



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, SICHALE & OTIENO-ODEK JJA)

CIVIL APPEAL NO. 122 of 2013

BETWEEN

REPUBLIC *Ex Parte* SAMUEL KAZUNGU KAMBI.....APPELLANT

AND

ATTORNEY GENERAL..... 1st RESPONDENT

THE REGISTRAR OF TITLES.....2nd RESPONDENT

KENYA RAILWAYS CORPORATION.....INTERESTED PARTY

(Being an appeal from the judgment and decree of the High Court of Kenya at Nairobi (W. K. Korir J.) dated 26th July 2012 in Nairobi JR ELC Case No. 56 of 2011)

JUDGMENT OF THE COURT

1. By Notice of Motion dated 26th May 2011, the *Ex parte* applicant now appellant, **Mr. Samuel Kazungu Kambi** sought an order of *certiorari* to remove and bring into the High Court and quash the decision of the Registrar of Titles made on 26th November 2010 to cancel and revoke the ex-parte applicant's title to Nairobi LR No. 209/19703 registered in Grant No. IR 123186 (hereinafter the suit property). The decision to cancel and revoke the title was communicated vide **Gazette Notice No. 15580**.

2. The appellant asserts he is the registered proprietor of the suit property and the Registrar of Titles had no power to cancel and revoke his title and grant. It is contended that prior to the revocation of title, the Registrar did not accord the appellant an opportunity to be heard; the Registrar's action in cancelling and revoking the title was oppressive and engender financial detriment to the appellant's investment. It was urged the appellant stands to suffer irreparable loss and damage.

3. In his statement supporting the application for the prerogative orders of *certiorari*, *prohibition* and *mandamus*, the appellant narrates how he came to own and be registered as proprietor of the suit property. He states that sometime in 1999, he approached the then **Permanent Secretary** (PS) to the Ministry of Lands seeking allocation of land to develop oil storage facilities; he informed the PS that there was land available along Mombasa Road although the same was reserved for **Kenya Railways Corporation** (Interested Party); he approached the then Managing Director of the Corporation a one **Mr. Nduva Muli** who confirmed the land in issue and allegedly stated that the Corporation was in the process of returning the land to the Government; that sometimes in January 2010, he was allegedly informed by the Commissioner for Lands that the Corporation had finally surrendered the land and the same was available for allocation; he applied for allocation and received a letter of allotment dated 24th March 2010. Subsequently, upon paying all the requisite sums, he received the Grant and was registered as sole proprietor of the suit property.

4. In opposing the application for the prerogative orders, both the Registrar of Titles and Kenya Railways filed replying affidavits. In the affidavit dated 22nd June 2011 deposed by **Mr. Stanley Gitari**, the Legal Officer of Kenya Railways, it is maintained that Kenya Railways has never surrendered the suit property to the Government; there is no documentation indicating surrender of the property; there are no minutes or resolutions of the Board of Kenya Railways discussing or approving surrender; the suit property belongs to Kenya Railways and that the property was alienated for public purposes and cannot be re-alienated to private persons. It was asserted that the Registrar of Titles has power to cancel titles that have been illegally, fraudulently and or corruptly obtained.

5. The Registrar of Titles, the 2nd Respondent, opposed the application vide an affidavit dated 5th December 2011 deposed by **Mr. Gordon**

Ochieng, the Chief Land Administration Officer. He avowed that as per the Records at the Lands Office, LR No. 209/19703 is a land parcel alienated and reserved by the Government for Kenya Railways Corporation; as per the records, the land was and still is public utility land set apart as property belonging to Kenya Railways Corporation; that no surrender or change of user of the parcel from public to private or for any other purposes has been recorded.

6. Upon hearing the parties on the contestations relating to ownership of the suit property and whether the Registrar of Titles has power to cancel and revoke appellant's title, the trial judge exercised his discretion and declined to grant the orders for *certiorari*, *mandamus* and *prohibition*. In dismissing the application for the prerogative orders, the learned judge expressed himself as follows:

“The Third question is whether the applicant is entitled to the orders sought. It must be borne in mind that judicial review remedies are discretionary in nature.....The applicant before me was alerted by the 2nd respondent through Gazette Notice that the reason for revoking his title was that the allocation of the land to him was illegal and unconstitutional. He was therefore put on notice about the respondent's defence. He had two options. The first option was to proceed by way of judicial review as he has done and have the decision of the 2nd respondent quashed. Such an option would still leave the alleged illegality and unconstitutionality of the acquisition unaddressed.... The second option would have been to file a civil suit and seek a declaration that the said parcel belongs to him. A fully fledged hearing would have ensured where all the parties would have had the opportunity to present evidence. At the end of the day, the court would have made a decision on the ownership of the land and the applicant if unsuccessful would have been compensated for the expenses incurred in the acquisition. The best option would have been to file a civil suit.....

In short, I find that judicial review was not the best option for the applicant herein. As such, I exercise my discretion and decline to grant the applicant the orders sought.....”

7. Aggrieved, the appellant has filed the instant appeal citing the following grounds in his memorandum of appeal.

“(1) The judge erred in law in failing to find to appreciate that the law did not confer power to the Registrar of Titles to cancel any title in a summary manner.

(ii) The judge erred in failing to hold the 2nd respondent having acted ultra vires, his decision cannot be allowed to stand irrespective of whether any other remedy is available to the appellant.

(iii) The judge erred in failing to exercise his discretion in favour of the appellant and annul the 2nd respondent's decision even after making a finding that the Registrar had breached the rules of natural justice.

(iv) The judge erred in placing an inordinate burden on the appellant to pursue other remedies.

(v) The judge erred in entertaining extraneous issues of illegality and unconstitutionality of the acquisition of the 2nd respondent's title.

(vi) The judge erred in exercise of his discretion”

8. At the hearing of the instant appeal, learned counsel **Mr. Mwenda Guantai** appeared for the appellant. The Principal State Counsel **Mr. Kephah Onyiso** appeared for the respondent while learned counsel **Mr. Kamua Muturi** appeared for Kenya Railways Corporation. All parties filed written submissions and list of authorities.

9. The appellant rehashed the background facts to the suit. It was urged that the appellants Grant to the suit property was signed by the Commissioner of Lands on 7th May 2010 in the presence of the Registrar of Titles; that no evidence was produced to show the Registrar had any misgivings about the registration and issuance of title to the appellant; the appellant was not given a hearing when his title was cancelled and revoked and this violated the rules of natural justice; that the land was allocated to the appellant before the coming into force of the 2010 Constitution and prior to this, **Section 75 of the retired Constitution** protected the right to private property; that the Registrar's action of cancelling and revoking the appellant's title is a violation of **Article 40 of the 2010 Constitution** that protects and guarantee right to private property; that before the effective date of the 2010 Constitution, the suit property was outside the definition of public land as defined in **Article 62** of the Constitution; that the **Registration of Titles Act** places the burden of investigating any title or grant on the Registrar of Titles; that the title issued to the appellant is indefeasible; that an order for certiorari is issued if a decision is made without or in excess of jurisdiction; and that in the instant case, the Registrar acted without jurisdiction and the learned judge erred in declining to issue certiorari. Counsel cited various authorities in support.

10. Counsel for the 1st and 2nd respondents opposed the appeal. He submitted the appellant has not tendered any cogent reasons for this Court to set aside the

judgment of the learned judge; it is not disputed that the suit property was public land and any attempt to justify its acquisition has been rebutted and clarified by the respondents in their replying affidavit; that from the records at the land office, there has never been a conveyance or surrender of the suit property by the Kenya Railways Corporation; that the judge comprehensively addressed the question whether the Registrar of Titles has power to cancel and revoke titles; the judge did not err in the exercise of his discretion; the judge correctly took into account that the dispute between the parties relate to ownership of the suit property and this issue can only be conclusively determined by way of oral evidence in a full-fledged hearing. Counsel cited the case of **Republic vs. Judicial Service Commission ex parte Pareno (2004) 1 KLR 203 at 219** where Nyamu, J. stated as follows:

“even if a case falls into one of the categories where judicial review will lie, the court is not bound to grant it...”

11. The respondents urged this Court not to set aside the learned judge’s decision because what the appellant is trying to do is to hope this Court will sanctify its right to acquisition of public land which is tainted with a shadow of illegality in its acquisition. It was urged that the respondents aptly demonstrated that according to official records at the Lands Registry, the suit property was alienated and reserved as public utility land for the Kenya Railways Corporation.

12. The Interested Party in opposing the appeal submitted the property in dispute was alienated and reserved by the Government for Kenya Railways; the property has always been reserved as a public utility property; the appellant has admitted the suit land was reserved for the Kenya Railways; however, Kenya Railways Corporation has never surrendered the land nor transferred it to the appellant; there is no conveyance or instrument of surrender executed by the Corporation; the absence of execution of any instrument of surrender by Kenya Railways go to the root of genuineness and legality of the appellant’s title and ownership to the suit property. It was urged that the Registrar of Titles did not err in law in revoking and cancelling the appellant’s title as it was acquired illegally and procedurally. To this end, the learned judge correctly held that *viva voce* evidence is necessary to determine the dispute between the parties; the judge correctly held that judicial review was not the proper way of resolving the contestation on ownership of the suit property. The Interested Party cited the case of **Redcliff Holdings Limited vs. Registrar of Titles, The National Land Commission & others (2017) eKLR** to buttress its submission that judicial review is not an appropriate procedure to determine disputations on title and ownership to land. In concluding its submissions, Kenya Railways urged that the judge did not err in exercising his discretion as allegations of illegality, fraud and unprocedural acquisition of title to the suit property need to be resolved by *viva voce* evidence. Counsel reiterated the appellant had not demonstrated how the learned judge erred in law or misapprehended the facts in arriving at his decision.

13. We have considered the grounds urged in support of the appeal as well as submissions by counsel and the authorities cited. The appellant commenced the suit before the trial court by way of judicial review seeking orders of *certiorari*, *mandamus* and *prohibition*. The *leitmotif* of the appellant’s contestation is that the Registrar of Titles erred in law in cancelling and revoking his title to the suit property; that the Registrar acted *ultra vires* in cancelling his title without a hearing; the judge erred in failing to issue *certiorari* and quash the *ultra vires* decision of the Registrar of Titles.

14. We are cognizant that prerogative remedies of *certiorari*, *mandamus* and *prohibition* are a means to hold those who exercise public power accountable for the manner of its exercise. The remedies are discretionary and it is within the discretion of the trial court to grant or not to grant any of the remedies.

15. In the instant matter, the trial court declined to grant the orders of *certiorari*, *mandamus* and *prohibition*. In **Republic vs. Director of Immigration Services & 2 others Ex parte Olamilekan Gbenga Fasuyi & 2 others**

[2018] eKLR, the High Court correctly expressed that the grant of the orders of *certiorari*, *mandamus* and *prohibition* is discretionary. In considering whether or not to grant the remedies, the court is entitled to take into account the nature of the process against which judicial review is sought and satisfy itself that there is reasonable basis to justify the orders sought. The court has to weigh one thing against another to see whether or not a prerogative remedy is most efficacious in the circumstances obtaining.

16. In this matter, the trial judge in his final determination stated:

“In short, I find that judicial review was not the best option for the applicant herein. As such, I exercise my discretion and decline to grant the applicant the orders sought....”

17. From the foregoing quotation, it is manifest the final determination by the court was an exercise of discretion. In **Edward Sargent vs. s-Chhotabhai Jhaverbhat Patel [1949] 16 EACA 63**, it was held that an appeal does lie to an appellate Court against an order made in the exercise of judicial discretion, but the appeal Court will interfere only if it be shown that the discretion has not been exercised judicially. The circumstances under which an appellate Court can interfere with discretionary orders are well settled. In **Mbogo & Another vs. Shah [1968] E.A. 93**, it was held at page 96 that: -

“An appellate Court will interfere if the exercise of the discretion is clearly wrong because the Judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate Court should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result, there has been injustice”

18. In this appeal, it is thus incumbent upon the appellant to satisfy us that the learned judge erred in the exercise of his discretion in declining to issue any of the prerogative orders of *certiorari*, *mandamus* or *prohibition*. In support of the submission that the learned judge erred, the appellant urged the writ of *certiorari*, *mandamus* and *prohibition* were the most effective remedies available in this matter; that the Registration of Titles Act places the burden on the Registrar of Titles to investigate any title to ascertain if there is procedural illegality or irregularity; that in this matter, the Commissioner in the presence of the Registrar could not have signed and issued the Grant to the appellant if there was any illegality in allotment of the land; that the learned judge erred in the exercise of his discretion because in declining to grant any of the prerogative orders, the judge approved and sanctioned the *ultra vires* and illegal actions of the Registrar in cancelling and revoking the appellant’s title without a hearing.

19. We have considered the submission by the appellant as to whether the judge erred in exercise of his discretion and if the judge unreasonably burdened the appellant to file suit where *viva voce* evidence will be adduced.

20. This Court in **Redcliff Holdings Limited vs. Registrar of Titles & 2 others [2017] eKLR** was faced with facts that are *in pari materia* to the instant matter. In the **Redcliff case**, the Registrar of Titles had cancelled and revoked titles to the suit property that belonged to the

appellant. The trial court declined to issue an order of certiorari. On appeal, this Court in dismissing the appeal stated as follows:

“[19] We agree with counsel for the respondents that even if the trial Judge were to issue the judicial review remedies sought, that would not solve the problem as the respondents alleged illegal and irregular allocation of public land; while the appellant was waving titles and claiming indefeasibility in a judicial procedure that does not allow an inquiry of the substantive and underlying issues of acquisition. There are also intervening circumstances since the revocation of titles and perhaps even earlier as it was claimed by the respondents that part of the suit premises is occupied by the headquarters of Ministry of Agriculture’s Veterinary Laboratories. Granting the reliefs that were sought would have led to a clash between public and private interests as the substantive issues would remain unresolved.

[21] Before parting with this case, we must mention that we too, just like the trial Judge, appreciate the Constitutional underpinning that a right to property is protected and a registered proprietor of title to land cannot be deprived of his/her land arbitrarily without being afforded an opportunity of being heard. Having distinguished those cases, we think we have said enough to demonstrate this appeal lacks merit and ought to be dismissed as the appellant ought to have yielded to the direction given by the trial Judge and filed its claim before the ELC where the court will determine the issues of ownership, and other rights and obligations, if any.”

21. On our part, we are persuaded by the reasoning and *ratio decidendi* of this Court in *Redcliff Holdings Limited vs. Registrar of Titles & 2 others* (supra).

22. Accordingly, the final order is, we find this appeal has no merit and is hereby dismissed with costs.

Dated and delivered at Nairobi this 22nd day of March, 2019

E.M. GITHINJI

JUDGE OF APPEAL

F. SICHALE

JUDGE OF APPEAL

J. OTIENO-ODEK

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR