



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

JUDICIAL REVIEW NO. 21 OF 2013

IN THE MATTER OF A NOTICE TO DEMOLISH

DEVELOPMENTS ON PLOT NO.702 AT GILGIL SITE AND SERVICE

AND

**IN THE MATTER OF CANCELLATION OF OFFICIAL TRANSFER RECORDS REGARDING
PROPERTY PLOT NO.702 GILGIL SITE AND SERVICE**

BETWEEN

VISIONS OF GLORY CHURCH.....APPLICANT

VERSUS

THE CLERK TO THE COUNTY COUNCIL

OF NAKURU.....RESPONDENT

AND

FRANCIS KOGIE KIRAGU.....INTERESTED PARTY

RULING

Introduction

1. Pursuant to the leave granted on **8th November, 2013** allowing the subject, **Visions of Glory Church**, to apply for orders of certiorari and prohibition; the subject filed the notice of motion dated **17th May, 2013** seeking an order of certiorari to bring to this court and quash the notice dated **21st March, 2013** issued by the respondent (the Clerk to the County Council of Nakuru) and served upon the subject on **29th April, 2013** requiring the subject to demolish the building and developments presently standing on plot No.702 Gilgil Site and Service (hereinafter referred to as "the suit property"). The subject also sought an order of prohibition to prohibit the respondent from deleting/altering the records of the suit property by removing its name therefrom.

Background and pleadings

2. The application is premised on the grounds that the notice dated **21st March, 2013** requiring the subject to demolish its developments on the suit property is not justifiable as the subject is the lawful proprietor of the suit property and that the threat by the respondent to delete its name from its

records is unlawful.

3. The motion is supported by the affidavit of the subject's pastor, **James Gichuru Apollo**, sworn on **9th May, 2013** in which it is deposed that sometime in January 2012 the subject mandated the deponent to purchase the suit property on its behalf. On 18th January, 2012 the deponent conducted a search at the offices of the respondent (read the County Council of Nakuru) concerning the ownership of the suit property. The search revealed that the property was owned by **Francis Kogie Kiragu**. With that information, and based on the certificate of search issued to him by the officers of the respondent confirming that fact, the subject entered into an agreement of sale with the said Francis Kogie Kiragu and paid him the agreed consideration of Kshs.280,000/=.

4. Thereafter, the council records were altered to reflect the subject as the owner of the suit property. Upon concluding the said transaction, the subject took possession of the property and began developing it while awaiting the processing of a title deed by the Commissioner of Lands.

5. It is the subject's case that **in March 2013**, the respondent started alleging that the suit property belonged to a Francis Kogie Kiragu whose identity is different from the one it dealt with. On the basis of that allegation/ contention, the respondent ordered the subject to demolish its assets on the suit property and threatened to reverse the records in respect of the suit property from the subject to the said Francis Kogie Kiragu.

6. In opposition to the application, the legal officer of the respondent, **Anthony Owour**, swore the replying affidavit filed on **27th January, 2014** wherein he admits that the respondent sent a letter to the subject asking it to halt construction of structures on the suit property. He explains that the said letter was sent to the subject after it came to the attention of the respondent that the subject was not the proprietor of the suit property.

7. Concerning the said letter, Mr. Owour, contends that it was not the final decision of the respondent as the letter indicated that if the subject had any grievances against the notice he was free to appeal. Further that, if the applicant chose to appeal against the notice, he was to present his documents to the council to help it in getting an amicable solution to the dispute.

8. It is contended that, in breach of the terms of the impugned notice, the subject failed to make any complaints against the notice and instead decided to move to court seeking the orders cited herein above.

9. Since the remedy of judicial review is concerned with the decision making process and not the merits of the decision, Mr. Owour argues that for the current application to succeed, the subject has to show that the decision or action complained of was tainted with illegality, irrationality and/ or procedural impropriety.

10. In that regard, the deponent contends that the subject has failed to show how if at all there was breach of the rules of natural justice and/ or any other legal requirements that would have entitled it to seek an order of judicial review.

11. With regard to the impugned notice, it is reiterated that the respondent had provided the subject with a mechanism which it was supposed to use if it felt aggrieved by the notice. Since the subject failed to follow the said mechanism before moving to court, its decision to move to court before exhausting the dispute resolution mechanism notified in the impugned notice is said to be premature as the notice to demolish was not the final decision of the council.

12. In view of the foregoing, Mr.Owour urges the court to stay the matter in order to allow the respondent's arbitration committee to try and resolve the dispute concerning the suit property amicably.

Submissions

13. On **8th November, 2013** when the application came up for hearing, directions were given to the effect that the application be disposed off by way of written submissions. Subsequently, the advocate for the subject and that of the respondent filed submissions which I have read and considered. The interested party, even though served did not file any response j papers.
14. In the submissions filed on behalf of the subject, a brief explanation of how the subject gained interest in the suit property is given. In this regard it is reiterated that the subject bought the suit property from its original owner, Francis Kogie Kiragu (the interested party herein); that the parties to the agreement for the sale of the suit property (being the subject's representative and the property's previous owner (the interested party herein) presented themselves to the respondent to seek consent to transfer the property and that after their application for consent to transfer was approved by the respondent, the property was transferred to the subject. As proof of that fact, the subject explains that after the transaction was completed it received a demand for payment of property rates in respect of the suit property.
15. The foregoing notwithstanding, on **21st March, 2013** the respondent sent the subject the impugned notice contesting the transaction executed between itself and the interested party.
16. Contending that the person it dealt with was the same person challenging the transaction they had entered into, the subject explains that after the respondent failed to give a satisfactory explanation about the circumstances leading to the issuance of the impugned notice the subject filed the instant case to quash the notice and prohibit the respondent from acting on it.
17. Although the respondent, filed a reply to the application herein, it is contended that both the respondent and the interested party, even though served with the application, failed to respond to the respondent's grievances.
18. On behalf of the respondent, it is reiterated that the subject's application does not fall within the purview of judicial review. In this regard, it is submitted that the subject, if aggrieved by the notice, ought to have exhausted the dispute resolution mechanism provided in that notice before moving to court. Referring to the decision in **Elizabeth Nditi Njoroje vs. National Land Commission (2013) eKLR** where this court declined to quash a notice on the ground that it was not a decision on the impugned titles; and the case of **Council Of Civil Service Unions and Others v. Minister of Civil Service (1984) 3 ALL ER 935** where Lord Diplock suggested a threefold classification of the various grounds on which an administrative decision can be reviewed by a court, counsel for the respondent maintains that the subject has failed to show how, if at all, there was breach of natural justice as is required by law when invoking the court's judicial review jurisdiction.
19. Referring to the window for appeal provided in the impugned notice, counsel urges this court to stay this matter and allow the respondent's arbitration committee to handle the matter as it is the body that is well suited to handle the dispute. In alternative to the foregoing, counsel urges the court to dismiss the application with costs for having been filed prematurely.
20. In a rejoinder, counsel for the subject filed the supplementary submissions dated **12th February, 2014** and filed on **13th February, 2014**. In those submissions, it is contended that the subject filed the application herein because the respondent had already made a decision prejudicial to it. Counsel argues that through the impugned notice, the respondent had already reached a conclusion concerning the ownership of the suit property without giving the subject an opportunity to be heard.
21. On whether the respondent had made a decision capable of forming the basis of the current proceedings, by advising the subject to appeal against the decision if aggrieved, it is submitted that the respondent made it clear that a decision had already been made concerning the ownership of the suit property. Counsel maintained that the respondent had made a decision because an appeal can only be lodged against an existing decision.

22. With regard to the authorities cited in support of the respondent's case, it is submitted that contrary to the respondent's submissions, the authorities support the subject's case in that the respondent's decision to the effect that the suit property belonged to the interested party in the face of a transfer effected between the subject and the interested party and sanctioned by itself was irrational. It is also submitted that there was procedural impropriety in the procedure used by the respondent to arrive at the impugned decision.

Unlike in Elizabeth Nditi Njoroge vs. National Land Commission (2013) eKLR where a decision was yet to be made, counsel maintained that in the instant case, the respondent unprocedurally made the impugned decision and advised the subject to appeal if aggrieved.

Analysis and determination:

23. It is not in dispute that the respondent made the impugned decision without giving the subject an opportunity to be heard on the accusations leveled against it. Since a decision made without giving the person to be affected by it an opportunity to defend himself amounts to a breach of the rules of natural justice which demands that every person must be given a fair hearing, I hold the view that the such a breach would, in appropriate cases and circumstances, entitle an aggrieved party to apply for judicial review.

24. I say in the appropriate cases and circumstances because the remedy of judicial review is discretionary and pegged on existence of certain circumstances. For instance, the remedy can only be sought against public bodies for acting in excess of their powers, unlawfully, unreasonably and/ or in breach of the rules of natural justice. See Kenya National Examination Council V. Republic; Civil Appeal No. 266 of 1996.

25. Turning to the circumstances of this case, whereas the respondent made its initial decision without giving the subject an opportunity to be heard, it at the same time communicated its intention to provide the subject with an opportunity to be heard before it made its final decision.

A literal construction of the impugned notice leads one to the conclusion that the impugned notice would only form a ground of the threatened action if, and only if, the subject did not take the step notified therein, that is, lodge an appeal against the notice. The notice provided as follows:-

"RE: REMOVAL OF THE STRUCTURE CONSTRUCTED ON PLOT NO.702 RESIDENTIAL GILGIL SITE AND SERVICE

"It has been established that you have constructed on the above said plot which is legally belonging to Mr. Francis Kogie Kiragu of ID NO.124135 who has paid the necessary charges to council and also is in possession of all the relevant documents related to the plot.

You are therefore required that:

- (i) You remove the structure illegally constructed on the said plot whose owner has raised a complaint;**
- (ii) Since the plot was first allocated to Ujamaa General Stores, then transferred to Mr. Peter Ndegwa Nderitu ID NO.23117674/65, who later sold it to Mr. Francis Kogie Kiragu on 28th June, 1996, nobody has lodged formal complaint to the council.**

Therefore take NOTICE that unless you remove the said structure on the said plot within seven 7 days, from the date of this letter, the council shall remove the structure at your own risk and costs, in addition to the legal measures that shall provide.

In conclusion, you are advised to appeal against the decision in case you are aggrieved

by the notice on production of the verifying documents in your possession to prove ownership.

Anthony Owour

Ag. Legal Officer." (Emphasis supplied)

26. Although in the circumstances of this case, the decision by the respondent smirks of bad faith and unreasonableness on the part of respondent, I hold the view that, the subject ought to have exhausted the avenue provided in that notice for protecting its rights to the suit property, rather than taking the long and the tedious court process. Be that as it may, having found that the respondent had communicated a decision that threatened the subjects right to the suit property without according it an opportunity to defend itself, in the first instant, I hold the view that the subject had the right to choose whether to lodge the appeal as advised in the notice or to apply for judicial review of the said unprocedural decision, dubbed a notice.

27. The upshot of the foregoing is that the subject has made up a case for issuance of an order of certiorari to bring to this court and to quash the decision of the respondent communicated in the impugned notice and for an order of prohibition to prohibit the respondent from deleting and/ or altering the records of the suit property by removing the subjects name therefrom.

28. As concerns the costs of the application, since the subject chose to move to this court without exhausting the dispute resolution mechanism reserved in the impugned notice, it is not entitled to an order for costs.

Each party shall bear its own costs.

Dated, signed and delivered in open court this 10th day of December, 2014

L N WAITHAKA

JUDGE

PRESENT

Mr Aim for the respondents

N/A for the Applicant

N/A for the Interested Party.

Emmanuel Maelo: Court Assistant

L N WAITHAKA

JUDGE