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IMPACT OF THE JUDGEMENT IN PETITION NO. 54 OF 2015 DECLARING THE FORMS AND REGULATIONS PROMULGATED BY THE CABINET SECRETARY FOR LANDS AND PHYSICAL PLANNING INVALID



1.0 Introduction

The Land Registration Act (No. 3 of 2012) (hereinafter the “LRA”) was enacted in March, 2012 and came into effect on 2nd May, 2012. Section 110 of the LRA empowers the Cabinet Secretary to make regulations including forms to be used in connection with the LRA. In making such regulations, the LRA requires the Cabinet Secretary to take into account the advice of the National Land Commission and to have the regulations tabled before Parliament for approval.

2.0 Promulgation of Regulations and Forms

The Cabinet Secretary through Legal Notice Nos. 104/2014, 112/2014, 116/2014 and 156/2014 gazetted the forms of Lease and Certificates of Title pursuant to Section 110 of the LRA. The said forms of Lease and Title have been adopted and used by the Ministry of Lands in the registration of interests in Land.

3.0 Petition Number 54 of 2015 Seeking the Annulment of the Regulations and Forms Noted in Number 2.0 Above

On 16th February, 2015, Anthony Otiende Otiende filed a petition in the Constitutional and Human Rights Division of the High Court (Petition Number 54 of 2015) seeking inter alia a declaration that the forms promulgated by the Cabinet Secretary without taking into account

the advice of the National Lands Commission and without the necessary parliamentary approval are null and void.

The Cabinet Secretary in response to the petition, stated that the National Land Commission had no role to play in the day to day or issue by issue participation in the land registration process. The Cabinet Secretary did not however address the issue of failure to table the forms before Parliament for approval as mandated under the LRA.

4.0 Judgement in the Petition

The Judge held that where statute confers power upon the Executive to legislate, then the manner and form provided for the making of such subsidiary legislation has to be complied with. Section 110 of the LRA which empowered the Cabinet Secretary to make the subsidiary legislation promulgating the prescribed forms also required the Cabinet Secretary to take into account the advice of the National Land Commission and to have the forms tabled before Parliament for approval. Additionally, the Statutory Instruments Act (No. 23 of 2013) requires public participation in the enactment of subsidiary legislation by third parties other than Parliament and parliamentary approval for such legislation. The Cabinet Secretary failed to adhere to the statutory requirements in promulgating the forms namely; taking into account the advice of the National Land

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Commission, public participation and tabling the forms before Parliament for approval as such, the promulgated forms were held to be null and void.

The Judge however noted that an outright declaration of the forms as invalid would interrupt the registration of various titles and such a disruption would also cloud the land registration system with uncertainty. Furthermore, titles already issued under such forms would be placed in doubt.

The Judge held that the forms including leases, titles, grants and certificate of titles issued under the promulgated forms without the input of the National Land Commission, without public participation and without parliamentary approval are null and void. However in view of the impact of this order the declaration of invalidity was suspended for a period of 12 months to enable the Cabinet Secretary to engage the public, take into account the advice of the National Land Commission and seek parliamentary approval. If the Cabinet Secretary fails to comply with the statutory requirements within the 12 month suspension period, then all the forms promulgated shall stand null and void for all purposes on the 366th day following the judgement.

The judge also stated that the declaration of invalidity is not to operate retroactively.

5.0 Conclusion

The action of the judge in suspending the declaration of invalidity gives the Cabinet Secretary an opportunity to correct the errors that have occurred. However, we have a difficulty with the order that the declaration of invalidity does not operate retroactively. If the subsidiary legislation is unconstitutional, null and void then it was so since its inception. This part of the order will need interpretation.

In our opinion, the judgement does not affect interest in property conferred upon registration. The judgement only affects the form of leases, grants and titles issued under the promulgated forms and does not alter the sanctity and indefeasibility of title conferred in Sections 24 and 25 of the LRA.

We understand that the Cabinet Secretary is taking measures to comply with the judgement and is in the process of constituting a committee of members for purposes of ensuring that the forms meet the statutory requirements.

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