



REPUBLIC OF KENYA

High Court at Kakamega

Constitutional Reference 5 of 2011

NELSON KORONGO 1ST APPLICANT

JUDITH OTAALO 2ND APPLICANT

JONAH OSIAKO 3RD APPLICANT

DANIEL AKALA..... 4TH APPLICANT

MARY WANJIKU 5TH APPLICANT

CLAIRE N. SIMIYU 6TH APPLICANT

KARIUKI GACHERA 7TH APPLICANT

JOHN LICHINA 8TH APPLICANT

V E R S U S

MUNICIPAL COUNCIL OF KAKAMEGA 1ST DEFENDANT

HON. ATTORNEY GENERAL 2ND DEFENDANT

AND

JAMES MACHARIA GITU INTERESTED PARTY

RULING

The applicants filed an originating summons on 18.11.2011 which was later amended and became a Constitutional Petition on 8.2.2012. The applicants also filed the Chamber Summons dated 18.11.2011 seeking orders of injunction against the respondents restraining them from evicting them or demolishing their kiosks or in any manner dealing with the suit property described as plot number **BLOCK B/253 KAKAMEGA TOWN**. The application is supported by the affidavit of the 1st applicant. The applicants also filed a second chamber summons dated 6.3.2012 under Article 35 of the Constitution seeking certain documents in form of minutes of the Municipal Council of Kakamega.

Mr. Anziya, counsel for the applicants relied on the application and submitted that the applicants have been in occupation of the suit property for over 20 years. They have kept on paying their rates to the 1st respondent. The plot was changed to someone else without notice. The applicants were entitled to a notice in writing. The applicants' rights as enshrined in Article 47 of the Constitution were violated. The applicants have been issued with an eviction notice by the 1st respondent. Counsel further submitted that Article 35 of the Constitution gives the applicants the right to seek information. The information being called for is within the domain of the 1st respondent.

Mr. Wafula, counsel for the 1st respondent submitted that the subject matter **BLOCK 1/253 KAKAMEGA MUNICIPALITY** was allocated to the interested party legally. The applicants were mere licensees who cannot demand proprietary rights. The applicants only used to pay rent for the kiosks allocated on the plot. They did not apply to be allocated the plot. The owner has an approved plan for the construction of a modern building. The new owner has a valid lease over the plot. With regard to the application for the supply of information, counsel submitted that some of the documents requested do not exist. Further the documents have been called for so as to boost the applicants' case.

Mr. Abok for the interested party submitted that the originating summons filed in court was not signed and should be struck out. There is no evidence that the applicants are the owners of the kiosks on the plot. The annexures purporting to show that the applicants have been in occupation for 20 years only date back to the years 2007 to 2009. The suit property was demarcated in 1978 and was transferred to **JOYCE KHAGALI** in 2007 who later sold to the interested party for valuable consideration.

The affidavit in support by the 1st applicant states that the applicants were issued with a fourteen (14) days' notice to vacate their kiosks. They learnt that a new owner was ready to develop the plot and Kenya Power and Lighting officers informed them that they were going to disconnect the power supply to their kiosks. If that is to happen they will suffer irreparable loss and their social and economic rights will be violated. In essence therefore, the applicants are seeking an order of injunction to restrain the defendants from evicting them from the suit land. That calls for the question as to whether the applicants have established a prima facie case with a probability of success against the defendants or whether the applicants will suffer irreparable loss or damage if the orders being sought are not granted.

The certificate of lease for plot number **KAKAMEGA/MUNICIPALITY BLOCK I/253** shows

that it is a 99 year lease from 1.3.1999. The lease was given to one **JOYCE KHAGALI GANIRA** in the year 2007. In the same year she sold her interest James Macharia Gitu for KShs.2.5 million. James Macharia was issued with a certificate of lease on 19.10.2011. James Macharia Gitu filed a replying affidavit sworn on the 8.12.2011 indicating that he is the owner of the suit property. He has paid all the Municipal rates and would like to develop the property. Similarly Newton Mkabue, she Town Clerk of the Municipal Council of Kakamega swore an affidavit on 9.1.2011 indicating that the applicants were licensed to operate kiosks on the suit land. This was a temporary arrangement and was terminable at the instance of the Council. The applicants cannot turn the license into ownership. They are not the ratable owners of the plot. The Council is at liberty to transfer the kiosks to other premises. The new town planning rules require that modern building be erected at the town.

From the pleadings herein it is established that the applicants have been operating kiosks on the suit land. It is not established that they have been in occupation for over 20 years. If that were to be so nothing would have been easier than for them to annex the initial letter that allocated them the plot as well as the old receipts for rent payment. The 1st respondent is the lawful owner of the land and is at liberty to lease it to any qualified applicant. Joyce Khagali Ganira was allocated the plot in 2007 and the applicants never contested her ownership. She was a lease but the ownership still remains with the 1st respondents. She transferred her interest to the interested party who intends to develop the property. The 1st respondent is empowered to call upon allottees of town plots to develop them. That is the only way the town can grow. It is not clear how the applicants could be in occupation for 20 years without seeking ownership of the property. They cannot claim adverse possession against the Municipal Council of Kakamega. Their entry was sanctioned by the Council and I do agree that they are licensees of the Council as opposed to lessees of the Council. They do not have any proprietary rights that can override the rights of the 1st respondent. As of now the registered lessee of the suit land is still **JAMES MACHARIA GITU** who is entitled to develop the land. The issue of violation of the applicants' rights shall be determined during the hearing of the petition.

In the end, I do find that the applicants have not established a prima facie case against the defendants as well as the interested party. The application dated 18.11.2011 is hereby dismissed with no orders as to cost.

The interim orders are hereby vacated.

Delivered, dated and signed at Kakamega this 7th day of February, 2013

SAID J. CHITEMBWE
J U D G E