



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CIVIL SUIT 54 OF 2012**

**THE TOWN COUNCIL OF NYANSIONGO ..... PLAINTIFF**

**-VERSUS-**

**HON. ATTORNEY GENERAL ..... DEFENDANT**

**RULING**

Through a Notice of Motion dated the 14th February, 2012, and brought under Order 40 rules (1) and (4) of the **Civil Procedure Rules** and section 3A of the **Civil Procedure Act**, the applicant moved this Honourable court under a certificate of urgency seeking *inter alia* the following orders:

- a. A temporary injunction do issue against the defendant/ respondent restraining him either by himself, his agents, servants and workers from interfering with parcel number 58 situate within the applicant's jurisdiction pending the hearing and determination of this application.*
- b. An order of permanent injunction restraining the Respondent from interfering with the suit property pending the hearing and determination of the suit.*

In the Supporting Affidavit sworn by one **Peter Mochama** the Town Clerk to the applicant herein, the applicant avers that it is within its jurisdiction to control development in the local authority area and that any person wishing to carry out development within the area ought to seek prior permission from the Clerk and that the defendant failed to do so.

It is the applicant's contention that under the **Physical Planning Act**, the parcel number 58 has been set aside for the development of a police station and that the physical development plan would have to be amended to allow for any other development. It is the applicant's further contention that the plot number 58 had been ear marked for the police and that the respondent failed to advise the relevant Ministries being the Ministry of Fisheries and Ministry of Livestock Development who have since 6<sup>th</sup> February, 2012 began putting up structures on the parcel of land.

It is also contended that the ministries have ignored the applicant's plan thus putting the existing plan into disarray. The applicant wants this court to stop the interference so as to preserve the existing development plan.

The matter was certified as urgent by **Sitati J.** on the 17<sup>th</sup> February, 2012 and ordered that the same be served upon the respondent. The application was thereafter set for hearing on the 29<sup>th</sup> February, 2012.

When the matter came up for hearing, **Mr. Gisemba** appeared for the applicant. There was no appearance from the respondent. No opposition was filed against the application and no appearance was made by the

respondent despite service being effected on it. The applicant told the court that there was an affidavit of service on record.

It is quite striking that the applicant elected not to have the ministries concerned enjoined as defendants herein. Section 12 (i) of the **Government Proceedings Act**, Cap 40 states:-

*i. Subject to the provisions of any other written law. Civil proceedings by or against the Government shall be instituted by or against the Attorney General as the case may be.*

However, as a matter of good practice and to properly meet the ends of justice, a public authority or officer against whom any order is directly sought ought to be enjoined as a party, to enable service of the documents filed, and also an opportunity to be heard or be properly represented. This is the essence of right to fair hearing that is succinctly enunciated under Article 50 of our Constitution.

In the case of **Mwongera Nkwaru v M'Linturi M'Libachi Meru HCCA 127 of 1999 (Unreported)**, **Justice Emukule** stated as follows:

*‘The principle of natural justice is posited in two propositions, hear the other party (audi alteram partem) and no man shall be condemned unheard ..... They connote that the court or adjudicating authority must act fairly in good faith, without bias, and in judicial temper, to give each party the opportunity of adequately stating his case and correcting or contradicting any relevant statement prejudicial to his case, and not to hear one side behind the back of the other. ...’*

Similarly, the Court of Appeal in the case of **Kiai Mbaki & Others v Gichuhi Macharia & Another Nairobi Civil Appeal No. 178 of 2002 (Unreported)** the Court stated:

*“The right to be heard is a valued right. It offends all notions of justice if the rights of the parties were to be prejudiced or affected without the party being afforded an opportunity to be heard”.*

In the circumstances therefore, I am unable to make a determination on the merits of the case in the absence of an opportunity first being given to the Ministries affected to present their case.

I hereby make an order that the applicant serves the affected Ministries and the Attorney General within 14 days for the application to proceed inter-partes.

**Ruling dated, signed and delivered at Kisii this 21<sup>st</sup> day of September, 2012.**

**R. LAGAT-KORIR**  
**JUDGE**

**In the presence of:**

..... for applicant

..... for respondent

..... court clerk

**R. LAGAT-KORIR**  
**JUDGE**