



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**JUDICIAL REVIEW APPLICATION NO. 4 OF 2015**

**IN THE MATTER OF AN APPLICATION FOR PREROGATIVE ORDER OF CERTIORARI**

AND

IN THE MATTER OF THE REPORT OF THE ORDINARY WORKS TOWN PLANNING MARKETS AND HOUSING COMMITTEE OF THE COUNTY COUNCIL OF KIRINYAGA

REPUBLIC .....  
APPLICANT

VERSUS

KIRINYAGA COUNTY COUNCIL )

CHAIRMAN OF THE ORDINARY WORKS TOWN

PLANNING MARKETS AND HOUSING COMMITTEE ) RESPONDENTS

PAUL MURIMI )

AND

PATRICK NJUE NGARI ..... EXPARTE APPLICANT

**JUDGMENT**

By a Notice of Motion dated 1<sup>st</sup> October 2012 and filed herein on the same date, the applicant seeks the following orders:-

1. ***An order of certiorari to remove into this Court and quash the report, findings, remarks and/or decision of Ordinary Works Town Planning Markets and Housing Committee of County Council of Kirinyaga made on 22<sup>nd</sup> June 2012 and its consequent adoption on 17<sup>th</sup> July 2012***
2. ***That the costs of this application be provided for.***

The application is supported by a statement as well as verifying affidavit.

Briefly, the applicant's case is that he is the legal owner of a plot No. 19 Githogondo which he purchased from one Elijah Wambugu Mwangi and for which he has been paying the rates, levies and charges as per the receipt annexed and marked as **PNN 1**. That indeed the 1<sup>st</sup> respondent Kirinyaga County did write to the Kirinyaga Trade

Development Joint Board confirming that the applicant was the registered legal owner of the said plot 19 Githogondo (hereinafter the plot) and allowing him to offer the plot as security for a loan of Ksh.

100,000/=. However the 3<sup>rd</sup> respondent filed a complaint with the County Council of Kirinyaga claiming that he had bought half a share of the plot from Elijah Wambugu Mwangi while the applicant bought the other half yet the applicant had bought all that comprised in the plot from Elijah Wambugu Mwangi at a consideration of Ksh. 215,000/= vide an agreement dated 17<sup>th</sup> December 2010 who then wrote to the County Council of Kirinyaga requesting it to transfer all that was comprised in the plot to the applicant – annexure **PNN 5** - and this was done by the County Council of Kirinyaga vide minute No. WTPM & H 58/2011 – annexure **PNN 1**. That notwithstanding, following the complaint by the 3<sup>rd</sup> respondent, the County Council of Kirinyaga Works Planning Market and Housing Committee, acting without jurisdiction and without giving him an opportunity to produce all the evidence, documentary and oral, amended their records to include the 3<sup>rd</sup> respondent as a co-owner of the plot subsequently dividing it into two namely; plot 19A and 19B. That action by the 2<sup>nd</sup> respondent was not only ultra vires but also in breach of the rules of natural justice hence this application.

The 1<sup>st</sup> respondent filed a replying affidavit through Arthur Kamau who deponed, inter alia, that upon receipt of a complaint from Paul Murimi the 3<sup>rd</sup> respondent claiming that he had bought half share of the plot from one Elijah Wambugu Mwangi in 2010, a meeting of the Ordinary Works Town Planning Markets and Housing Committee convened to resolve the dispute in the presence of both the applicant and the 3<sup>rd</sup> respondent and each was asked to provide proof of their claims to the plot but the applicant failed to produce proof that indeed he had bought the whole plot as opposed to a share of it nor even the sale agreement between him and Elijah Wambugu Mwangi. On the other hand, the 3<sup>rd</sup> respondent produced a sale agreement between himself and Elijah Wambugu Mwangi. That the Council followed the rules of natural justice and accorded the applicant an opportunity to substantiate his claim which he failed to do and therefore his application should be dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

The 3<sup>rd</sup> respondent did not file any response though the record shows that he was served both with the Notice of Motion and the Hearing Notice but failed to attend Court.

Submissions have been filed both by the applicant himself (although the firm of Ngigi Gichoya Advocates filed a Notice of Appointment on his behalf on 28<sup>th</sup> May 2015) and by the firm of Wakini Kiarie Advocates for the 1<sup>st</sup> respondent.

I have considered the application, the statement and the verifying affidavit together with the annexures thereto, the replying affidavit of the 1<sup>st</sup> respondent and the submissions by the applicant and counsel for the 1<sup>st</sup> respondent.

This is a Judicial Review application and in order to succeed, the applicant has to show that the decision 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. Irrationality is when there is such gross un-reasonableness in the decision taken or act done that no reasonable authority addressing itself to the fact and the law before it would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards. Procedural impropriety is when there is a failure to act fairly on the part of the decision making authority. Unfairness may be in the non-observance of the rules of natural justice – see: 1. **PASTOLI VS KABALE DISTRICT LOCAL GOVERNMENT COUNCIL AND OTHERS (2008) 2 E.A 300**

### **3. AN APPLICATION BY BUKOBA GYMKHANA CLUB 1963 E.A 478.**

It must also be remembered that the rules of natural justice apply to administrative bodies where their action affects the rights of others. Further, under **Article 47(1) of the Constitution**, it is provided as follows:-

***“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair”***

Judicial Review is concerned with the decision making process and not with the merit of the decision. In the case of **MUNICIPAL COUNCIL OF MOMBASA VS REPUBLIC AND UMOJA CONSULTANTS LTD COURT OF APPEAL CIVIL APPEAL NO. 185 of 2001**, the Court described this duty as follows:-

***“The Court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the powers, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision-maker take into account relevant matters or did he take into account irrelevant matters?”***

Lastly, as was observed by **W.R. WADE AND C.F FORSYTH** in their text **ADMINISTRATIVE LAW 10<sup>th</sup> Edition 2009 at page 437**, where an oral hearing has been given, it has been laid down that a tribunal must:-

- (a) Collect all relevant evidence which a party wishes to submit***
- (b) Inform every party of all the evidence to be taken into account whether derived from another party or independently***
- (c) Allow witnesses to be questioned and***
- (d) Allow comment on the evidence and argument on the whole case.***

Guided by the above principles, and as rightly submitted by the counsel for the 1<sup>st</sup> respondent, there is no doubt in my mind that the 1<sup>st</sup> respondent through its Committee, had the jurisdiction to entertain the complaint brought forth by the 3<sup>rd</sup> respondent with regard to the plot.

This is based on the fact that the plot is within its jurisdiction and it is indeed its mandate to lease out plots to individuals and approve transfer of plots between buyers and sellers which therefore necessitates resolving any dispute that may arise from such transaction.

Did the 1<sup>st</sup> respondent in the exercise of its jurisdiction in resolving the dispute between the applicant and the 3<sup>rd</sup> respondent over the plot observe the rules of natural justice, fairness or was its conduct irrational, unreasonable and illegal? That is the issue for determination by this Court.

The applicant said he was not given an opportunity to produce both oral and documentary evidence when the County Council of

Kirinyaga Works Planning Markets and Housing Committee summoned him to a meeting on 22<sup>nd</sup> June 2012 when it arrived at the decision to sub-divide the plot equally between him and the 3<sup>rd</sup> respondent. It is clear from the text by **WADE & FORSYTH** (supra) that having summoned the parties to a hearing, the Committee should at least have given each an opportunity to adduce whatever evidence they needed to in support of their respective cases. I have looked at the minutes of the Kirinyaga Works Town Planning Markets and Housing Committee of 22<sup>nd</sup> June 2012 (annexture PNN 7). It is clear from the said minutes that the applicant informed the Committee that he bought the plot from Elijah Wambugu and even quoted the reference letter approving the transfer. The minutes read as follows:-

***“Patrick in his response said that Elijah approached him because he wanted to dispose his village plot at Githogondo and he became interested. They both went to the Council office and filed forms for transfer of the whole plot. The transfer was approved by the Council in his favour vide WTPM & H 58/2011. In 2012, he found Paul Murimi claiming part of the plot. They tried their fruitless (sic) efforts to look for Elijah Wambugu in order to solve their case but it was in vain”***

However, in its decision subject of this application, the said Committee made the following observations:-

***“During the interview, the Committee noted that Patrick Njue had no sale agreement during the interview regarding the village plot in question. This made it difficult to prove whether he purchased the whole plot or half share of the same”***

The Committee then proceeded to sub-divide the said plot equally between the applicant and the 3<sup>rd</sup> respondent. Clearly, this demonstrated both unfairness and bias on the part of the Committee.

Firstly, no attempt was made to give the applicant an opportunity to produce the agreement or any other evidence he may have wished. It is not even clear whether he was asked to bring along documentary evidence in support of his claim. The meeting itself was held at 10.30 a.m. on 22<sup>nd</sup> June 2012 and ended on the same day and no prejudice would have been occasioned to anybody if the applicant had been afforded an opportunity to bring his evidence particularly the agreement which appears to have been the main basis upon which the Committee found it ***“difficult to prove whether he had purchased the whole plot or half share of the same”***.

The Committee was clearly unfair in its conduct with regard to the applicant because among the documents that the applicant has produced and served upon the 1<sup>st</sup> respondent is a letter signed by Elijah Wambugu Mwangi dated 17<sup>th</sup> December 2010 addressed to the 1<sup>st</sup> respondent advising it that he had sold the plot to the applicant and advising the 1<sup>st</sup> respondent to transfer it to the applicant. Nowhere in the replying affidavit of Arthur Kamau sworn on behalf of the 1<sup>st</sup> respondent has it been suggested that that letter (annexture PNN 5) was never received at their offices. Therefore, not only did the 1<sup>st</sup> respondent not give the applicant an opportunity to present his documentary evidence but it was clearly determined to ignore such evidence which was within its possession. The 1<sup>st</sup> respondent cannot in the circumstances, escape a claim of bias against the applicant.

But that is not all. By a letter dated 22<sup>nd</sup> September 2011, (annexture PNN 3), the 1<sup>st</sup> respondent wrote to the Kirinyaga Trade Development Joint Board in the following terms:-

***“Dear Sir***

**LETTER OF UNDERTAKING**

***This is to confirm that plot No. 19 Githogondo County Council Markert in Kirinyaga District was/were allocated to M/S PATRICK NJUE NGARI of I.D 1911394. The said plot(s) is/are built with permanent materials. We further confirm that this/these plot(s) is/are un-surveyed and lease has not been issued.***

***We have no objection to the said PATRICK NJUE NGARI offering the plot(s) as a security for a loan amount of Ksh. 100,000 plus interest”.***

Again the authenticity of that letter written by the 1<sup>st</sup> respondent itself

has not been disputed. It is strange, therefore, that having recognized the applicant’s ownership of the plot in dispute and even given an undertaking that it could be used as security for a loan, the 1<sup>st</sup> respondent’s Committee could again claim that the applicant had not proved his ownership of the plot.

That smacks of obvious irrationality and impropriety on the part of the 1<sup>st</sup> respondent which, as was held in the cases of **PASTOLI** (supra) and other cases cited above, is a ground upon which a decision can be impugned in Judicial Review proceedings. Irrationality was defined in the **PASTOLI** case (supra) as

***“..... Such gross unreasonableness in the decision taken or act done that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision”***

In the case of **COUNCIL OF CIVIL SERVICE UNION** (supra), Lord Diplock, referring to the **Wednesbury** un-reasonableness as discussed in **ASSOCIATED PROVINCIAL PICTURE HOUSES LTD VS WEDNESBURY CORPORATION (1948) L.K.B 223** described an irrational decision as one which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Therefore, having recognized the applicant’s ownership of the plot through its own letter of undertaking, it was an act of irrationality on the part of the 1<sup>st</sup> respondent, which opens its decision for review, for it to turn around again and claim that the applicant had not established whether he owned the whole or half of the plot. That was clearly illogical and indeed demonstrates mala fides on the part of the 1<sup>st</sup> respondent which calls for the quashing by the writ of certiorari the decision of the 1<sup>st</sup> respondent’s Committee made on 22<sup>nd</sup> June 2012 and adopted on 17<sup>th</sup> July 2012.

Ultimately therefore, having considered all the evidence herein, I am satisfied that the applicant is entitled to the orders sought in his Notice of Motion dated 1<sup>st</sup> October 2012 and call into this Court and quash the said decision. The applicant is also entitled to costs to be borne by the 1<sup>st</sup> respondent.

**B.N. OLAO**

**JUDGE**

**26<sup>TH</sup> OCTOBER, 2015**

26/10/2015

Before

B.N. Olao – Judge

Gichia – CC

Mr. Ngigi for Applicant – present

Mr. Kiarie for 1<sup>st</sup> & 2<sup>nd</sup> Respondents – absent

COURT: Judgment delivered this 26<sup>th</sup> day of October, 2015 in open Court

Mr. Ngigi for Applicant present

Mr. Kiarie for 1<sup>st</sup> & 2<sup>nd</sup> Respondents absent.

Right of appeal explained.

**B.N. OLAO**

**JUDGE**

**26<sup>TH</sup> OCTOBER, 2015**