IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)

CIVIL APPEAL NO. 360 OF 2014

BETWEEN

ANHALT HOLDINGS LIMITED…….....……...… APPELLANT

AND

REGISTRAR OF TITLES……..……..…..…….1ST RESPONDENT

THE COMMISSIONER OF LANDS…….…...…..…2ND RESPONDENT

THE MINISTER FOR LANDS…….…..……....3RD RESPONDENT

THE HON. ATTORNEY GENERAL…….....…….4TH RESPONDENT

(Being an appeal from the judgment and decree of the High Court at Nairobi (W.Korir, J.) delivered on 30th October 2014

in

JUDICIAL REVIEW ELC NO. 26 OF 2011)

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JUDGMENT OF THE COURT

This appeal concerns the revocation of the appellant, ***Anhalt Holdings Limited's*** *(Anhalt*) title to the property known as Land Reference No. 21730 *(the suit property*) situated in Nairobi, measuring six decimal six nought eight (6.608) hectares or thereabouts.

By a Legal Notice No. 16531 dated 24th December 2010 *(the Gazette Notice)*, the 1st respondent, the Registrar of Titles *(the Registrar)*, revoked Anhalt's title on the basis that it was reserved for public purposes, and that its allocation to Anhalt was illegal and unconstitutional.

This provoked Anhalt to seek and obtained leave to institute Judicial Review proceedings. Thereafter, by a Notice of Motion dated 8th March 2011, it sought orders of *certiorari* to quash the Registrar's decision and orders of prohibition to prohibit the respondents from interfering with the suit property. Anhalt's application was grounded on the premises that, following purchase and transfer of the suit property from

Angelica Wambui, Lee Nyachae, Jotham Chea and Michael Macharia trading in the name and style of Mab-lok Investments, on 13th February 2008, the Registrar registered the transfer in its favour. The title of the suit property was subsequently charged to Investment & Mortgages Bank Limited, which charge was also registered by the Registrar on 18th June 2008.

In the affidavit in support of the motion sworn by Lee Nyachae, a director of Anhalt, it was averred that the Registrar's decision was procedurally improper and *ultra vires* as it violated the express provisions of ***section 60*** of the ***Registration of Titles Act, Cap 281, Laws of Kenya*** (now repealed); that the revocation was arbitrary and violated the rules of natural justice and the constitutional right to an administrative hearing; that Anhalt was deprived of the suit property without prompt payment of full and just compensation; and that unless the court grants the orders, Anhalt would be unable to meet its financial commitments, as it would be precluded from dealing in any way with the suit property.

In its judgment, the High Court dismissed Anhalt's application for reasons that, the court found that the judicial review application was not the most efficacious remedy for resolving ownership of a disputed title; that the appellant's title could only be validated after the hearing of witnesses and the production of document, a process which cannot be encompassed by judicial review proceedings.

The appellant was aggrieved by the High Court's decision and has appealed to this Court on grounds that, by finding that judicial review was not the most efficacious remedy, that the learned judge fell into error when he failed to determine the application for judicial review on factors other than, whether the Registrar acted within or outside his powers under the law when revoking Anhalt's title to the suit property.

Both parties filed written submissions which they summarized before us. In his submissions, ***Mr. G. Mogere*** stated that the Registrar had no authority to revoke Anhalt's title; that despite concluding that the Registrar did not have such powers, the learned judge declined to grant the reliefs sought. Counsel argued that if it was the Registrar's intention to invalidate or cancel the title, he ought to have filed the necessary proceedings in court.

It was counsel's view that judicial review was concerned with the decision making process, that is, whether or not the decision to revoke Anhalt's title was regular or irregular. The learned judge having found the Registrar's decision to have been irregular, ought to have quashed it as prayed.

On her part, ***Ms. Wambui***, learned counsel for the State opposed the appeal, and argued that the issue turned on the ownership of the suit property; and that judicial review was not the most efficacious remedy to resolve the issue. Counsel further argued that there was need to interrogate the documents of ownership of the suit property prior to making a determination on whether or not the Registrar's decision should be quashed.

We have considered the pleadings and the rival submissions of the parties and are of the view that the issue for our consideration is whether in declining to grant the orders of certiorari and prohibition sought; the High Court misdirected itself so as to warrant the interference by this Court with that decision.

In the exercise of his discretion, did the learned judge misdirect himself in declining to grant the orders sought? Anhalt's complaint is that despite having concluded that the Registrar's decision to revoke the appellant's title to the suit property was arbitrary, illegal and unconstitutional, the learned judge misdirected himself when he declined to grant the orders sought. We will begin by determining whether the learned judge reached the right conclusion.

Following an examination of ***Section 60*** of the ***Registration of Titles Act***, the learned judge concluded thus;

> ***"According to me, the Section only allowed the Registrar to cancel a title with the cooperation of the person in whose name the title was registered. Where cooperation was not forthcoming, the Registrar had no option but to seek the assistance of the***

court."

The learned judge went on to agree with decision of Musinga, J, (as he then was) in the case of ***Kuria Greens Limited vs Registrar of Titles and Another [2011] eKLR*** and stated thus;

> ***"There is no evidence in the case before me the directors of Anhalt were summoned to explain how the title to the property were obtained. In not summoning the Applicant's directors, the 1st respondent not only acted ultra vires the Registration of titles Act but breached the rules of natural justice as the Applicant was condemned unheard."***

Up to this point, there is no controversy with the learned judge's conclusions regarding the failure of the Registrar to apply the laid down procedures where *inter alia*, a certificate of title is issued in error or has been fraudulently or wrongly obtained as set out in ***section 60*** of the Act. What is in contention is that having found that the Registrar's acted *ultra vires* the Act, and breached the rules of natural justice, the learned judge declined to exercise his discretion to grant the orders sought. This was for the reason that, the matter concerned the contested ownership over the suit property between Anhalt and the respondent.

Was the learned judge compelled to grant the reliefs sought? Whether or not to grant orders of *mandamus*, *certiorari* and *prohibition* is a discretion that should be exercised by a single judge judiciously and justly. The case of

Mbogo and other vs Shah [1968] E.A. 93, Sir Charles Newbold, President, put

it succinctly thus:-

> ***"… a Court of Appeal should not interfere with the exercise of the discretion of a single Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice….."***

In ***Halsbury's Laws of England 4th Edn. Vol. 1(1) para 12 page 270*** it was observed that:

> ***"The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief."***

Under judicial review proceedings, for the relief sought to be granted, the applicant must demonstrate that the threshold requirements have been met. In the case of ***Biren Amritlal Shah & Another vs Republic & 30 others [2013] eKLR*** this Court stated thus;

> ***Judicial review is not concerned with reviewing the merits or otherwise, of a decision by a public entity, in respect of which the application for judicial review is made, but the decision making process itself. It is important to note in every case, that the purpose of judicial review is to determine whether the applicant was accorded fair treatment by the concerned public body, and that it is not within the remit of the court to substitute its own opinion with that of the public entity charged by law to decide the matter in question."***

The decision in this case concerned the revocation of a title registered in the name of Anhalt, and was said to be pursuant to the provisions of the Registration of Titles Act. That being the case, ***sections 60*** and ***61*** of Act were the provisions that would govern the manner in which any title issued in error was to be dealt with by the Registrar. ***Section 60*** stipulated thus;

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. Section 61 of the Act then provided as follows;

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 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.

In view of these provisions, the learned judge rightly found that the Registrar did not adopt the procedures set out by ***section 60*** and ***61*** of the Act, when revoking Anhalt's title, as there is nothing to show that it was summoned for a correction of the title, or to appear before a court. In effect, Anhalt was not provided with an opportunity to be heard. The decision revoking the title did not follow the laid down procedures, which meant that, the Registrar had acted in excess of the jurisdiction granted by the Act, thereby rendering the decision *ultra vires*, null and void.

Having found that Anhalt was not subjected to a fair process, meant that the threshold requirements for grant of the relief sought had been met, and, it was on this basis that the learned judge ought to have quashed the Registrar's decision contained in the Gazette Notice, but declined to do so.

In declining so to do, the learned judge relied on the decision of this Court in the case of ***Republic vs National Environmental Management Authority, Civil Appeal No. 84 of 2010,*** where it was observed that where Parliament had made provision for an alternative remedy, through "…*a statutory appeal procedure*", it is only in exceptional circumstances that an order for judicial review would be granted. With respect, what the learned judge did not appreciate was that the alternative remedy referred to was the statutory appeals procedure enacted under the Environment Management and Coordination Act which should have been the applicant's next step towards recourse rather than the judicial review proceedings. This was not the case here.

In reference to the case of ***Livingstone Kunini Ntutu vs Minister for Lands & 4 others [2014] eKLR***, the learned judge cited the observations of Odunga, J, in the case ***of Republic vs Registrar of Titles & Another ex-parte David Gachina Muriithi [2014] eKLR***, where that court declined to grant the relief sought in a matter where the title was disputed, as it was considered that judicial review was not the most efficacious remedy, the court found that instead, a civil suit as an alternative remedy would be a more appropriate forum for the final resolution of a disputed title since it would enable the parties to call witnesses and adduce evidence.

But the case of ***Republic vs Registrar of Titles & Another ex-parte David Gachina Muriithi (supra)***, can be distinguished, as, in that case both a civil suit and judicial review proceedings were filed in respect of the same decision. The court there concluded that, the civil suit, rather than the judicial review proceedings, was the more appropriate forum for ascertaining the legitimacy of the applicant's title. Hence the court declined to grant the reliefs sought.

In the instant case, Anhalt filed the judicial review proceedings, wherein it sought to obtain the prerogative reliefs from the court, and having established that the decision making process was wanting, the learned judge had no reason to decline to grant the orders sought, particularly as no civil proceedings were pending.

In addition, nothing was shown to warrant the exercise of discretion to decline the relief sought. The application was brought without undue delay, the appellant had neither conducted itself unreasonably or unmeritoriously nor was it demonstrated that it had acquiesced to the irregularity complained of, or waived its right to object.

The result of the aforegoing is that, the learned judge misdirected himself in declining to grant the orders sought, and we find it necessary to interfere with that decision.

Accordingly, we allow the appeal, set aside the orders of the learned judge of 30th October 2014, and substitute it with an order of *certiorari* to quash Gazette Notice No. 16531 dated 24th December 2010. As there has been no demonstration of the necessity of a prohibition order, we decline to grant it. The appellant shall have the costs of both this appeal and the costs in the High Court against the 1st respondent.

It is so ordered.

Dated and delivered at Nairobi this 12th day of May, 2017.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

……..……..

JUDGE OF APPEAL

A. K. MURGOR

……..……..……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR