REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

CORAM: OUKO (P), NAMBUYE & WARSAME, JJ.A

CIVIL APPEAL NO. 266 OF 2017

MARKET PLAZA LIMITED.....APPELLANT

VERSUS

COMMISSIONER FOR LANDS.....1ST RESPONDENT

NATIONAL LAND COMMISSION.....2ND RESPONDENT

CITY MARKET STALL HOLDERS ASSOCIATION....3RD RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION....4TH RESPONDENT

(Being an appeal from the judgment and order of the High Court of Kenya at Nairobi (Odunga, J) dated 22nd September 2016 **in Miscellaneous JR Application No 18 of 2011)**

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JUDGMENT OF THE COURT

The instant appeal contests the exercise of judicial discretion by the High Court (Odunga, J) when it declined to grant judicial review orders. The appellant had sued the defendants by Notice of Motion dated 23rd February, 2011 seeking orders of certiorari, prohibition and mandamus. The matter took a Judicial Review trajectory because the appellant alleged various actions by the Registrar of Titles which amounted to breaches of the law including unlawful and *ultra vires* exercise of discretionary powers, breach of legitimate expectations, breach of rules of natural justice, oppression, and breach of constitutional rights.

The appellant is a limited liability company with its offices in Nairobi, claiming to be the registered owners of the suit property LR No. 209/1855/2. The 1st respondent was sued in his capacity as the person in charge of allocation alienation, processing and issuance of land titles held by the government.

The appellant claims the suit premises were transferred to them by the City Council of Nairobi for a consideration of Kshs.2

million (2,000,000), and insists that by reason of the supposed registration if a lessee of the government of Kenya for a period of 99 years with effect from 1st August 1928.

The suit property is said to have originally been part of all that property known as L.R. No. 209/1855, Nairobi, which was reserved by the colonial government of Kenya for use as a Municipal Market. The parcel was subsequently subdivided sometime in the 1990's with the suit land going to the appellant, the other portion L.R. No. 209/1855/1, Nairobi was left for the City Council for use as public market.

It is further alleged that on 22nd December, 1992, the Nairobi City Commission purported to transfer it to the appellant for private development. The appellant began construction on the suit property but the said construction stalled; and the property is currently in use as a public car park.

The issue of title arose when the Registrar of Titles placed a caveat against the title to L.R. No.209/1855/2 for non-payment of stamp duty. It had come to the attention of the Registrar that the only condition of the grant from the Government of the Republic of Kenya was that the suit property be used as a public market; and it was therefore unavailable for appropriation to a private entity, or for private use. The registrar subsequently revoked the title to LR Nol. 209/1855/2 via Gazzette Notice dated No. 15580 of 26th November, 2010, on grounds that it was contrary to law to turn the suit property from public land to land for private development without following the necessary procedures.

The appellant's contention before the High Court was that the Registrar had no power to cancel a certificate of title save as directed by the court under **section 61 of the Registrations of Titles Act** (hereinafter the RTA); and further, that the City Council of Nairobi, being the previous leasee of the suit property had no legal claim over it.

In support of its claim, the appellant pointed out that a certificate of title issued under **section 23 (1)** of the RTA is conclusive evidence of title and cannot be challenged except under allegations of fraud or misrepresentation. Furthermore, the appellant asserted, the revocation of its title was a violation of the constitutional right to property under **Article 40 of the Constitution**.

It was the appellant's submission that the issue falling for the Superior Courts determination was not whether there was such fraud or misrepresentation in the acquisition of the title, but rather whether the Registrar of Titles in revoking the title, had acted unreasonably and unlawfully; and in finding that the Registrar had acted beyond his powers, order that the revocation be declared null and void. The appellant asserted that no other remedy lay in law to prevent the 1stRespondent from further abusing their official powers. Relying on the case of ***O'Reilley and Others vs. Mackman and Others [983] UKHL 1*****,** the appellant insisted that filing for judicial review was the most efficacious way of dealing with the impugned action of the Registrar.

In response, the Registrar averred that the issues raised by the Notice of Motion centered around the issue of validity of title to the suit property and the process of how the title was acquired. Referring to this Court's decision in the case ***Prof. Wangari Maathai & Others vs. City Council of Nairobi & 3 Others, Civil Application No. 321 of 1995*** the respondents asserted that the said issues could not be dealt with by the Superior Court as they were res- judicata. Indeed, there appears to be other proceedings in other courts to determine allegations of proprietorship of the suit land.

The Superior Court considered the submissions filed by both sides in support of their opposing positions and declined to grant the orders sought by the appellant. In its judgment, the trial Judge pointed out that the suit property was a subject of illegal and irregular allocation of land which was meant for public use. As a result of such irregularity it was within the Registrar's mandate to revoke the title and return it to its intended use as part of the municipal market. However, in the instant case, the Learned Judge conceded that the Registrar indeed had exercised his powers irregularly.

Being of the view that the issue of validity of title still lay undetermined, the Superior court declined to issue the orders sought

until such determination was done. He ordered that the parties do fix the pending cases revolving around the suit land for hearing and final determination.

It is those findings and orders that provoked the appeal before us. The appellants challenged the finding of the Superior Court in a Memorandum of Appeal dated **2nd August, 2017**. The Memorandum contained nine grounds which can be summarized as follows; that the learned Judge failed to properly exercise his discretion when declining to grant the judicial review orders; that the learned Judge erred by failing to find that the judicial review orders were the most efficacious and only remedy available in the circumstances; the learned Judge erred when he held that public interests override the appellant's rights; the learned Judge erred when he held that an alternative remedy exists which can provide a satisfactory answer to the appellant's grievance.

When the matter came before this Court on 11th March 2019, **Mr. Kamau Njenga,** learned Counsel for the appellant, submitted before this court that the decision to revoke the title vide government notice was contrary to the law. Counsel argued that in his decision, the learned Judge had circumvented the issue of the appellant's constitutional rights and had failed to determine what public right was being protected. Mr. Njenga also challenged the allegation that there were other proceedings besides the suit whose determination resulted in this appeal regarding the issue of ownership of the suit property. It was counsel's prayer that the appeal be allowed.

In turn, **Mr. Miyare, counsel for the 3rd respondent,** asserted that judicial review orders are issued as a matter of discretion. Regarding to the alleged pending suits on the issue of ownership of the suit property, counsel referred the Court to the facts highlighted in HCC No. 1059/2000 which was filed on 7th July 2000 and the JR Misc. Application No. 18/2011 which was filed on 17th February 2011 as well as the gazette notice No 15580 of 26th November 2010. He contended that the orders sought were not appropriate for the matter in dispute.

In those submissions, **Mr. Miyare** was supported by **Ms. Shamallah, counsel for 4th respondent** who pointed out that the 4th respondent had produced evidence to demonstrate that the proper procedure for transfer of the suit land had not been followed. Ministerial consent should have been obtained and according to **section 12 and 13 of the Government Lands Act** (repealed) the sale of the suit property was supposed to be by public auction. Learned counsel reiterated that the issue of ownership was currently pending determination before the Environment and Land Court No. 544/2017. That being the case, Ms. Shamallah posited, the issue of ownership cannot therefore be dealt with through judicial review until the final hearing and determination of the said suit. On that account Counsel prayed that the appeal be dismissed.

In a brief rejoinder, **Mr Njoroge** vehemently challenged the claim that the issue of acquisition of appellant's title was being contested in another court.

We have considered the appeal and the submissions of counsel and carefully perused the parties' lists of authorities. The appeal herein turns on the exercise of discretion by the learned Judge. As such, our approach is on a well trodden path and was summarized by Madan, JA (as he then was) in **United India Insurance Co. Ltd & 2 Others vs East African Underwriters *(Kenya)* *Ltd [1985] eKLR*** thus:-

"The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong".

In line with the criteria and principles as set herein above, the question we intend to answer is whether the decision of the trial Judge was plainly wrong. The function of the High Court sitting in judicial review proceedings is not to determine an appeal or

otherwise consider the merits of the decision by a public body, but rather undertake a consideration of the manner in which the decision was made. (See ***Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR***).

In **Ransa Company Ltd vs. Manca Francesco & 2 Others [2015] eKLR** this Court expressed itself thus:-

"As we all appreciate, a court sitting on Judicial Review exercises a sui genesis jurisdiction which is very restrictive indeed, in the sense that it principally challenges the process, and other technical issues, like excessive jurisdiction, rather than the merits of the case. It is also very restrictive in the nature of the remedies or reliefs available to the parties."

It is also important to remember that the purpose of seeking judicial review remedies is to ensure that the individual is given fair treatment by the authority to which he has been subjected. According to **Judicial Review Handbook**, 6th Edition by **Michael Fordham** at page 5, judicial review is a central control mechanism of administrative law (public law), by which the judiciary discharges the constitutional responsibility of protecting against abuses of power by public authorities. It constitutes a safeguard which is essential to the rule of law: promoting the public interest; policing parameters and duties imposed by Parliament; guiding public authorities and securing that they act lawfully; ensuring that they are accountable to law and not above it; and protecting the rights and interests of those affected by the exercise of public authority power.

In the present matter, there is interplay between administrative law, on which the remedy of judicial review is anchored, and constitutional law. Judicial review remedies presently have a constitutional underpinning in Kenya by virtue of **Articles 10, 25, 27, 47 and 50 of the Constitution** and the conventional grounds for judicial review take a secondary role after the constitutional benchmarks. In ***Bahajj Holdings Ltd. vs. Abdo Mohammed Bahajj & Company Ltd. & Another Civil Application No. Nai. 97 of 1998*** the Court of Appeal held that the limits of judicial review continue expanding so as to meet the changing conditions and demands affecting administrative decisions. Similarly, in ***Re: National Hospital Insurance Fund Act and Central Organisation of Trade Unions (Kenya), Nairobi HCMA No. 1747 of 2004 [2006] 1 EA 47,*** **Nyamu, J** (as he then was) held the view that, while it is true that so far the jurisdiction of a judicial review court has been principally based on the "3 I's" namely illegality, irrationality and impropriety of procedure, categories of intervention by the Court are likely to be expanded in future on a case to case basis. We are, however, aware that the above decision by Nyamu J was rendered before the current constitutional dispensation.

That being said, we reiterate that the purpose of judicial review is to determine whether the applicant was accorded fair treatment by the concerned public body. This is a discretionary power and is not guaranteed. A court may refuse to grant the orders sought even where the requisite grounds exist since the court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. Further, as the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. (***Mbogo vs. Shah [1968] EA 93***.)

The appellant submitted that the learned Judge failed to consider relevant circumstances when exercising his judicial discretion. The appellant's assertion was that it has a constitutional right to property; a claim that was contradicted by evidence that the said title was acquired by illegal/irregular means. In his judgment, the learned Judge was of the opinion that the allegations that the suit property was illegally acquired were valid and should be seriously considered.

In his deliberations, the learned Judge recognised that he had a constitutional duty to take into account public or national interests as was held in the case of ***AXA General Insurance Ltd. & Others vs. The Lord Advocate [2011] UKSC 46l;***

"34. In Sporrong and Lonnroth vs. Sweden (1982) 5 EHRR 35, ***para 69, the Strasbourg court declared that:-***

'…the Court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. In Pressos Compania Naviera SA vs. Belgium (1995) 21 EHRR 301, **para 63 recalling this passage, the Commission said that fair balance must be regarded as**

upset if the person concerned had to bear an individual and excessive burden… there must be a reasonable relationship between the means employed and the aims pursued'."

In his judgment, the learned Judge thoroughly conducted a proportionality assessment of the competing rights of the parties and applied the principle of proportionality. He emphasised that as a Court of Law, he was properly entitled pursuant to **Article 1** of the Constitution to take into account public or national interests where a dispute involves a conflict between public and private interests and decide where the scales of justice tilt. He referred to the case of ***Mureithi & 2 Others (For Mbari ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443,*** where the Court held that the doctrine of public trust is not confined to trust land, but also applies to public land and should be applied as a common law principle.

The court of appeal has appreciated the view expressed in ***Mureithi (***supra) and has applied the principle of proportionality in a number of recent decisions where the issue of public interests versus private interests arose; see ***Elizabeth Wambui Githinji & 27 others vs. Kenya Urban Roads Authority & Others, Civil appeal No 156 of 2013*** (unreported); ***Kenya Airports Authority vs. Mitu-Bell Welfare Society & 2 Others [2016] eKLR,*** and ***Kenya National Highway Authority vs. Shalien Massod Maghal & 5 Others [2017] eKLR***.

We have no doubt that the learned Judge was aware of his duty as can be discerned from his analysis, interpretation and determination of the issues in dispute. It is clear that public interest is a key issue in this matter and we find that the Learned Judge gave the issue due consideration.

The appellant submitted that the learned judge erred in finding that other remedies existed and the appellant should seek judicial review orders as a last resort. In his judgment, the learned Judge referred to the case of ***Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354*** where it was held that judicial review proceedings is not the appropriate forum to adjudicate over a dispute on land ownership or make a determination on the authenticity of title to property. The trial Judge was of the view that an alternative remedy already exists in the form of civil proceedings to determine authenticity of title and declined to issue the orders sought until such determination was made.

We agree with the learned Judge that orders for judicial review ought to be sought as a last resort and only where there are exceptional circumstances. This Court, in setting out the criteria for determining such exceptional circumstances in ***Republic vs. National Environmental Management Authority [2011] eKLR*** held:-

"The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what in, the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it.."

We find that the circumstances of this case were not exceptional such as to render a finding that judicial review was the most efficacious remedy. The real issue for determination by the Superior court was whether the registrar had acted ultra vires by invalidating the appellant's title via Gazette Notice. As to the orders sought, that was entirely up to the court's discretion to determine as to whether or not they will be granted.

The core issue for determination before this Court is whether the exercise of that discretion by the superior court was judicious. We find no reason to suggest that the learned Judge either misdirected himself in law, or that he misapprehended the facts, or took into account considerations of which he should not have, or failed to take into account considerations of which he ought to have taken, nor that his decision was plainly wrong. It is however our finding that we find no reason to interfere with the exercise of

discretion by the Judge as in our view, the same was exercised judiciously and in line with the parameters for the grant of said orders.

We are therefore satisfied that the trial Judge rightly, directed his mind to all the issues raised before him and arrived at the correct conclusion, by refusing to grant the discretionary orders sought. On our part, we see no basis to interfere or arrive at a different conclusion. We wish to add that it is not within our powers to substitute our discretion with that of the trial Judge. Our role is to determine whether the trial Judge exercised his discretion appropriately and in accordance with the threshold applicable in judicial decision making. We decline any invitation to whimsically interfere with the decision of the trial court; as no reasons was advanced and basis laid before us for us to do so..

We think we have said enough to demonstrate that the learned Judge properly appreciated the nature of the judicial review proceedings before him and the role of the court in evaluating and weighing the interests of the parties and the public's interests. He also correctly exercised his discretion in declining to grant orders of judicial review on the grounds that until the issue of validity of title was determined and declaratory orders made.

Accordingly, the appeal herein lacks merit and is hereby dismissed with costs to be borne by the appellant.

Dated and delivered at Nairobi this 26th day of August, 2019.

W. OUKO (P)

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JUDGE OF APPEAL

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R. N. NAMBUYE

JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR