IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OKWENGU, MAKHANDIA & SICHALE, JJ.A.)

CIVIL APPEAL NO. 282 OF 2010

BETWEEN

MOMBASA TECHNICAL TRAINING INSTITUTE …..…….APPELLANT

AND

AGNES NYEVU CHARO & 106 OTHERS…....1ST-107TH RESPONDENTS

COMMISSIONER OF LANDS…….....108TH RESPONDENT

THE REGISTRAR OF TITLES …….109TH RESPONDENT

(An appeal against the judgment and order of the High Court of Kenya at Mombasa (Ojwang, J.) dated 15th March, 2010

in H.C. Misc. C. Appl. No. 395 of 2009)

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JUDGMENT OF THE COURT

This is an appeal from the judgment and decree of ***Ojwang, J***. (*as he then was*).

Briefly, Agnes Nyevu Charo & 106 other applicants (hereinafter referred to as the respondents) filed the substantive notice of motion dated 23rd September, 2009, for orders of Judicial Review pursuant to leave sought and obtained on 11th September 2009. The Commissioner of Land (now the 108th respondent and hereinafter referred to as "The Commissioner") was named as the 1st respondent whilst the Registrar of Titles (now the 109th respondent) was named as the 2nd respondent, and Technical Training Institute (now the appellant) was named as "Interested Party." In the motion the respondents sought the following orders:

a. ***An Order of Prohibition do issue prohibiting the 2nd Respondent from registering a document of title dated 24th April, 2009 or any Title for the property known as LR. NO. MN/1/14710 in favour of Mombasa Technical Training Institute or any other party.***

b. ***An Order of Certiorari do issue removing to the High Court of Kenya for quashing the decision of the 1st Respondent contained in the Letter of Offer dated 15th December, 2007 and***

referenced 76474/IX granting the Mombasa Technical Training Institute the property known as LR NO. MN/1/14710.

c. ***An Order of Certiorari do issue to bring to the High Court of Kenya for quashing the decision of the 1st Respondent of issuing a Grant of Title in favour of Mombasa Technical Training Institute to all that piece of land known as LR NO. MN/1/14710 contained in an unregistered document of Title dated 24th April, 2009.***

d. ***An Order of Mandamus do issue directing the 1st Respondent to cancel the Letter of Offer dated 15th December, 1997 issued in favour of the Interested Party and to issue a Letter of Offer in respect of the property known as L.R No. M/I/14710 in favour of the Applicants and issue a Letter of Offer in respect thereof in accordance with the Law;"***

The motion was supported by the statutory statement dated 10thSeptember, 2009 verified by the affidavit of ***Agnes Charo*** sworn on 10thSeptember, 2009. In her affidavit, she deponed that the 1st to 107th respondents had been in occupation of the piece or parcel of land known as LR. No. MN/1/14710, which is *the suit property"* since the 1940s; that they had severally applied to the 108th respondent to be allocated the suit property; that on 26th March, 1997 and 15th December, 1997 the 108th respondent purported to issue a letter of offer to the appellant; that at the time the appellant was not a registered entity; that the 1st to 107th respondents had a legitimate expectation that the suit property would be allocated to them having lived on it for nearly five decades; that on 24th April, 2009 the 108th respondent executed a Grant in respect to the suit property to the appellants who were in the process of procuring its registration by the 109th respondent, and finally, that the 1st to 107th respondents were all landless people.

In response to the motion, ***Solomon Mutungi***, the Chairman of the Board of Governors of the appellant, swore an affidavit dated 26th October, 2009 in which he deponed that by the year 2005 there were only six (6) '*trespassers*' on the suit property and the six moved out in 2009 upon request by the Principal of the appellant; that by then, the suit property had already been allocated to the appellant and title issued under the Registration of Titles Act; that although the appellant was registered on 5th May, 1998 it was a predecessor of Mombasa Technical Training School, the allottee of the suit property; and that the appellant's title to the suit property can only be challenged under the Registration of Titles Act.

On 15th March, 2010 the learned judge delivered a judgment in favour of the1st to 107th respondents and made the following orders:

1. ***An order of prohibition shall issue, prohibiting 2nd respondent from registering a document of title dated 24th April, 2009 or any title for the property known as L.R. No. MN/1/14710 in favour of Mombasa Technical Institute or any other party.***
2. ***An Order of certiorari shall issue removing into the High Court for quashing, the decision of 108th respondent contained in a letter of offer dated 15th December, 2007 and referenced 76474/IX granting Mombasa Technical Training Institute the Property known as L.R. No. MN/1/14710 – and the said decision is hereby quashed.***

3. ***An Order of certiorari shall issue removing into the High Court for quashing the decision of 108th respondent issuing a grant of title in favour of Mombasa Technical Training Institute for all that piece of land known as L.R. no. MN/1/14710 contained in an unregistered document of title dated 24th April, 2009 – and the said decision is hereby quashed.***

4. ***An Order of mandamus shall issue directing 108th respondent to cancel the letter of offer dated 15th December, 1997 issued in favour of the interested party.***

5. ***The 108th and 109th respondents shall bear the costs incurred by the applicants in this application.***

The appellant was dissatisfied with the judgment of the High Court hence this appeal in which 13 grounds challenging the judgment were listed. When the matter came before us the respective counsel agreed by consent to file written submissions which were then highlighted on 11th March, 2014.

Mr. Wamuti, learned counsel for the appellant faulted the orders of certiorari made by the High Court on the basis that the application for an order of certiorari filed on 11th September, 2009 was filed long after the expiry of six months of the decision sought to be impugned; that the suit property was reserved by the 108th respondent for the appellant's predecessor which was by then known as Technical High School; that a letter of allotment was issued on 26th March, 1977; that this letter of allotment was revised on 15th December, 1997; that the revision was necessitated by the hiving off, of 3 acres in favour of a public school namely Allidina Secondary School; that the leave granted on 11th September, 2009 was clearly outside the six months period; that the order of mandamus issued to cancel the letter of offer dated 15th December, 1997 was misplaced as an order of mandamus can only issue in respect of a public duty to be performed by a public officer; that the 1st to 107th respondents' letter dated 14th February, 1971 purporting to apply for the suit property was a forgery; and finally that the doctrine of legitimate expectation cannot be of any assistance to the 1st to 107th respondents.

In support of the submissions the appellant relied on the following authorities:

1. ***The Law Reform Act Chapter 26.***
2. ***Wilson Oslo v John Ojiambo Ochola & Another [1996] eKLR.***
3. ***Kenya National Examination Council v R. C.A. Nbi No. 266 of 1996 (UR).***
4. ***Aga Khan Education Service Kenya v R & Others [2004] IEAI.***
5. ***Sultan Hasham Lalji & 2 Others v Ahmed Hasham Lalji & 4 Others Civil Appeal No. 3 of 2003 (UR).***"

Mr. Eredi, learned litigation counsel who appeared for the 108th and the 109th respondents associated himself with Mr. Wamuti's submissions. He reiterated that the letter of 14th February, 1971 was a forgery. He dismissed this letter for want of authenticity. He relied on the decision of this Court namely, ***African Line Transport Company Ltd v The Attorney General C.A. No. 159 of 2007*** for the proposition that it is only the President who is vested with power to allocate land registered under the former Government Lands Act ***(Cap. 280)*** (now repealed). He argued that even if the decision to allocate the land to the appellant was to be quashed, the land would not be vested in the 1st to 107th respondents. He also relied on the case of ***Commissioner of Lands v Kunste Hotel Limited [1995-1998] I EA1*** which held that:

> ***"Judicial review is concerned not with the private rights or the merits of the decision being challenged but with the decision – making process. Its purpose is to ensure that an individual is given fair treatment by an authority to which he has been subjected."***

In response, ***Mr. Buti***, learned counsel for the respondents conceded that an application for certiorari had to be made within 6 months of the decision complained of, and therefore did not support the orders made by the learned judge in regard to prayers (b) and (d) of the motion that had sought:

> ***"b) an Order of Certiorari do issue removing to the High Court of Kenya for quashing the decision of the 108th respondent contained in the Letter of Offer dated 15th December, 2007 and referenced 76474/IX granting the Mombasa Technical Training Institute the property known as LR NO. MN/1/14710.***
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> ***(d) an Order of Mandamus do issue directing the 1st Respondent to cancel the Letter of Offer dated 15th December, 1997 issued in favour of the Interested Partyand to issue a Letter of Offer in respect of the property known as L.R NO. M/1/14710 in favour of the Applicants and issue a Letter of Offer in respect thereof in accordance with the Law;"***

However, Mr. Buti maintained that prayers (a) and (c) of the motion were within the six months limit and therefore the order of prohibition and certiorari issued by the learned judge in regard to those prayers were proper.

Mr. Buti contended that the letter of allotment was subject to acceptance of the offer within 30 days as was therein stated:

> ***"I should be glad to receive your acceptance of the attached conditions together with a Banker's cheque for the amount set out below within thirty (30) days of the postmark";***

He stated that the appellant failed to signify its acceptance of the offer; and hence the order of prohibition was meant to prevent the registration of the title.Mr. Buti's further argument was that the respondents had a legitimate expectation that they would be allocated the suit property having been on it for over 40 years. He relied on the pronouncement of ***Lord Diplock in Council of Civil Service Unions v Minister for the Civil Service [1985] at 374*** where it was stated at page 408 that a decision qualifies for Judicial review if its consequences affect an individual(s) –

"b) by depriving him of some benefit or advantage which either;

i. ***He had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communication to him of some rational grounds for withdrawing it on which he has been given an opportunity to comment."***

He further contended that the respondents who were squatters on the suit property had written to 108th respondent in 1971 and their application for allocation of the suit property had not been acted upon and that the suit property could not have been allocated without giving due regard to their occupation.

We have carefully perused the record of appeal and considered the pleadings, the judgment as well as the rival submissions. It is evident that on 14th July, 1977, the then Commissioner of Lands wrote a letter confirming the reservation of land identified in plan No. 76474/11/7 for a Technical School and ancillary purposes. This letter of reservation was followed by a letter of allotment Ref. No. 76474/IX dated 26th March, 1997 allocating the appellant land measuring12.58 hectares (*or thereabouts*). On 15th December, 1997 this letter of offer was revised by the issuance of another letter of allotment No. 191005/5 allocating the appellant 9.58 hectares or thereabouts. The revised allotment was explained vide a letter of the same date as necessitated by the hiving off, of a portion of the land which was allocated to Allidina Visram Secondary School. On 24th April, 2009 the 108th respondent executed a Grant in favour of the appellant for 9.084 hectares which was the remaining portion of the allotted land and now the suit property.

From the above, it is clear that the suit property was reserved for a public institution before issuance of the letter of allotment and subsequent certificate of grant in favour of the appellant. As was rightly pointed out by the learned judge, the issue was whether the 108th respondent acted in accordance with the law, having regard to principles of natural justice and proper public policy, when he purported to allot the suit property and issued the Grant in favour of the appellant. In other words, whether the decision making process leading to the issuance of the Grant in favour of the appellant was flawless.

It is noteworthy that during the hearing of the application for Judicial Review the appellant challenged the grant of leave to the 1st to 107th respondents to apply for orders of certiorari and mandamus in regard to the decision of 15th December 2007, and 15th December 1997. The application for leave having been granted exparte, it was proper for the appellant to challenge the leave during the hearing. The trial judge did not however address the issue of leave. ***Order 53 Rule 2*** of the Civil Procedure Rules of the former edition which was then in existence stated as follows:

> *" Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed unless the application for leave is made not later than six months after the date of the proceeding or such shorter period*

as may be prescribed by an Act……"

In ***Aga Khan Education Service Kenya v Republic & others [2004]1EA 1***, it was held that leave cannot be granted for an application for certiorari unless the decision sought to be challenged was made less than six months previously and that the burden was upon the applicant for leave to satisfy that condition.

It is clear that in this case, the order for leave to apply for orders of Judicial Review was obtained on the 11th September, 2009, which was long after the expiry of the six months period from the time of the allocation of the land and the subsequent review of the allocation. Therefore the application was incompetent in regard to the order of certiorari issued to quash the letters of offer of 15th December, 1997 and15th December, 2007 respectively and this has been conceded by the advocate for the respondents, and correctly so in our view. In the absence of the order quashing the allocation to the appellant the order of mandamus compelling the Commissioner to issue a letter of allocation to the Respondents in regard to the same land could not issue. Nor could an order of mandamus issue to cancel the order made to the appellant or its predecessor in 1997 as an order of mandamus cannot quash what has already been done. Indeed the prayer sought for mandamus directing the Commissioner to cancel the letter of offer issued to the appellant was in fact a prayer for an order of certiorari disguised as a prayer for mandamus. We can do no better than repeat what was stated in ***Kenya Nation Examination Council v Republic exparte Geoffrey Gathenji Njoroge & others (supra):***

> ***"...an order of mandamus compels, the performance of a public duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same, if the complaint is that the duty as been wrongly performed i.e. that the duty has not been performed according to the law, then mandamus is the wrong remedy to apply for because like an order of prohibition an order of mandamus cannot quash what has already been done. Only an order of certiorari can quash a decision already made…"***

Thus neither the prayer for certiorari in regard to the letters of 15th December 1997 and 15th December 2007 nor the prayer for mandamus could issue, and the orders made by the learned judge in this regard cannot stand.

As regards the issue of legitimate expectation, it is not disputed that the suit property was public land which was alienated in favour of the appellant under then Government Lands Act and theRegistration of Titles Act. The question that was raised by the trial judge was whether the decision by the 108th respondent in such a process has finality or whether the he/she is bound to consider legitimate interest or expectation of other parties as he allocates public land.As already noted under the Government Lands Act now (repealed) the power to alienate Government land was a special power reserved for the President. In limited circumstances such as under ***section 3 (a)*** as read with ***section 7*** of the said Act, the power was delegated to the Commissioner of Lands. The relevant section gives power:

> *"**Subject to any other written law, make grants or dispositions of any estates, interests or rights in or over unalienated Government land".***

The grant in favour of the appellant dated 24th April 2009, was apparently a grant issued to the appellant by the 108th respondent pursuant to such delegated powers. The issuance of the grant was predicated on the decision to allocate the suit property to the appellant, a public institution. It was an administrative action which cannot be isolated from the allocation of the suit property. Thus the issuance of the grant could only be effectively quashed if the decision to allocate the suit property to the appellant is also quashed. However, the prayer to quash the decision to allocate the suit property to the appellant was rendered moot by laches.

Since the power to alienate land registered under the then Government Lands Act was vested in the President, any request for allocation of land to the respondent ought to have been made to the President and not to the 108th respondent or the settlement scheme as the respondents purported to do. In ***R v Devon County Council exparte Baker & Another [1995] 1 ALL E.R 73 Simon Brown L.J.*** in an effort

to explain legitimate expectation identified two categories as follows:

i. ***Sometimes the category is used to denote a substantive right: an entitlement that the claimant asserts cannot be denied him ...***
ii. ***The concept of legitimate expectation is used to refer to the claimants interests in some ultimate benefits which he hopes to retain (or some would argue, attain). Here, therefore, it is the interest itself rather than the benefit that is a substance of expectation. In other words, the expectation arises not because the claimant asserts any specific rights to a benefit but because his interest in it is one that the law holds protected by the requirement of procedural fairness; the law recognizes that the interest cannot be properly withdrawn (or denied) without the claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decision".***

In ***Regina v Director of Public Prosecution exparte Kebilene & others the WLR 12th November, 1999***, the following statement on legitimate expectations made by Lord Woolf in ***Ragina v North and East Deveon Health Authority exparte Coughlan [2000] 2WLR 622*** which was cited in that judgment is instructive:

> ***" where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate expectation is so unfair that to take a new and different course will amount to an abuse of power. Here once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy".***

Thus, the legitimacy of the respondents' expectation had to be established before the requirements of fairness could be addressed. The respondents claimed to be squatters on the suit property which was unalienated government land. Assuming that to be the position ***section 142*** of the Government Lands Act provided that:

> ***"A person who unlawfully occupies unalienated government land in any manner whatsoever, shall be guilty of an offence and liable to a fine not exceeding Kshs.1500/"***

The question is whether the respondents can claim to have a legitimate expectation of allocation of the government land having occupied the suit property in violation of the law without any authority or any promises of such allocation. The circumstances of this case are clearly distinguishable from ***Commissioner of Lands v Kunste Hotel Limited (supra)***, in which the applicants' legitimate expectation was upheld as the applicant had been given an assurance that the plot would remain a road reserve so that access and view of his hotel was not interfered with.

The respondents laid claim on the suit property on the basis that they had applied for it and that they had a legitimate expectation of being granted the suit property as they are landless and have been on the land for over 40 years. According to the High Court, the respondents had a legitimate expectation as they:

> ***"… have been resident on the suit land for tens of years; that they had used the suit land as their source of livelihood; that they had much earlier made unanswered requests to the 1st respondent to be allocated the suit land, that public interest called for due response to their prayer; that the 1st respondent chose a secret course, and, thereby purported to pass on the land to the interested party; that they were not notified, and they were not accorded a hearing."***

With all due respect to the learned Judge, the respondents were (*if at all*) on the suit property illegally. In our view if their occupation was in contravention of the law, no rights can flow from an illegal occupation to warrant a legitimate expectation as their occupation (if any) was illegal. Thus the position is distinguishable from ***The Council of Civil Union v Minister for Civil Service*** (supra) as the respondents were not permitted to enjoy the benefit which they claim and hence had no legitimate expectation. Regardless of the length of time the respondents remained on the suit property, their status remained that

of illegal squatters. In considering the legitimacy of the respondent's expectation, we cannot fail to take note of the fact that the issue of land and squatters in this country is a sensitive and emotive issue in view of the number of people who are landless. To create a precedent that a legitimate expectation for allocation of Government land can arise out of an occupation declared illegal by statute would be opening a Pandora's Box which would compound the problem of land by encouraging squatter invasion of Government land. Further it would be tantamount to introducing the doctrine of adverse possession in Government land. This would be inimical to the public policy of maintaining law and order.

We find that the legitimacy of the respondents' expectation was not established, and the respondents' complaint that they were not heard or their interest considered before the allocation of the suit property to the appellant, cannot hold. Indeed the rules of natural justice would apply only where the legal right, liberty or interest of an aggrieved party is affected (***Nairobi Permanent Market Society & others v Salima Enterprises & others [1995-1998] 1EA 232)***. This was not the case herein.

As already stated orders of Judicial Review will only issue where there has been breach of the laws of the land, excess of Jurisdiction or departure from the rules of natural justice. We discern no such breaches in the circumstances of this case. Moreover as was noted earlier, it is doubtful whether the respondents made an appropriate application to the right authority for allocation of the land. Finally it is not lost on us that the allocation of the suit property to the appellant was an allocation for public purposes to wit a school. In the circumstances, we come to the conclusion that process resulting in the decision of the 108th respondent to allocate the suit property to the appellant cannot be faulted and the leaned judge erred in issuing the orders of Judicial Review.

For the foregoing reasons, we allow the appeal and set aside the orders made on 15th March, 2010 and substitute thereof an order dismissing the respondents' motion dated 11th September 2009.

Given the circumstances of this case we direct that each of the parties shall bear their own costs in the lower court as well as in the appeal. Those shall be the orders of the Court.

Dated and delivered at Mombasa this 19th day of June, 2014.

H. M. OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL