IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO. 77 OF 2016

BETWEEN

REDCLIFF HOLDINGS LIMITED……..APPELLANT

VERSUS

THE REGISTRAR OF TITLES……1ST RESPONDENT

THE NATIONAL LAND COMMISSION...…..2ND RESPONDENT

MINISTRY OF AGRICULTURE

LIVESTOCK & FISHERIES……3RD RESPONDENT

(Being an appeal from the judgment and decree of the High Court at Nairobi (Odunga J.), dated and delivered on 22nd day of February 2016

in

Misc. Civil Appl. No. 188 of 2015)

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JUDGMENT OF THE COURT

[1] By Gazette Notice No. 1274 issued on 4th February, 2011 by G. G. Gachihi, the then Registrar of Titles, he revoked a total of twenty titles, being, L.R Nos. 21070, 21073/2- 21073/3, 21073/4,21073/5, 21073/6. 21073/7, 21073/8. 21073/9, 21073/10. 21073/11, 21073/12, 21073/13, 21073/14, 21073/15, 21073/16, 21073/17, 21073/18, 21073/19, 21073/20, which were subdivisions from the original LR No. 21073 (hereinafter referred to as the suit premises) belonging to Redcliffe Holdings Ltd, (appellant). This revocation was done allegedly in accordance with the provisions of the Government Land Act Cap 280 and the Trust Land Act Cap 288. Here below is the full import of the said gazette notice as was published;-

> **"WHEREAS the parcels of land whose details are described under the schedule herein below were allocated and titles issued to private developers, it has 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 (Cap 280) and the Trust**

Land ACT (Cap 288). The allocations were therefore illegal and unconstitutional. Under the circumstances and in view of the public need and interest, the Government revokes the said titles …LR L.R Nos. 21070, 21073/2- 21073/3, 21073/4, 21073/5, 21073/6. 21073/7, 21073/8. 21073/9, 21073/10. 21073/11, 21073/12, 21073/13, 21073/14, 21073/15, 21073/16, 21073/17, 21073/18, 21073/19, 21073/20.

The above land was reserved for the Ministry of Livestock, Kabete."

[2] Precisely 4 years and about 3 months later, on 26th June, 2015, the appellant filed a notice of motion before the High Court seeking orders of *certiorari* to issue and quash the aforesaid gazette notice; an order of prohibition to issue prohibiting the Registrar of Titles by himself, servants, agents or anyone authorized by him from issuing any title or licence or alienating the appellant's parcels of land and finally an order of mandamus compelling the Registrar of Titles, the National Land Commission, Ministry of Agriculture, Livestock and Fisheries, their agents or servants from issuing title or giving vacant possession of the above titles in furtherance of the aforesaid revocation.

[3] The appellant's case as it was put appeared straight forward (although that changed after the defence was filed). The appellant claimed that in 1996, it was allotted the suit land situated in Loresho Nairobi County and was the registered proprietor as per the Grant No. I.R. 6866 issued under the Registration of titles Act (Cap 281) now repealed. In December, 2006 the appellant applied for various consents from several bodies to subdivide the suit premises into sub-plots and it was issued with the necessary approvals. The land was subdivided and registered in April, 2007 into the above titles and the appellant was issued with individual certificates of title for each of the twenty plots. However, sometime in February, 2011, the Registrar of titles purported to revoke the said titles. The appellant stated that it became aware of the said revocation when it was preparing to make a transfer in respect of some of the plots to a third party and that is when it filed suit by way of judicial review before the High Court; claiming that the revocation was done *inter alia* in excess of jurisdiction; without giving the appellant a hearing and in contravention of the appellant's constitutional rights guaranteed under **Article 40** of the Constitution among others.

[4] The motion was opposed by the respondents who contended that the suit premises is government land that was reserved for the Ministry of Agriculture, Livestock and Fisheries, where the Kabete Veterinary Laboratories Headquarters of the Directorate of Veterinary services (Kabete Vet Lab) are currently situated. That the suit premise was part of; **L.R No. 189R and 2952** which forms part of Kabete Vet Lab. However, sometime in 1995, the then Ministry of Agriculture, Livestock and Development commissioned a firm of surveyors called Kamwere and Associates (the firm) to carry out a survey of land reference No. 189R and to process the title deed for the same. Instead of doing so, the said firm subdivided the land into multiple plots which were irregularly allocated or grabbed by companies, private individuals, churches and the Ministry was allocated 12 plots although the titles were never delivered by the said firm as per the contract.

[5] It was during the said period that the said firm engaged in the subdivision of LR. No. 2952 into 19 plots, the subject of the appeal. The respondents contended that letters of allotment and subsequent issuance of title could not have been issued for the suit land which was reserved for the Ministry of Agriculture and Livestock and the headquarters of Vet Labs. The respondents further alleged that the said titles for the suit premises were irregularly issued as the correct procedure for allocating public land to individuals or private developers at the time used to be done through a Cabinet Memorandum countersigned by the Minister for Lands which procedure was not followed, thus, in view of the irregular issuance or grabbing of public land, the Registrar of Titles as the custodian of titles issued under the Act had the authority to revoke illegally acquired titles. The respondent also challenged the motion which was filed to challenge a gazette notice which was issued more than four years. Thus, according to the respondents, an order of *certiorari* cannot issue to challenge a decision made over 6 months ago as the gazette notice was issued in February 2011, prohibition and mandamus too could not issue in the circumstances as the cancellation had already taken place.

[6] Upon hearing the matter, the learned trial Judge fastidiously went through several decided cases

forming a body of jurisprudence in this area of law, and various provisions of the law, especially the ones that touch on the power of the Registrar of Titles to revoke a title to land that was issued on error or mistake and the effect of delay in seeking judicial review remedies. The Judge made certain profound statements such as agreeing with the appellant and some decided cases that indicated that a Registrar of Titles had no authority under the Act to revoke a title by way of gazette notice without providing parties a hearing. However the learned Judge distinguished this case which was filed after an inordinate passage of more than 4 years as he concluded that in the instant case, which called for the exercise of judicial discretion, a court has a duty to weigh one thing against another to arrive at the conclusion as to whether or not the remedy of judicial review is the most efficacious in the circumstances. In his own words, the learned Judge posited as follows;-

> **"In this case, the decision being challenged was made vide gazette notice published on 4th February, 2011, being more than 5 years ago after the decision. It is agreed by the parties that the interested party has taken possession of the suit land. Whereas the applicant contends that it stumbled upon the said gazette notice while in the process of transferring some of the said parcel to a third party, it does not disclose when thin "stumbling" occurred. The purpose for gazette notice was dwelt in Catholic Diocese of Mosh v. Attorney General [2000] 1 EA 25 (CAT), where it was held that the whole objective behind such publication is to bring the purport of the order concerned to the notice of the public or persons likely to be affected by it, thereby making the legal maxim "ignorance of the law does not excuse" more rational.**
>
> **In the absence of the exact time when the applicant came to know of the existence of the gazette notice, coupled with the time lapse between the gazettement and the commencement of these proceedings, which is undoubtedly a long period, this Court is unable to exercise its discretion in these proceedings. The applicant is at liberty to challenge the decision before the ELC Court.**
>
> **In the premises, the notice of motion dated 26th June, 2015 fails and is dismissed. In light of my findings herein with respect to the powers of the respondents, there will be no order as to costs."**

[7] The above is what provoked the instant appeal that is predicated on some sixteen grounds of appeal. To avoid obvious repetition, and in line with the provisions of rule of **Rule 86(1)** of the **Court of Appeal Rules** which stipulates in mandatory terms as thus;

> **"A Memorandum of Appeal shall set forth concisely and under distinct heads, without argument or narrative the grounds of objection to the decision appealed against, specifically the points which are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the Court to make." (**Emphasis added)

We shall endeavour to summarize the grounds of appeal as it is alleged the learned Judge erred in law and fact in;

> Failing to exercise his discretion in a judicial manner according to evidence, law, and appropriate procedures.
>
> Failing to correlate legal reasoning on the validity of the impugned legal reasoning, and elaborating on judicial decisions relating to cancelation of title as a mere window dressing.
>
> Finding for the appellant that it cannot be driven from the seat of judgment unless statute barred but dismissing the suit due to delay/time lapse between the time the gazette notice was issued and when the suit was filed.
>
> By equating the appellant's ignorance of the gazette notice to ignorance of law; thereby creating a legal duty on every title holder to be looking out for gazette notice for revocation of titles.

Failing to develop the law in a consistent and predictable manner and for exhibiting bias against the appellant.

Holding that the respondents were in possession of the suit premises, while the parties had submitted only some plots were in the respondents' possession.

Abdication judicial responsibility in dismissing the appellant's case and directing then to file a claim before the ELC whereas the remedy for challenging the gazette notice remained in the realm of judicial review.

[8] During the plenary hearing of this appeal, Mr Sagana, learned counsel for the appellant relied on his client's written submission and made some oral highlights, so did Ms Fatuma Ali learned counsel appearing for the 1st and 3rd respondents. There was no appearance by the 2nd respondents although they were duly served. Mr Sagana collapsed the grounds of appeal further into three thematic areas and argued them as; legality of the gazette notice; failure to exercise judicial discretion and directing the matter be handled before the ELC to challenge an invalid gazette notice. According to Mr Sagana, the appellant was allotted the suit premises being Land Reference Number 21073, Grant Number I.R 6866, situate in Loresho, Nairobi County on 14th March, 1996. It obtained permission to subdivide it into 19 sub-plots and about ten years down the line obtained the titles for the sub-plots in April 2007. The 3rd respondent took possession of part of the suit properties as extension of its golf course following the gazette notice but not all the plots are under their occupation and possession thereto.

[9] Thus, counsel for the appellant faulted the learned Judge for failing to exercise his discretion judiciously as the orders of judicial review were the most amenable in the circumstances of this case. The judge, having correctly concluded that under the Constitution, a party cannot be deprived of their title by the Registrar of titles through a revocation of the same, vide a gazette notice, which was illegal, irrational, the Judge was wrong to later find fault in the appellant who stumbled on the same gazette notice 4 years later when the suit was filed. On the issue of delay, counsel relied on two cases from the Supreme Court of India, the case of **Collector of Land Acquisition**, **Anantnag & Another v. MST Katiji & Others** 1988 SC 897 where it was held

"Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.

When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non- deliberate delay…

It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so…"

[10] Also the case of **Tukaram Kana Joshi & Other v. M.L.D.C & Others** Civil Appeal No 7780 of 2012. The latter case involved poor and illiterate farmers whose land was acquired for industrial development but the proceedings were taken after the statutory period had lapsed. In resolving that dispute that had taken the appellants more than a century to litigate their ownership interests, the Court posited as follows in a pertinent portion of the judgment;-

"No hard and fast rule can be laid down as to when the High Court should refuse to exercise its jurisdiction in favour of a party who moves it after considerable delay and is otherwise guilty of lashes. Discretion must be exercised judiciously and reasonably. In the event that the claim made by the applicant is legally sustainable, delay should be condoned. In other words, where circumstances justifying the conduct exist, the illegality which is manifest cannot be sustained on the sole ground of lashes. When substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred, for the

other side cannot claim to have a vested right in the injustice being done, because of non-deliberate delay. The court should not harm innocent parties if their rights have in fact emerged, by delay on the part of the petitioners…"

We must on the onset state that the facts in above cases are distinguishable, save for the issue of time within which a party can pursue a claim in court. The two cases involved poor, illiterate farmers or members of the community whose land was acquired for public interest development without proper compensation to the previous land owners. This was not a case of compulsory acquisition but allocation to private entities government land reserved for public institution.

[11] The appeal was opposed; Ms Fatuma Ali relied on her written submissions and made some oral highlights. Counsel submitted that the appellant was wrong to challenge ownership of title by way of judicial review after a period of more than 4 years since the titles were revoked; this was an in appropriate forum as it was seeking orders outside the 6 months period of when a decision can be challenged. Counsel emphasized that judicial review remedies are issued by a court in exercise of judicial discretion hence a court may refuse to grant them as the court has to make several considerations to establish whether the remedy is the most efficacious in the circumstances as the learned trial Judge did in the instant case. There was a question of ownership of land that belonged to the 3rd respondent which went into the hands of the appellant and the titles were revoked and the question of procedure of revoking the title. Thus the learned Judge was guided by the gravity of the issue of ownership that had changed hands from the appellant to the 3rd respondent that could not be litigated within the scope of judicial review; the consideration of the allegations of illegal allocation of public land that needed to be proved in a court room process.

[12] Counsel further stated that if the trial Judge exercised his discretion in favour of the appellant, it was likely to cause administrative chaos and public inconvenience to Kabete Vet Lab a public body that is occupying the suit premises; also the underlying legal problem of land ownership of the suit premises was going to remain unresolved. The respondents' replying affidavit clearly brought out issues that demonstrated a deeper dispute of ownership of the suit premises, which belonged to the 3rd respondent and challenged the procedure that was used to allocate the appellant public land which counsel alleged was not followed. In view of these accusations and counter- accusations, counsel submitted that there was need to resolve the ownership dispute by way of *viva voce* evidence which could only be done before the Environment and Land Court (ELC) as directed by the learned Judge. Judicial review proceedings are confined to the process of decision making and the mere fact that the appellant did not challenge the decision within the statutory period disentitled them of the orders.

[13] The above is the summary of the case before us, which we admit, when taken holistically is not a simple straight forward one. The determination of the underlying issues raised therein such as; how a publicly owned land that becomes private property was acquired would as of necessity dig deep into this country's own dark, contentious and unresolved history of land allocation of public land for private use which is sometimes referred to as public land grabbing. It also touches on the implementation (or lack of it) of what is known as the ***"Ndungu Land Commission's report***." We are acutely conscious and appreciate these are not matters that can be resolved in proceedings under judicial review *realm of our laws.* Be that as it may, we have been able to distil two issues for our determination, that is, whether the learned Judge erred by refusing to exercise his discretion in favour of the appellant having found the Registrar of Titles had no power to revoke the title through a gazette notice and secondly, whether the direction given that the suit or dispute over the suit premises ought to lie before the **ELC** was a misdirection.

[14] Where the rubber meets the road or where the heavy lifting in this matter lies is, not the straight forward issue of revocation or cancellation of title that was registered in the name of the appellant; it is the underlying issues of ownership of the title by a public body and the process of allocation of land that the respondents claimed was publicly owned by the Ministry of Agriculture and Fisheries to the appellant. Apparently the appellant did not address this issue of allocation even after it was raised by the respondents and indeed it was made central by the respondents in the grounds of objection and the replying affidavit by **Prof. Fred Segor** sworn on 30th July, 2015. This is what the good Professor stated

in a pertinent paragraph of the said replying affidavit;-

> **"That even though the suit parcels had not been leased out to any person or institution, letters of allotment and subsequent titles should not have been issued to the interested party or any other person or institution since the land was reserved for the Ministry of Livestock, Kabete. This is evidenced by a copy of the Kenya gazette notice No. 1274 by the 1st respondent.**
>
> **That the suit properties are some of the several parcels of land reserved for the interested party over years were irregularly allocated and titles issued to various private developers including the Ex parte applicant.**
>
> **…**
>
> **That I know of my own knowledge that the correct procedure for allocating Government land to institutions and individuals at that time was through a Cabinet Memorandum that is countersigned by the Minister for Lands and the parcels of land in issue should only be allocated after the Cabinet has discussed and authorized the same and this procedure was not followed."**

[15] This is how the appellant responded to the said allegations vide an affidavit sworn on 4th December, 2015 by one **Sohil Parmer,** a director of the appellant;

> **"That in reply to paragraph 8 of the interested party's replying affidavit, it is common ground when Ex-Party applicant was issued with the letter of allotment to the suit title/s, no other letter of allocation has been previously issued and/ or leased to any other party. I am advised by the applicant's advocates which advice I believe to be verily true that the President through the Commissioner of Lands lawfully issued the title as this was alienated Government land which was not leased to any party or in respect to which the Commissioner had not issued any letter of allotment."**

To us, we see many contested issues in the above averments; the respondents are alleging irregular and illegal allocation of public land reserved for a Government Ministry and failure to follow the proper procedure in allocation of public land. On the other hand, the appellant claims there was no other body or party who had been allocated the same land. Bearing in mind the issue was not double allocation but whether the land was available for allocation for private development, we find ourselves agreeing with the learned trial Judge that the contested issues could not have been determined through judicial review proceedings but before the Environment and Land Court.

[16] We are also aware that judicial review remedies invoke the exercise of Judges' judicial discretion and therefore seeking the orders are not a guarantee they will be granted. The Judge can decline to issue the orders as he did in the instant appeal where there are grounds that require a court to weigh one thing against another and to establish a remedy that is efficacious in the circumstances. The learned Judge held and correctly so that Registrar of Titles had no power to revoke a title but the remedy did not lie in re-revoking the same title. To us that would have amounted to a game of musical chairs and a mockery of justice as the deeper issues would remain unresolved. The learned Judge declined to exercise his discretion in favour of the appellant and in our view, this was not because of bias or any misapprehension of the law or decided cases as put by the appellant; to us every case is unique in its own ways and every case is decided according to its own circumstances.

[17] We find the learned Judge appreciated the principles that guide a Court on when a party may be dis - entitled to a relief. These are *inter alia* undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained about or waiver to the right to object may result in the court declining to grant the relief also when there are alternative remedies that will resolve a dispute holistically. The list is long as other considerations that are brought to bear include weighing as in the instant appeal whether in granting the remedy will be a futile exercise or whether practical problems, including administrative chaos and public inconvenience and the effect to third parties who deal with the land in question would

result from the orders given. See Halsbury's Laws of England 4th Edn Vol. 1 (1) para 12 page 270.

[18] The learned Judge also appreciated some of the above challenges as he cited the ratio in **Municipal Council of Mombasa v. Republic &Umoja Consultants** Ltd Civil Appeal No 185 of 2001 where it was held as follows;-

> **"Where a decision is made and its making has been made known to the respondents who did not challenge the same within 6 months of its being made by way of certiorari to have it moved into the High Court and be quashed, it is not open for them to seek to have the appellant prohibited from implementing the decision as an order of prohibition would normally issue to stop or pre-empt a contemplated action where such contemplated action is either outside the jurisdiction of the decision-maker, or where the decision maker has evinced an intention to act contrary to law."**

In that case, the Judge did not consider whether the documents of title held by the appellant were validly issued which was outside the scope of judicial review and that is why he directed the parties to file suit before the **ELC**. The Judge further appreciated the import of **Article 40** of the Constitution which protects the rights of property that is lawfully acquired, thus, a title under **section 23(1)** of the Registration of Titles Act is no longer held sacrosanct by *hook, line and sinker* as it was under the Australian law of Torrens system especially when there are allegations of illegalities or irregularities in acquisition of title. In this respect the Judge went on to cite the case of;- **Mureithi & 2 Others v. Attorney General 5 Others** Nairobi HCMA No. 158 of 2005 [2006] 1 K L R 443 where the courts, even before the promulgation of the Constitution, appreciated that the mere fact that a person had title to land did not mean that such title could not be questioned. The court expressed itself as follows;-

> **"Should the Land Acquisition Act give shelter to the land grabbers of public land or the courts going to invent equally strong public interest vehicle to counter this? Should individual land rights supersede the communal land, catchments and forests? How for instance are the courts going to deal with land grabbers who stare at your face and wave to you a title of the grabbed land and loudly plead the principle of the indefeasibility of title? Are the courts going to stay away and refuse to rise to the greater call of unravelling the indefeasibility by holding that such a title perhaps issued in order to grab a public utility plot such as hospital by an individual violates the public or national interest and therefore a violation of the Constitution. I venture to suggest that such titles ought to be nullified on this ground and, thrown into the dustbins."**

[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 crash between public and private interests as the substantive issues would remain unresolved.

[20] Consideration of time in this case was also a factor not only in relation to physical occupation of the suit land, but also in terms of the provisions of **Section 9 (3)** of the Law Reform Act. An application for judicial review to challenge a decision by a public body has a shelf life of 6 months. Thus the parameters within which the High Court can issue judicial review orders such as the ones sought in this matter, required to be made within 6 months, although we believe for sufficient cause a party can apply for extension of time. It is common ground that the impugned gazette notice was published on 4th February, 2011 and the proceedings were commenced in June, 2015 which was more than 4 years after the decision. The appellant had other remedies under the civil law to challenge the revocation of title in view of the serious allegations made against the appellant and the passage of time; this was not a suitable matter under the scope of judicial review that merely looks at the process and not the substance of the subject matter.

[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.

[22] Accordingly we order the appeal be and is hereby dismissed and in view of the public interest nature of the subject matter, we order each party to bear its or their own costs of the appeal.

Dated and delivered at Nairobi this 29th Day of September, 2017.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR