



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISCELLANEOUS CIVIL CASE NO. 511 OF 2008**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW  
ORDERS OF PROHIBITION CERTIORARI  
AND**

**IN THE MATTER OF THE LOCAL GOVERNMENT ACT CAP 265**

**REPUBLIC .....APPLICANT**

**VERSUS**

**COUNTY COUNCIL OF OLKEJUADO.....1<sup>ST</sup>  
RESPONDENT**

**CLERK TO COUNTRY COUNCIL OF OLKEJUADO .....2<sup>ND</sup>  
RESPONDENT  
EX-PARTE**

**WILLAIM SAPURO KIMANAA.....1<sup>ST</sup>  
APPLICANT**

**CLERK TO COUNTRY COUNCIL OF OLKEJUADO.....2<sup>ND</sup>  
APPLICANT**

**FATUMA WASAMA .....3<sup>RD</sup>  
APPLICANT**

**HADIJA ABDI SAIDI .....4<sup>TH</sup>  
APPLICANT**

**JUDGEMENT**

The applicants herein are William Sapuro Kimanaa, Adam Galgalo Godana, Fatuma Wasama and Hadija Abdi Saidi and they appear in the order in which they are named. County Council of Olkejuado and the clerk to the County Council of Olkejuado are the 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively. From the court papers it is not clear whether the interested parties are 35 or 50. What is clear is that Lenana William Sapuro is the 1<sup>st</sup> interested party and he is represented by J Harrison Kinyanjui & Co.

Advocates. According to a notice of appointment of advocates dated 25<sup>th</sup> September, 2009 another 49 interested parties led by Peter Kairo Muruia are represented by M Korongo & Co Advocates. Through another notice of appointment of advocates dated 11<sup>th</sup> November, 2009 by the same law firm the number of the other interested parties had reduced from 49 to 34.

By way of a notice of motion dated 5<sup>th</sup> September, 2008 and filed in court on 9<sup>th</sup> September, 2008 the applicants seek orders as follows:-

- (a) **THAT this Honourable Court be pleased to issue a judicial Review order of Certiorari directed to the Respondents to bring to the High Court to be quashed the Respondents' decision and/or Public notice served upon the ex-parte applicants that they have encroached into Namanga open air market and Bus park dated 15<sup>th</sup> August, 2008.**
- (b) **THAT this Honourable Court be pleased to issue a judicial review order of Prohibition directed to the Respondents prohibiting them from acting upon, taking any action, demolishing the ex-parte Applicants buildings or doing anything in any manner to effect the public notice dated 15<sup>th</sup> August. 2008**
- (c) **THAT the costs of this application be provided for**

The application is supported by a statement of facts dated 21<sup>st</sup> August, 2008 and a supporting affidavit sworn on 21<sup>st</sup> August, 2008 by William Sapuro Kimanaa the 1<sup>st</sup> applicant.

The 1<sup>st</sup> applicant is the allottee of plots numbers 191 and 623 whereas the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> applicants are the allottees of plots numbers 1291,685 and 3 respectively. All the plots are in Namanga which falls under the jurisdiction of the respondents. Through an affidavit sworn on 27<sup>th</sup> May, 2009 the 1<sup>st</sup> interested party introduced himself as the son of the 1<sup>st</sup> applicant. He averred that he resides on plot No. 191 and he was therefore interested in the outcome of this case. There are no papers in the court file to show why the other interested parties wanted to be enjoined to this case. I will therefore proceed to make my decision on the papers placed before the court.

What has brought the applicants to court is a notice dated 15<sup>th</sup> August, 2008 issued by the 1<sup>st</sup> respondent. For the purpose of this judgement it is important to reproduce the notice as follows:-

**“PUBLIC NOTICE**  
**ENCROACHMENT ONTO NAMANGA OPEN – AIR MARKET AND BUS PARK IN**  
**PURSUANT OF:-**

**1) THE PHYSICAL PLANNING ACT (CAP 286)**

**2) THE LOCAL GOVERNMENT ACT (CAP 265,SECTION 166)**

**The County Council of Olkejuado wishes to inform all those who have encroached and illegally erected structures on the land earmarked for open-air market and bus-park within Namanga Township to remove all such structures within a period of fourteen (14) days from the date of this notice. Failure to this, the council will enter into the said land and demolish any standing structure(s) at the expense of the owner(s).”**

The notice is signed by Moses Semera for the clerk to council.

It is the applicants' case that the said notice targets their plots and is a disguised revocation notice. The applicants argue that before the issuance of the notice the respondents ought to have given them an audience. The applicants also argue that the issuance of the said notice is an abuse of power on the part of the respondents.

The respondents opposed the application through a replying affidavit sworn on 30<sup>th</sup> November, 2010 by Fredrick Ndede the 2<sup>nd</sup> respondent. In the said affidavit the respondents admit that the applicants were indeed allotted plots but they did not comply with the terms of allotment. The respondents aver that the applicants put up unapproved structures in an area earmarked for a public market and bus park. The respondents state that it was resolved in 2004 that all the squatters occupying public utility plots be evicted. It is the respondents case that the Council is statutorily vested with the power to prohibit and control the development and use of land within its area of jurisdiction in the interest of proper and orderly development.

In paragraph 18 of his affidavit the clerk to the County Council avers that:-

**“The 1<sup>st</sup> Respondent therefore is only protecting public utility plots, viz, the marked and bus park**

**which are very essential services to the township that have been encroached and the said exercise shall not involved cancellation of any allotments. Indeed, the area involved is as per the Physical Planning Development Plan .....**”

The respondents’ case is that since the decision to evict those who have encroached on public utility plots was made in 2003 and that particular decision has not been challenged then the court cannot grant the orders sought by the applicants. The respondents also argue that the applicants’ right to institute judicial review proceedings is statutory time barred. The respondents further argue that there was no need to give the applicants a hearing since the notice did not relate to their plots but related to public utility plots.

From the papers filed before the court, it is clear that the applicants are indeed allottees of certain plots in Namanga township. The respondents claim that the applicants have not complied with the conditions of allotment. To me that is not an issue for determination in this cause. After all the respondents have not issued notices to the applicants informing them that they intend to cancel the allotments because they have not complied with the conditions for such allotment. The issue to be addressed is whether the notice dated 15<sup>th</sup> August, 2008 affects the applicants’ plots and whether the applicants ought to have been given a hearing before the issuance of the notice.

There are issues raised by the respondents which I need to address before addressing the core issues. The respondents claim that the applicants’ case is statute barred because the decision to evict squatters from the public utility plots was made in 2003. The notice being challenged was issued on 15<sup>th</sup> August, 2008 and the applicants came to court on 26<sup>th</sup> August, 2008. The time they learned of the notice was on the date it became public knowledge. They therefore came to court within the time prescribed by the law. This argument by the respondents therefore fails.

Did the notice issued by the respondents affect the applicants’ plots? A plain reading of the said notice clearly shows that it was addressed to those who had encroached and illegally constructed structures on land earmarked for open-air market and bus park within Namanga Township. The applicants did not tell the court how they came to the conclusion that their plots were targeted by the said notice. Infact when highlighting submissions on 16<sup>th</sup> November, 2011 Mr. Ongegu for the applicants informed the court that the applicants plots were about 1 Km from the bus park and open air market. That means they are not the targets of the notice. It was the duty of the applicants to convince the court that the notice was aimed at them. The respondents have clearly told the court that the plots of the applicants are not affected by the notice. It follows therefore that the applicants need not have been given a hearing since they were not affected by the decision of the Council.

Looking at the evidence placed before the court, it is clear that the applicants have not satisfied the court that their plots are affected by the notice dated 15<sup>th</sup> August, 2008. They therefore have no business asking the court to quash the said notice. It is assumed that the respondents will not take this decision as authority to move against allottees of plots within Namanga Township. At the end of the day the applicants’ application is dismissed with costs to the respondents. The interested parties will meet their own costs.

Dated and signed at Nairobi this 1<sup>st</sup> day of February, 2012.

**W. K. KORIR**  
**JUDGE**