



**REPUBLIC OF KENYA**  
**ENVIRONMENT AND LAND COURT OF KENYA**  
**AT MALINDI**  
**ELC PETITION NO. 16 OF 2012**

**IN THE MATTER OF: ARTICLES 19, 22, 23, 40, 47, 50 & 64 OF THE  
CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: THE GOVERNMENT LAND ACT AND TRUST LANDS ACT**

**AND**

**IN THE MATTER OF: THE PURPORTED REVOCATION OF TITLE:  
LAMU TOWNSHIP/BLOCK IV/211**

**BETWEEN**

**FOREST RECREATIONAL PARK LIMITED.....PETITIONER**

**AND**

**DISTRICT LANDS REGISTRAR LAMU.....RESPONDENT**

**J U D G M E N T**

**Introduction**

1. This matter was commenced by way of a Petition dated 12<sup>th</sup> August, 2011. The Petitioner has averred that he was allocated a leasehold grant of land known as Lamu Township/Block IV/211 situate in Lamu Township measuring approximately 1.350Ha (the suit property).

**The Petitioner's case**

2. According to the Petition, the Petitioner learnt with shock when he discovered that vide a gazette notice number 5564/2010 published on 21<sup>st</sup> May, 2010, the Respondents caused to be published a notification of revocation of land titles which included the suit property; that the Respondent's purported revocation of the Petitioner's title to the suit property violates Article 47(2) of the

Constitution in that no written reasons for the action have been furnished to the Petitioner to deal and that the Respondent's action was taken in excess of his jurisdiction, is ultra vires, irrational and is tainted with impropriety and illegal.

3. The Petitioner has prayed for a declaration that the Respondent's purported revocation of its title to all that parcel of land comprised in land known as Lamu Township Block IV/211 is unconstitutional, unlawful, null and void, amongst other prayers.

**The Respondent's case:**

4. In reply, Michael Shumu Chinyaka, the Land Registrar, Lamu, deponed that in the 1980's to 1990's, there was rampant illegal and irregular allocation of land reserved for public use thus denying public institutions, bodies and organizations use of land reserved for public purposes.
5. The Respondent deponed that the National Museums of Kenya is a stake holder in the suit land and that in the year 2003, the Government embarked on a policy to restore the illegally acquired parcels of land by establishing the Ndung'u Commission which published a report otherwise known as the Ndung'u report.
6. According to the Respondent, although the allocation of land begins with the preparation of a Part Development Plan, there are no records of any Part Development Plan in respect to the suit property; that the suit property was reserved as a water catchment area and that the suit property comprises of sand dunes and was irregularly and illegally allocated to the Petitioner.
7. The Respondent further deponed that the Petitioner has always been aware of the intended cancellation of his title when it was declared a monument vide a gazette notice of 28<sup>th</sup> March, 2002 and that the court should uphold the decision to revoke the title in the public interest.

**Submissions:**

8. The Petitioner's advocate submitted that since the year 2002 when the Petitioner lawfully acquired the suit property, the Respondent has not informed the Petitioner of any intention to revoke his title contrary to the law.
9. Counsel submitted that the revocation of the Petitioner's title deed has violated the Petitioner's constitutional rights as provided for under Articles 40(1) 43(3) and 47 of the Constitution.
10. The Petitioner's counsel submitted that it is against public policy to arbitrarily revoke a registered title and that the Petitioner's right of ownership of land under Article 40(1) of the Constitution is beyond reproach.
11. Counsel submitted that the attempt to de-register the Petitioner's land so as to vest the land in government is equal to an acquisition of land by the government from an individual albeit without following the law, hence null and void.
12. Counsel finally submitted that the right to fair administrative action as stipulated under Article 47 of the Constitution should be read together with the right to a fair hearing which is set out at Article 50(1) of the Constitution.
13. Counsel submitted that the Petitioner was never afforded a hearing, let alone a fair hearing, over the alleged illegal allocation of the suit property to it.
14. According to counsel, the notice revoking the Petitioner's title does not indicate the provisions of the law that was invoked by the Respondent. Consequently, it was submitted, the Respondent acted ultra vires his legal mandate.
15. Counsel relied on several authorities which I have considered.

**The Respondent's submission:**

16. The Respondent's counsel submitted that the issue before the court is not just about the revocation of the Petitioner's title document, but the legality of the said title.
17. The Respondent's counsel submitted that for the issue of the legality of the title to be resolved, the Petitioner must have filed a Complaint and not a Petition; that the Petitioner did not object when the gazette notice revoking his title document was published and that the area over which the petitioner was issued with the certificate of lease is reserved for public purpose.
18. The Respondent's counsel submitted that the Petitioner has not tendered evidence to show the

procedures it followed to have the suit property allocated to it and that in the absence of a Part Development Plan, the government was right in revoking the Petitioner's title document. Counsel relied on my decision in Malindi Judicial Review Application number 6 of 2013 to buttress her arguments.

### **Analysis and findings**

19. The only issue for determination in this petition is whether the Petitioner's constitutional rights provided for under Articles 40, 43(3) and 50 of the Constitution have been violated with the cancellation of its certificate of lease by the Respondent.
20. It is not for this court at this particular stage to determine the legality or otherwise of the certificate of lease that was issued to the Petitioner for land known as Lamu Township/Block IV/211.
21. It is not in dispute that the Petitioner was issued with a Lease and a certificate of lease in respect to the suit property in October, 2002. The Petitioner has annexed the lease and the certificate of lease on his petition.
22. On 21<sup>st</sup> May, 2010, vide a gazette notice number 5564, the District Land Registrar, Lamu, revoked the Petitioner's certificate of lease because "it had 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 and the Trust Land Act and the allocations were therefore illegal and unconstitutional."
23. The Respondent has annexed on his Replying Affidavit a letter from the National Museums of Kenya dated 6<sup>th</sup> April, 2010. In the said letter, the National Museums of Kenya was asking the Clerk of the County Council of Lamu to stop the Petitioner from developing the suit property because it comprises the Shella-Kipungani sand dunes, the only reliable source of fresh water for residents of Lamu Island.
24. Previously, the Chief Land Registrar, vide his letter dated 18<sup>th</sup> February, 2005 had directed the District Land Registrar to notify the Petitioner that his plot falls within the gazetted area of the national heritage which is a protected area and that the allocation of the land was done erroneously.
25. There is no evidence before me to show that the Respondent informed the Petitioner that indeed the Lease and the certificate of lease it was holding was in respect of land reserved for public use or a water catchment area.
26. Instead, the Respondent, vide gazette notice number 5564 of 21<sup>st</sup> May, 2010 proceeded to cancel the Petitioner's certificate of lease.
27. I agree with the Respondent's submissions that where the title document of a proprietor is under challenge, the burden of showing that the proprietor of such a title obtained it lawfully is on the proprietor, and if he cannot prove the legality of the title, then the same may be cancelled.
28. However, the cancellation of a title document duly issued by the government can only be effected after the proprietor has been given a fair hearing as provided for under Article 47(2) and 50(1) of the Constitution.
29. Article 47(2) of the Constitution provides that if a right or fundamental freedom of a person has been or is likely to be adversely affected by an administrative action, the person has the right to be given written reasons for the action.
30. On the other hand, Article 50(1) provides that 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.
31. The Respondent did not comply with any of the above Articles of the Constitution before he cancelled the Petitioner's certificate of lease. His actions were thereof unconstitutional, null and void.
32. Although the Respondent's advocate relied on the decision in Malindi Judicial Review, Application number 6 of 2012 in which I declined to grant an order of certiorari to quash the decision of the Land Registrar, Kilifi for cancelling a title deed, the circumstances of that case were different from this particular one.
33. In that case, I held that due to the contested facts, the most efficacious way of determining if indeed the Applicant's proprietary rights to own the suit property have been infringed upon is by

- way of a Complaint or Petition. Indeed, I still hold that position.
34. What is before me is a Petition. The issue that I am supposed to determine is whether the Respondent did infringe on the rights of the Petitioner and not the legality of the Petitioner's title documents, which issue I have answered in the affirmative.
35. Whether the suit property was lawfully acquired or not can only be answered when either party files a Complaint and viva voce evidence is taken. In the meantime, the register should reflect that the Petitioner is still the registered owner of the suit property and until its title is lawfully cancelled, if at all, it has the right to own and possess the suit property.
36. The Constitution and the rules of natural justice demand that the Petitioner should have been given a hearing before an action affecting its title was made by the Respondent, or by any other person or body.
37. For those reasons, I allow the petition in the following terms:-

**(a) A declaration be and is hereby issued that the Respondent's purported revocation of the Petitioner's title to land known as Lamu Township/Block IV/211 is unconstitutional, unlawful, null and void.**

**(b) An order of prohibition be and is hereby issued to prohibit the Respondent by himself, servants, agents or whomsoever from alienating the Petitioner's land known as Lamu Township/Block IV/211 or any manner whatsoever with the Petitioner's possession of the said property.**

**(c) An order of prohibition be and is hereby issued prohibitory the Respondent by himself servants, agents or whomsoever from in any manner issuing any title and or license in respect to the Petitioner's land composed in Title No. Lamu Township/Block IV/211 to any third party or registering any encumbrance thereon.**

**(d) An order of Mandamus is hereby issued compelling the Respondent by himself, servants, or agents to delete any entry on the Petitioner's Certificate of Lease compromised in Title No. Lamu Township/Block IV/211 made as a consequence to or in furtherance of his decision contained in Gazette Notice NO.5564/2010 published on 21<sup>st</sup> May, 2010.**

**(e) Costs of and incidental to the suit.**

Dated and delivered in Malindi this 28<sup>th</sup> day of November, 2014.

**O. A. Angote**

**Judge**

