IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPEAL NO. 312 OF 2012

BETWEEN

EMFIL LIMITED ……. APPELLANT

AND

THE REGISTRAR OF TITLES MOMBASA …… 1ST RESPONDENT

THE COMMISSIONER OF LANDS …… 2ND RESPONDENT

THE HON. ATTORNEY GENERAL ……..….. 3RD RESPONDENT

(An appeal from the decree and judgment of the High Court of Kenya at Mombasa (Muriithi, J.) dated 7th September, 2012,

in

H.C. Misc. Appl. (JR) No. 84 of 2001.)

JUDGMENT OF THE COURT

[1] The facts leading to the appeal before us are substantially not in dispute. Emfil Limited who is the appellant, purchased land described as L.R No 12335/1 from Associated Sugar Company limited in 1987. The appellant subdivided the land into 143 pieces that is L.R No's 13433/1-143 (both numbers inclusive). The Commissioner of Lands (*herein the 2nd respondent*), consented to the subdivision, and the Registrar of Titles Mombasa (*1st respondent*) issued titles for the respective subdivisions to the Appellant. The appellant surrendered five of the subdivisions to the Government for public use, gifted ten subdivisions to Chale Fishermen Group, and nine subdivisions to various individuals. The appellant enjoyed peaceful possession of the remaining 119 subdivisions until 2007, when some unknown individuals encroached on some of the subdivisions, claiming to have been allocated the land by the Director of Land Adjudication and Settlement.

[2] In a bid to safeguard its interests, the appellant sued the intruders in ***Mombasa HCCC No. 181 of 2007: Emfil Limited vs. Hamisi Mwalimu & 9 Others*** **(**hereinafter referred to as the civil suit**).** On 29th October 2010, the High Court (***Sergon J***,) having heard the civil suit made orders declaring the purported allocation and title deeds issued to the intruders or any other person in respect of the appellant's land irregular, unlawful, illegal, null and void and of no legal effect. The learned judge also issued an injunction restraining the intruders and their agents from entering or remaining on the appellant's land or

in any way interfering with the appellant's quite enjoyment of the suit properties.

[3] On 14th June 2011, gazette notice No. 6652 was published in which the 1st respondent purported to revoke the appellant's titles to sub divisions Nos. 13443/6 to 143, (*hereinafter referred to as the suit properties*), contending that it had come to the notice of the government that the said parcels of land were reserved for public purposes and that the allocation to the appellant was therefore illegal and unconstitutional. Once again the appellant moved to the High Court on 8th August 2011, and obtained leave to apply for orders of Judicial Review. Subsequently, the appellant filed a substantive motion and sought orders of certiorari and mandamus to quash gazette notice No. 6652 and the revocation of the appellant's titles to the suit properties, and to compel the respondents to reinstate the titles, as well as an order of prohibition restraining the respondents from revoking or allotting the suit properties to any other person.

[4] The application was supported by a statutory statement and a verifying affidavit sworn by ***Vinaychandra Damodar Popat***. The appellant contended *inter alia* that the respondents action of revoking their titles was a unilateral and arbitrary action made without reference to the appellant or the appellant being given a hearing; that the revocation flies in the face of the orders made in the civil suit declaring the appellants the lawful owners of the suit properties; that the respondents had no powers to revoke the appellant's titles; that the revocation intended to arm-twist the appellant and coerce it into giving up its lawful rights over the suit properties.

[5] Initially, ***Mr. Asige*** was appointed to represent 313 persons who were joined to the proceedings as interested parties. However, by a notice of withdrawal dated 8th November 2011, the interested parties withdrew from the proceedings. This left only the three respondents to the motion i.e. the 1st respondent, 2nd respondent and the Attorney General who was cited in the motion as the 3rd respondent. The matter was adjourned severally for the respondents to file replying affidavits. However, none was filed. The parties were also given opportunity to file written submissions. On 23rd July 2012, notwithstanding strenuous objection from the appellant's counsel, the court visited the suit properties and made some observations and also interviewed certain persons who were at the *locus in quo.* Subsequently, the parties tendered final submissions, and the court delivered its judgment on 7th September 2012.

[6] In the judgment, the trial judge found that the Registrar of Titles had no power to revoke titles to land or cancel titles; that the Government could not revoke titles to land even for public need and interest or alleged illegality without moving the court for appropriate orders; and that the gazette notice 6552 of 2011 was made without authority and in breach of the right to fair administrative action under ***Article 47*** of the Constitution. Nonetheless, the trial judge declined to exercise his discretion to grant the remedy of certiorari, mandamus and prohibition in favour of the appellant, stating that the intruders who were squatters had acquired good titles to the parcels of land which had been offered to them by the Government as a parent owner, and that public interest was superior to the appellant's private interest. The trial judge therefore dismissed the appellant's motion and ordered *inter alia* that the allocation of the suit properties to the squatters proceeds , and that the appellant's right to compensation for the takeover of the suit properties by the Government be determined upon establishment of the validity of the applicant's titles to the suit properties.

[7] Being aggrieved by the judgment, the appellant moved to this court raising fifteen grounds of appeal. In short the appellant maintains that the learned judge having ruled that the Registrar of Titles did not have power to cancel the appellants titles to the suit properties, the judge erred in affirming the cancelation of the appellant's titles by concluding that the squatters had acquired good titles to the suit properties; that the learned judge erred in basing his decisions on improperly obtained evidence, and evidence from the bar that was not supported by any affidavit; that the judge erred in disregarding the law of adverse possession and concluding that the squatters interest took priority over those of the appellants; that the court ignored the judgment made in the civil suit which confirmed the appellants titles to the suit properties; that the impugned judgment amounted to the appellant being disenfranchised of his properties.

[8] The appeal was heard by way of written submissions that were duly filed and exchanged by the parties. For the appellant, it was asserted that the judge having found that the Registrar of Titles had no powers to revoke or cancel the appellant's titles to the suit properties, no amount of alleged public interest or public policy could stand against the appellant's titles; that the order made by the court was unlawful and constituted un-procedural interference with registered titles, an act which was contrary to ***Section 23*** of the Registration of Titles Act Cap 281 (now repealed); that such an action if allowed to stand will set a precedent likely to prejudice the entire system of registration of titles and ownership of properties. It was argued that the suit properties were not un-alienated Government land but were in fact private property, which the Government could not give away without violating the appellant's constitutional right to own properties.

[9] Further, the allegation that the suit properties were required for public purposes was discounted as neither ***Article 40(3)*** of the Constitution, nor the provisions of the Land Acquisition Act Cap 296 were complied with. To fortify the submissions the appellants relied on ***Ocean View Plaza Limited v Attorney General [2002] 2KLR 277***. It was contended that the judge abused the process of the court in invoking ***Article 159*** of the Constitution to irregularly admit evidence without following the provisions of the Evidence Act; that the interested parties who were squatters having willfully decided not to participate in the proceedings by withdrawing from the suit, it was curious why the court ruled in their favour; and that the judgment in the civil suit having been brought to the attention of the learned judge and the judgment not having been set aside, there was no justification for the judge disregarding the orders made in regard to the appellant's titles.

[10] For the respondent, it was contended firstly that the appeal was defective, as the memorandum of appeal contained no prayers. Secondly, that the appeal was baseless and unmerited as the revocation of titles to the suit properties were based on public need and public interest; that the appellant failed to demonstrate that his interest in the suit properties was superior to the public need of settling squatters; that the appellant's titles were fraudulently obtained and the terms of the original grant violated; that in view of the irregularities, the Registrar had powers to revoke the titles under ***Section 59*** and ***60*** of the Registration of Titles Act; that admission or rejection of evidence could not be a ground for a new trial or reversal of any decision; that the visit to the *locus in quo* was proper and necessary to facilitate the just determination of the issues before the court.

[11] It was argued that the appellant failed to carry out any development on the suit properties for more than twenty one years and this encouraged an influx of squatters on the suit properties and the appellant should not therefore be entitled to any compensation; that there was evidence of fraud, as the appellant's directors were essentially the same as the directors of Associated Sugar Company Limited the grantee of the original title, and the transfer of the suit properties to the appellant was done just a few months before the original grantee was placed under receivership; that the court properly exercised its jurisdiction and discretion in turning the application for Judicial Review into a Constitutional Petition in order to determine the dispute and finally that the civil suit was distinguishable from the motion before the learned judge, and was only persuasive and not binding. The court was therefore urged to dismiss the appeal with costs.

[12] We have carefully perused the record of appeal including the submissions that were made by the learned counsel and the authorities that were before the trial judge. We have also considered the submissions filed by counsel and the authorities availed to us. We note that the memorandum of appeal, which was filed by the appellant, was defective to the extent that it was not properly entitled and did not show the order or judgment against which the appeal was intended, or the date the order was made, nor did it seek any specific prayers. However, there is no doubt that the goof in drafting was made by the appellant's counsel and that notwithstanding the flaws, the parties understood the purport of the memorandum and therefore no prejudice has been caused. In the circumstances, we would under ***Article 159*** of the Constitution ignore the defects as mere want of form and deal with the substantive merit of the appeal.

[13] The orders that were made by the learned judge in the impugned judgment were peculiar and of far reaching consequences. We reproduce the orders herein verbatim as follows:

a. ***The applicant's notice of motion dated 9th August 2011 is dismissed.***
b. ***Subject to the vetting of squatters to determine eligibility and to a bar on resale of the parcels of land for a period of not less than twenty years, the respondents are at liberty to proceed with the allocation of the suit property to genuine squatters or landless persons of the area. The respondents will file in the court for approval the profiles of all squatter alottees to the suit property within thirty days from the date of this ruling.***
c. ***The judicial proceedings herein are deemed to be an application under the Bill of Rights for the enforcement of the Right to property under Article 40 of the Constitution.***
d. ***The respondents will file affidavits (sic) evidence in reply and such other pleadings as they may be advised on the question of the validity of the applicant's title to the suit property.***
e. ***The applicant's right to compensation for the takeover of the suit property by the Government will be determined upon establishment of the applicant's valid title.***
f. ***The pending application for contempt of court against the 1st and 2nd respondents and two others shall proceed alongside the further hearing of this matter in relation to the applicant's title on such dates to be fixed by the court in consultation with the parties.***
g. ***The matter will be mentioned on 8th October, 2012 for directions as to further hearing.***
h. ***Costs in the cause."***

[14] What was originally before the trial judge were Judicial Review proceedings under ***Order 53 Rule 3(1)*** of the Civil Procedure Rules. Indeed, the judge was alive to this fact hence the order that the Judicial Review proceedings be deemed to be an application under the Bill of Rights for enforcement of fundamental rights. In support of his decision to convert the proceedings to an application for enforcement of the Bill of Rights under ***Article 40*** of the Constitution, the learned judge stated thus:

> *"Although the proceedings before the court are for Judicial Review, the allegations of infringement of the Constitutional Right to property under **Article 40** brought the application into the purview of **Article 22** of the Constitution. In accordance with long established practice of deeming an application brought under Judicial Review to be an application under the Bill of Rights to enable the court a wide latitude of the choice of remedies (see **Githunguri v Attorney General No. 2 [1986] KLR 1**), I will treat this application as an application for enforcement of the bill of rights with respect to the right to access to the court in cases of compulsory acquisition or takeover of private land, and direct that the issues of the applicant's title to the suit property and the payment of compensation under **Article 40** of the Constitution be determined hereinafter on the basis of the pleadings filed by the applicants and affidavits evidence to be filed by the respondent within the next fourteen days from the date of this ruling."*

[15] We have perused the ***Githunguri v Attorney General No.2 [1986] KLR 1*** (***Githunguri case***) which was relied upon by the learned judge. In the first place the constitutional reference leading to the ***Githunguri case*** was made under the former Constitution of Kenya (hereinafter referred to as the repealed Constitution). The holding criticizing the reference from the subordinate court to the Constitutional Court under ***Section 67*** of the repealed Constitution was made obiter as the court was not sitting on appeal in regard to the reference. The judges nonetheless expressed the view that the questions referred to the Constitutional Court under ***Section 67*** of the repealed Constitution ought to have been framed as an infringement of the applicant's fundamental rights, thereby bringing the matter within ***Section 84(1)*** of the repealed Constitution.

[16] In addition, the deeming of the proceedings as dealing with enforcement of the Bill of Rights in the ***Githunguri case*** was not prejudicial to the accused, but was in his interest as evident from the following statement from that judgment:

> *"It seems to us that the application in these proceedings comes true appropriately as a fundamental right application under section 77(1) of the Constitution as referred to in sections 84(1) above*.

Section 77 (1) *is:*

'if a person is charged with a criminal offence, then unless the charge is withdrawn ,the case shall be afforded a fair hearing within a reasonable time by an independent and impartial Court established by law.'

In the interests of justice, we will treat the application before us as having been made, and to deem it amended and to have been brought under section 84(1)."

[17] In the appellant's case, the application for Judicial Review was made in August 2011 after the promulgation of the Constitution of Kenya 2010 (*hereinafter the Constitution*), which replaced the repealed Constitution. ***Article 23*** of the Constitution, provides for an order of Judicial Review as an appropriate relief that may be granted in the enforcement of the Bill of Rights. Clearly, the appellant had the option to bring his application under ***Article 22*** and ***23*** of that Constitution, but opted for Judicial Review proceedings under ***Order 53*** of the Civil Procedure Rules.

[18] The extract of the judgment of the High Court reproduced herein above (paragraph 13) reveals that the adoption of the constitutional reference proceedings under ***Article 22*** and ***23*** by the learned judge was basically to expand the proceedings in order to include the issue of compulsory acquisition. But the appellant in the notice of motion only mentioned compulsory acquisition in passing. It was not a specific relief that was sought. Unlike the ***Githunguri case***, it cannot be said that it was necessary to convert the applicant's Judicial Review proceedings to a constitutional reference in order to allow the court the latitude in granting relief. The issue of compulsory acquisition was not before the judge for determination, such as to justify expanding the proceedings to accommodate it. The only interest that was advanced by the change in the nature of the proceedings was that of the alleged squatters. The appellant having specifically moved the court for orders of Judicial Review, which were available to the appellant under ***Order 53*** of the Civil Procedure Rules, the court had no business tampering with his application by turning it into an application for enforcement of the bill of rights under the Constitution.

[19] Judicial Review proceedings, are proceedings of a sui generis nature subject to its own peculiar rules. While we appreciate ***Article 159*** of the Constitution and the need to apply substantive justice, that article provides no justification for a court to ignore a specific procedure provided by law and deliberately chosen by a litigant, nor does it allow a court to bend backwards to accommodate persons who have deliberately failed to protect or assert their interest. Thus the court was bound to apply the specific provisions of ***Order 53*** of the Civil Procedure Rules. ***Rule 4*** of the Order provides that the relief granted in Judicial Review proceedings can only be the relief sought in the statutory statement filed under ***Rule 2*** of the same Order, and in this case neither compulsory acquisition nor compensation for compulsory acquisition was a relief sought by the appellant.

[20] Further, the order made by the trial judge converting the proceedings from one of Judicial Review to that of a Constitutional Reference was in the nature of a direction that ought to have been given during the pre-trial stage. Coming as it did at the final stage in the judgment it had the effect of re-opening the proceedings. The judgment was therefore not a final decision as envisaged under ***Order 21 Rule 1&4*** of the Civil Procedure Rules. In this regard the order made by the learned judge may be distinguished from that made in the ***Githunguri*** case, in which the order of prohibition that was issued finally determined the litigation. In light of the orders which were made by the trial judge, declining to protect the appellant's constitutional right to property, the conversion of the appellant's application from one of Judicial Review to one of enforcement of the bill of right was prejudicial to the appellant and was purely for the benefit of the squatters who had opted not to pursue their rights.

[21] Moreover, ***Order 53*** of the Civil Procedure Rules provides for Judicial Review proceedings to be conducted by way of affidavits, such that an applicant for Judicial Review must not only file a statutory statement setting out the relief sought and the grounds on which it is sought, but also an affidavit verifying the facts. Once served, the respondents and other interested parties to the proceedings are also required to serve an applicant with copies of the affidavits they intend to use at the hearing. The respondents did not file any affidavits in response to the appellant's statutory statement or verifying affidavit. To that extent, it can be concluded that the averments, which were made by the appellant in their statements and verifying affidavits were not disputed.

[22] Thus it was not disputed that the appellant had titles to the suit properties, which the 1st respondent purported to revoke. In ***Pastoli vs. Kabale District Local Government Council and Others*** ***[2008] 2 EA 300*** it was held:

> ***"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality".***

The learned judge made a finding that the 1st respondent had no authority or power to revoke the titles. Indeed, the learned judge at paragraph 17 of his judgment stated that the appellant had demonstrated that the gazette notice no. 6652 of 2011 was made without authority and in breach of the right to fair administrative action under ***Article 47*** of the Constitution. Thus, the appellant had established a basis for his claim and no cross appeal has been filed challenging that finding. Judicial Review is however a discretionary remedy and therefore, the substratum of the appeal before us is whether the learned judge exercised his discretion judiciously in refusing to grant the appellant the remedies of certiorari, mandamus and prohibition notwithstanding his findings that the Registrar had no authority to revoke the appellant's titles to the suit properties.

[23] As was stated in ***Attorney general v Sumair Bansraj*** ***[1985] 38 WLR 286***:

> ***"The critical factor in case of this kind is the exercise of the discretion of the judge who must hold the scales of justice evenly not only between man and man but also between man and state"***

In ***Muslims for Human Rights (Muhuri) & 2 Others v Attorney General & 2 Others*** ***[2011]*** **eKLR**, ***Ibrahim J*** (*as he then was*), put the duty of exercising judicial discretion succinctly as follows:

> "***The exercise of discretion as is usually the case must be exercised judiciously and not capriciously taking into account all the facts and circumstances of the case. The court in exercise of its discretion must act cautiously and with a great degree of care but still with reasonableness to promote the enhancement and enforcement of fundamental rights and freedoms of the individual and the public at large, where appropriate***".

[24] As regards the duty of an appellate court, in an appeal involving the exercise of discretion, an appellate court can only interfere with the exercise of that discretion where the trial judge misdirected himself in some matter and as a result arrived at a wrong decision or where it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been some injustice (see ***Mbogo & Another v Shah*** ***[1968] EA 93***; ***Chotram v Nazari*** ***[1984] KLR 327***).

[25] The following extract from paragraph 18 of the judgment of the learned judge reveals what the trial judge took into account in exercising his discretion:

> ***"I have noted the decision of the High Court in*** *Msa HCC 181 of 2007 Emfil Ltd versus Hamisi Mwalimu Mwarandani & 8 Others****. I have also noted submissions by the Principal State Counsel as to the illegality of the Applicant's title on the grounds of alleged fraudulent transfer from the original allotee Associated Sugar Company and irregular change of user and extension of lease from 34 years to a term of 99 years. Although these submissions are not supported by affidavit evidence as the Respondents did not file any replying affidavits, I find the allegations serious enough to warrant an investigation into the matter by further hearing. I note that the said allegations, though not made under the solemnity of an oath, are made by a senior Government officer and officer of the court who would not trifle with the court. It must be for this type of***

situations that the Constitution under** Article 159 **provides for substantial justice without regard to technicalities of procedure to require a further hearing and determination of the issues of the validity or otherwise of the Applicant's title to the property as a prerequisite to the determination of payment of due compensation by the Government and the takeover of the suit property"

[26] Thus, the factors which influenced the exercise of the discretion of the learned judge were the submissions made by the principle state counsel on the illegality of the appellant's titles, the alleged fraudulent transfer from the original grantee and the extension of lease from thirty four years to a term of ninety nine years. The question is whether it was proper for the trial judge to take into account this statement, which was made from the Bar without any supporting evidence. More so when the respondents had the opportunity to file affidavits in support of these allegations, but chose to file none. Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities. Although ***Article 159*** enjoins the court to administer substantial justice without undue regard to procedural technicalities, ***Article 159*** does not allow the respondents to totally ignore the rules of evidence. The respondents having failed to file any replying affidavit, the affidavit of the appellant stood unchallenged on facts, and thus the respondent could only challenge the application on issues of law based on the undisputed facts before the court. Therefore the allegations made from the Bar disputing the facts before the court were matters which the trial judge ought not to have taken into account.

[27] On the issue of public interest, while we appreciate that the settlement of squatters in this country is a matter of public interest requiring urgent attention, the same must be done in accordance with the law. Thus if the original grantee had violated the terms of the grant the Government had the option to put in place the machinery to have the grant revoked through an order of the court. Alternatively if the Government felt that there was a genuine need to settle squatters on the land, it could have invoked the provisions of the Constitution and the Land Acquisition Act to acquire the land. The Government chose to follow none of these processes but acted in clear violation of the law. It is in the public interest that the rule of law prevails, and it is for this purpose that the people of Kenya through the Constitution entrusted the court with judicial power. The remedy of judicial review of administrative action is intended to check the excesses of power to ensure that the rule of law prevails.

[28] The appellant having established its titles to the suit properties, backed with the order from the civil suit, it was unreasonable for the trial judge to refuse to exercise his discretion in the appellant's favour. Moreover, the learned judge failed to appreciate that the suit properties were not un-alienated land which could be allocated to squatters. For even assuming for the sake of argument, that the revocation of the appellant's titles was proper, the suit properties remained private properties as the original Grant was not revoked and therefore the revocation of the sub titles did not result in the titles to the suit properties reverting back to the Government as un-alienated land for allocation. The Government could not therefore pass any good title to the squatters nor did the issue of legitimate expectations arise as there was no question before the court regarding the squatters' interest.

[29] Further, it is clear that there was no proper evidence before the trial judge regarding the squatters sought to be allocated the suit properties. The attempt by the trial judge to use the "evidence" obtained at the *locus in quo* was contrary not only to the Judicial Review proceedings which limited the court to the affidavits before it, but also contrary to the Evidence Act that required evidence to be given on oath.

[30] In light of the above, we come to the conclusion that the trial judge did not exercise his discretion judiciously as he took into account matters which he should not have taken into account and therefore clearly arrived at the wrong decision in dismissing the appellant's motion. Moreover, the learned judge clearly misapprehended his role. As was stated by ***Lord Hailsham*** in the ***R v Chief Constable of North Wales exparte Evans [1982] 1WLR 1155***

"the purpose of the remedies is to ensure that the individual is given fair treatment by the authority to which he had been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority

constituted by law to decide the matters in question. The function of the court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by the law"

The attempt by the court to settle the squatters on the appellant's land though noble cannot be sustained as it was not anchored on any law, but was in fact usurpation of the powers of the 1st and 2nd respondent.

[31]Accordingly, we allow this appeal, set aside the orders made by the learned judge on 7th September 2012, and substitute thereof an order allowing the appellant's motion dated 9th August 2011, by issuing the orders of certiorari, mandamus and prohibition as prayed in the motion. We award costs of this appeal and the suit in the lower court to the appellant. Orders accordingly.

Dated and delivered at Malindi this 18th day of July ,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