the part of the decision making body. The applicant's prayer for an order of ***Certiorari*** is based on the sanctity of the title and protection of the property rights under Article 40 and 50(1) of the Constitution of Kenya, 2010. The applicant has contested the revocation of title Nairobi LR. No. 20927 issued on 1.10.2010 vide Gazette Notice No. 11536 on the grounds that it offends the law. Article 40 of the Constitution states as follows;

Section “40. (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person—

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”

The question that comes to my mind at this juncture is whether it was lawfully for the Registrar to revoke the title herein that was registered in the name of the petitioner arbitrarily without giving the petitioner an opportunity to be heard? The suit land is duly registered under the Registration of Titles Act, Cap 281, now repealed, which is the applicable law in this case. Sections 59 and 60 of the said Act stipulates for procedure to be followed in rectifying (or rather revoking for that matter) grant and / or the

title thereof. Section “40. (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

59 states as follows;

“59. (1) In the case of a non-existent or fictitious person being named as proprietor, the name in the register or document of title or other instrument may on the order of the competent authority be cancelled.

(2) In other cases, the rectification of grants, certificates of title and other instruments shall be effected by the addition of further endorsements correcting former endorsements which are found to be insufficient or to have been otherwise made in error. ”

While section 60 stipulates 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 mis-description 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. ”

While Article 50(1) of the Constitution states as follows:

“50. (1) *Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.*”

In view of the foregoing it is apparently clear that before any correction, rectification and or revocation as in this case of the title or grant issued, it is important that the grant holder or the title holder ought to be summoned and be given a fair hearing. This was not the case in the instant matter.

In Isaac Gathungu Wanjohi and Another vs. The Attorney General and 6 Others, [2012]eKLR, H.C at Nairobi, Constitutional Case No. 154 of 2011 it was held inter alia that the finding of 'unlawful acquisition' referred to in Article 40(6) of the Constitution must be through a legally established process and not by whim or Gazette Notice as the the Registrar of Lands purported to do in the instant case. See also

Electrical Options Limited v. Attorney General & Another [2012]eKLR, High Court at Nairobi, Petition No. 23 of 2011, supra, where the learned judge Majanja J. cited Article 40 of the Constitution and made a finding to the effect that the state had breached the said article 40 by reversing the acquisition of the suit land without notifying the petitioner.

In Kuria Greens Limited v. Registrar of Titles and Commissioner of Lands Nairobi, [2011]eKLR, H.C Petition No. 107 of 2010, supra, the learned judge Musinga J. held that the Registrar has no authority under the Registration of titles Act to revoke the titles.

See also Power Technics Limited v. The Hon. Attorney General & 2 Others [2012] eKLR, H.C at

Nairobi Petition No. 178 of 2011, supra. In *Emange Se-Semata Investments Limited v. Attorney General & 4 Others [2012] eKLR, H.C at Nairobi, Petition 224 of 2010*, supra, The District Land Registrar, had no power to revoke the petitioners title by way of Gazette Notice and that the said act is unconstitutional null and void for breach the petitioners right to a hearing.

In *Maria Soti Educational Trust V Registrar of titles and 3 others Eldoret High Court petition no 2 of 2013*, this court held that revocation of the title to property without affording the title holder a hearing violates his rights to fair hearing and fair administration of justice. *In view of the foregoing authorities cited above, it is apparently clear that the revocation of the title herein was irregular and unlawfully due to the fact that the petitioner was not given an opportunity to defend the said title.*

In conclusion this court finds for the petitioner and declares that the revocation of title to the Petitioner's property title Nairobi L.R. No. 20927 by the first Respondent violates the petitioner's constitutional rights to protection of private property under Article 40 of the Constitution of Kenya and further, violates the petitioner's right to fair hearing before the petitioner is deprived of its private property in contravention of Article 40 of the Constitution of Kenya.

The upshot of the above is that the exparte applicant has demonstrated that the decision to revoke title number Nairobi LR. No. 20927 was made without affording the exparte applicant a hearing albeit the the applicants entitlement to the right to be heard and therefore the same is tainted with procedural irregularity. The right to be heard is so pertinent in any administrative action determining the rights of a person that it cannot just be wished away. In the circumstances, I do grant an order of **Certiorari** to remove the decision of the Land Registrar, Nairobi revoking title No. Nairobi L.R. No. 20927 into this court and the same is quashed forthwith. The prayers for an order for prohibition are superfluous and therefore cannot be granted the same are dismissed. The respondent and interested party to pay half costs as the applicant has not succeeded on the other prayers. Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 19TH DAY OF FEBRUARY 2016.

ANTONY OMBWAYO

JUDGE