



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**Judicial Review 41 of 2011**

**REPUBLIC .....APPLICANT**

**VERSUS**

**THE TOWN CLERK CITY COUNCIL OF NAIROBI .....RESPONDENT**

**EX-PARTE**

**GATKIM ENTERPRISES LIMITED**

**JUDGEMENT**

This judgment is in respect of the notice of motion dated 5<sup>th</sup> August, 2011 in which the ex-parte applicant Gatkim Enterprises Limited seeks orders as follows:-

- 1. THAT this Honourable Court be pleased to issue an Order of Certiorari to remove into this Honourable Court and quash the decision of the Town Clerk, City Council of Nairobi in refusing to grant the Ex-parte Applicant the approval for Change of User over that property known as Land Reference Number 209/8274/172.**
- 2. THAT this Honourable Court be pleased to issue an Order of Mandamus compelling the Town clerk, City Council of Nairobi to issue the Ex-parte Applicant with a Certificate of Change of User over all that property known as Land Reference Number 209/8274/172.**
- 3. THAT this Honourable Court be pleased to issue an Order of Prohibition prohibiting the Town Clerk, City Council of Nairobi from interfering with the Ex-parte Applicant's Ownership, Possession and Development of the said property known as Land Reference Number 209/8274/172.**
- 4. THAT the costs of this application be provided for.**

The application is supported by the grounds on its face, the statutory statement filed on 8<sup>th</sup> April, 2011 and a verifying affidavit sworn by John Kiragu Gituku.

The Town Clerk, City Council of Nairobi who is the respondent in the matter opposed the application by way of a replying affidavit sworn on 14<sup>th</sup> November, 2012 by P T Odongo the respondent's Director of Physical Planning.

The applicant's case is that it is the registered owner of L.R. No. 209/8274/172 having bought the same

from George Ngacha Njiriri, Samwel Ngacha Njiriri, Susan Njoki Njiriri and Kellian Wanjiku Njiriri who had inherited it from their deceased father Paul Kabucho Njiriri. Thereafter the applicant formalized the transfer. After the applicant obtained title in its name, it applied to the respondent for change of user of the property from residential to commercial. It was instructed by the respondent to comply with certain procedures which it did. The proposed change of user did not receive any opposition from the public and the applicant was informed that the documents would be worked upon. The applicant's Managing Director one John Kiragu Gituku thereafter pursued the consent without success and on 29<sup>th</sup> October, 2010 he was verbally informed by one Tom Odongo that the land in question belonged to the City Council of Nairobi and had been designated as a parking space and as such no change of user would be granted to the applicant.

That is why the applicant has come to court to seek the orders already stated. The applicant's case is that the denial of change of user is a breach of the protection of right to property as provided by the Constitution. The applicant argues that the respondent's inaction is unlawful and amounts to gross abuse of office.

Through the replying affidavit the respondent first attacks the application on the ground that it is directed at the wrong person. It is the respondent's case that the Town Clerk of the City Council of Nairobi is not charged with the duty of granting development approvals and therefore the Director of Physical Planning who is charged with the responsibility ought to have been made the respondent. Secondly, the respondent argues that the applicant has not tendered any prove that it applied for development permission and complied with the requirements of the Physical Planning Act. Thirdly, the respondent argues that the applicant has not annexed the challenged decision and there is therefore no decision that has been made by the respondent to warrant the granting of judicial review remedies.

Looking at the evidence placed before the court I find that the issues for the determination by this court are:-

1. Whether these proceedings are proper.
2. Whether the respondent made a decision which can be subjected to judicial review orders.
3. If the answer to 2 is in the affirmative whether the applicant is entitled to the orders sought.
4. Who will meet the costs of these proceedings?

The first and second issues are related and I will address both of them at the same time. A town clerk is the chief executive and administrative officer of a given local authority and has the general responsibility of coordinating the whole of the work of the local authority-see Section 129 (1) of the Local Government Act, Cap 265 Laws of Kenya. The town clerk is thus responsible for the acts and omissions of all the officers in the local authority. The town clerk cannot run away from the decisions of the Director of Physical Planning. In my view, the applicant has named the correct respondent and its case is therefore proper.

The other issue is whether there is a decision capable of being quashed. The respondent argues that the applicant has not exhibited any decision that can be quashed. I find that this issue was addressed by Musinga, J in these proceedings in his ruling of 18<sup>th</sup> July, 2011 when he stated at Page 8 that:-

**“The applicant stated that the respondent failed to give any written explanation for refusal of its application. In the circumstances, the applicant cannot be faulted for failing to exhibit a copy of the decision sought to be quashed since the same was not availed to it.”**

The applicant's Managing Director in his affidavit averred that he was verbally informed by one Tom Odongo that the application could not be granted since the applicant's land had been set aside for use as parking space. I presume that the said Tom Odongo is one and the same person with P T Odongo who in the replying affidavit introduced himself as the Director of Physical Planning. If my presumption is

correct, then it is important to note that he did not deny uttering the said words to the applicant's Managing Director. In fact P T Odongo in his affidavit did not state that the applicant's land belongs to the City Council of Nairobi.

The respondent denied receiving an application for change of user from the applicant. This is strange because the applicant has clearly exhibited documents to show that it made the said application to the respondent. It paid Kshs.40, 300/= to the respondent so that its application could be processed. The applicant also exhibited a copy of the Standard newspaper of 13<sup>th</sup> August, 2010 in which the respondent published a public notice as follows:-

#### **“CHANGE OF USER**

**The owner of this plot L.R. No. 209/8274/172 situated on Outering Road Nairobi proposes change of user from Residential to commercial subject to approval by the CITY COUNCIL OF NAIROBI. Individuals, Institutions with objection to the proposal should submit the same in writing within fourteen days of the publication of this notice to:**

**The Town Clerk  
City Council of Nairobi  
P O Box 30075, Nairobi”**

The respondent cannot deny the obvious. It did receive the applicant's request and gave a response verbally as stated by the applicant's Managing Director.

The third issue is whether the applicant is deserving of the orders sought. The applicant who is a citizen of this county submitted itself to the respondent for administrative action. Instead of approving the application or denying the application with written reasons, one of the respondent's senior officers verbally put a claim to the applicant's title. It must be noted that the applicant purchased the plot and followed all the processes in transferring the plot to its name. If the respondent truly believed it owned the plot then it ought to have moved to court to establish its ownership. There is no evidence that it has done so. The other alternative was for the respondent to commence acquisition mechanism for public use of the plot. There is again no evidence to show that it has taken such action. I therefore agree with the applicant that the respondent's failure to make a decision and communicate the same in writing is an abuse of power. It is an act that this court frowns upon.

The decision of the respondent which was communicated to the applicant verbally was not based on any valid reason. The respondent has a duty to make and communicate in writing a decision on the application for change of user.

At the end of the day I grant the 1<sup>st</sup> prayer in the application so that the decision conveyed verbally is quashed. The making of the said decision falls squarely in the province of the respondent and does not lie with the court. The 2<sup>nd</sup> prayer is therefore amended so that an order of mandamus is issued directing the respondent to make a decision on the applicant's application for change of user within 30 days from the date of the delivery of this judgement. The 3<sup>rd</sup> prayer is superfluous since it is presumed that the City Council of Nairobi is a law abiding public entity which cannot take away a citizen's land without resorting to due process. I therefore decline to grant the 3<sup>rd</sup> prayer. This matter could not have reached this court had the respondent acted fairly and reasonably. This is one case where the applicant deserves costs. The applicant will therefore get costs from the respondent.

Dated and signed at Nairobi this 27<sup>th</sup> day of **September**, 2012

**W. K. KORIR, J**