



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

REVIEW CASE NO. 17 OF 2010.

**IN THE MATTER OF THE REGISTERED LAND ACT CAP 300 LAW REFORM ACT
SECTION 8.**

AND

IN THE MATTER OF TITLE NO. BUSIA MUNICIPALITY 7983/435

AND

**IN THE MATTER OF A RESOLUTION BY THE MUNICIPAL COUNCIL OF BUSIA
PURPORTING TO RIGHTS IN THE ABOVE TITLE AND RE-ALLOCATE THE SAME TO
THE INTERESTED PARTY.**

BETWEEN

REPUBLIC.....APPLICANT

AND

THE MUNICIPAL COUNCIL OF BUSIARESPONDENT

AND

MARTIN OKOTH ONYANGO.....INTERESTED PARTY

AND

DAVID OYE ASHIOYAEXPARTE APPLICANT

R U L I N G.

David Oye Ashioya, the applicant herein, through Ouma Okuta and associates advocates filed the notice of motion dated 10th December, 2010 for the following order:

“That an order of certiorari do and is hereby issued to call into the High Court quash the decision/minutes made by Municipal Council Town Planning and Works committee’s sitting on the 2nd day of June 2010 and adopted by the full Council meeting on 3rd June, 2010 and or any other date, as regards the suit title LR No. Busia Municipality 7983/435 ‘

The application is based on the following three grounds:

- a. "That the respondent cannot confer any rights to any party, and or the interested party over the suit title nor take away those conferred upon the exparte applicant by any virtue of registration of his title.
- b. That the Council in purporting confers title, rights and or privilegesto the interested party, to move into LR.NO. Busia Municipality 7983/435 to use, pay rates and carry out the development on the property, acted ultra vires its powers, if any.
- c. That the action of the respondent is null and void, as in any event the decision was made without notice to the exparte applicant hence denying him an opportunity to defend his rights of ownership over the property."

The application was filed together with a statement of facts and affidavit in verification of the statement which contains the following facts among others:

1. That the council's resolution purports to revoke the registered owners rights without giving him an opportunity to be heard on his proprietary rights.
2. That the council action was beyond its powers as it purports to confer rights to use, pay rates and develop the property to interested party while its registered in the names of exparte applicants.
3. That the council having earlier approved the transfer of the property to exparte applicant cannot purport to nullify the rights of the applicant over the same property.
4. That the action by the council is beyond its jurisdiction that against the principal of natural justice.

The application opposed by the respondent through the replying affidavit sworn by Jonathan Kerio, the Town clerk to the Municipal Council of Busia, sworn on 7th January, 2011 and filed through M/s BogonkoOtanga& company advocates in which he avers to the following among others:

1. That the respondent records show that plot No.7983/435 was bought by the interested party from the person to whom it had been originally allotted to.
2. That the respondents has no records to show that the property had been transferred to Michael OkumuOsinya.
3. That the respondent on discovering that both the interested party and the exparte applicant were paying rates for the same plot, initiated investigations through the Town Planning and Works Committee which on 2nd June, 2010 noted the interested party herein was the rightful owner.
4. That the Town Planning and Works Committee did not revoke the exparte applicant lease hold title but only rectified its record to allow the interested party to continue paying the rates as the circumstances leading to the registration of Michael OkumuOsinya as the proprietor of the said plot was investigated.
5. That the respondent acted within its powers as it could not continue receiving rates over the same plot from two parties.
6. That the exparte applicant is at liberty to present his ownership document to the relevant authorities for investigations and a decision of owners would be made thereafter.

The Counsel for the exparte applicant and the respondent consented

to file written submissions. The applicants counsel submissions dated 11th May, 2011 were filed on the same day while the respondents counsel submissions dated 8th June, 2011 were filed also on the same day.

The counsel for the applicant in his submissions faulted the respondent by holding a secret meeting held on 2nd June, 2010 relating to his property and failed to invite him. The respondent went ahead to make a resolution that had the effect of conferring rights of ownership among others to Martin OkothOnyango the interested party herein without giving the applicant the right to be heard which is against the cardinal rule of natural justice. He submitted that the respondents decision should be quashed and referred the court to the following cases:

- a. **Public procurement and Administration Board –vs- Ken Gen Nairobi HCC.Misc. No.53 of 2010 where Wendo J, had this to say.’’ The remedy of judicial review is radically different from those of review and appealthe courts exclusive concern is with the legality of the administrative act of decision in question.....as to whether it is or not, the action under attack is lawful and should be allowed to stand or be quashed.....’’.**
- b. **Republic –vs- the land dispute tribunal Githunguri and MungaiNjoroge Nairobi HC JR NO. 1 of 2007.**

The respondents counsel in his submissions more or less repeated the contents of the replying affidavit specifically that the council’s decision was within its powers as it has the responsibility of collecting rates. He emphasized that the decision of the Council did not amount to revoking the exparte applicant’s title as alleged and the application is therefore misconceived, without merit and abuse of the courts process and should be dismissed. He referred the court to case of **Murungi –vs- Attorney General(1990 – 1994) E.A 413** which held that certiorari deals with decisions already made so that when issued, an order of certiorari brings up into this court a decision of an inferior court, tribunal or a public authority to be quashed.

The court has considered the pleadings herein, supporting a replying affidavit and submissions by counsel and find as follows:

1. That the Respondent’s Town Planning and Works Committee meeting of 2nd June, 2010 in its minutes reference MCB/S, TPW/14/2010 discussed the issue of Busia Municipality plot 435 in relation to Ashioya& co. Advocates. The copy of the minutes attached to the affidavit of the applicant shows that one Luke L. Mukoyaread to the committee the applicants letter 11th December, 2009 raising some issues relating to payment of rates in respect of the plot in question. The committee discussed the matter and made two resolutions as herein below.:
 - a. ‘’ Mr Martin OkothOnyango be allowed to pay rates and carry out development on plot No.7983/435.
 - b. The allegation by M/S. Ashioya& co. advocates over the matter be rejected and that the acquisition of lease for plot No.7983/435 in the name of Michael OkumuOsinya be referred to the ant-corruption unit for investigations.’’
2. That the respondents have in their reply to the application indicated that the resolutions of the committee not in any way amount to revoking the title of the applicant and conferring it to any other party. Their decision only related to the person from whom rates would be received in relation to the plot No.7883/435 on discovering two parties including the applicant have been making payment of rates for the same property.
3. That the respondent was under the law within its powers to make decisions relating to payment of rates in respect of properties in the area of jurisdiction. Ordinarily, in situations where there exist disputes as to ownership of a specific property the law provides the procedures such parties would follow to resolve the issue of ownership.
4. That the court in exercising the special jurisdiction of judicial review over administrative bodies like the respondents town planning and works committee’s decision the is interested with the procedure followed in arriving at the decision and not the merits or otherwise of the decision.
5. That the applicant’s application appear to imply that the respondents decision of 2nd June, 2010 and confirmed by the full council on 3rd June, 2012 amounted to denying him title to plot No.7983/435 and awarding it to the interested party without giving him a hearing.This has been disputed by the respondent as shown above and the court agrees with the interpretation given to the resolution by the respondent that it does not amount to deciding the ownership of the plot with finality.The resolution of the respondent included a recommendation for further investigations with a view of establishing how Michael OkumuOsinya who transferred the property to the applicant got registered with the plot.
6. That during the hearing of the respondents committee’s on 2nd and 3rd June, 2010, the applicant and the interested parties were not present. However, the contents of a letter written by the

applicant reference OA/R/279/07 and dated 11th December, 2009 was brought to the attention of the committee members. The applicant cannot therefore say that he was prejudiced by not being personally present as none of the parties had actually been invited.

7. That from the foregoing, the court finds that the respondent followed the procedure in discussing the issue that had been presented through the letter written by the applicant referred to the letter written above. The respondent was within its powers to make a decision as to which party to receive rates from in respect of the property in question upon discovering two persons had been making payment so long as their decision does not amount to a final finding as to the ownership of the property in question.

From the foregoing, the court finds no fault in the procedure following by the respondent in discussing the issue relating to plot No.7983/435 and resolving the party from whom to receive the rates as investigations of ownership continued. It is upon their applicant to initiate the necessary steps or legal proceedings against the relevant parties to sort out the issue of ownership the property in view of the conflicting interest. This cannot be dealt with in any application for certiorari orders.

The application dated 10th December, 2010 is therefore dismissed with each party bearing its own cost. It is so ordered.

S. M. KIBUNJA,

JUDGE.

26TH JUNE, 2013.