



JUDICIAL REVIEW

- ***Applicant has to demonstrate if his rights are threatened to be violated.***

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

JUDICIAL REVIEW 33 OF 2011

**PERIS NKUENE.....1ST EX PARTE
APPLICANT**

**NICKSON KIMATHI.....2ND EX PARTE
APPLICANT**

**PAUL KIREMA.....3RD EX PARTE
APPLICANT**

VERSUS

**COUNTY COUNCIL OF MERU
CENTRAL.....RESPONDENT**

RULING

The applicants filed an *ex parte* Chamber Summons dated 2nd June 2011 under order 53 rule 1 of the Civil Procedure Rules 2010 and under sections 8 and 9 of the Law Reform Act Cap 26. When this matter initially came before court, the applicants were ordered by the court to serve the respondents for the hearing of that Chamber Summons *inter partes*. Order 53 rule 1 (1) it is provided that a party ought to obtain the leave of the court to seek for judicial review orders in mandamus, prohibition and *certiorari*. Sub rule (2) of that order provides that such an application for leave to file for orders of judicial review shall be made *ex parte* before a judge. However, the proviso to sub rule (4) provides as follows:-

“Provided that where the circumstances so require, the judge may direct that the application be served

for hearing inter partes before grant of leave. Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days.”

The court exercised its discretion under that proviso and ordered the Chamber Summons dated 2nd June 2011 be heard *inter partes* rather than *ex parte*. The applicants by that Chamber Summons seek leave to apply for an order of prohibition to prohibit the respondent from demolishing the applicants' structure on plot number 57 situated at Mitunguu Market. A party who seeks for judicial review orders does so because he feels that the exercise of a public power by a public body is unlawful because it violates his rights. It follows that the party approaching the court must have sufficient interest in the matter to which the application relates. Plot number 57 was allocated by the government on behalf of the County Council to Peris P. Nkuene Benson and Nickson Kimathi Benson of Box 3 Meru. Those two are the 1st and 2nd applicants in this action. The 3rd applicant is not one of the allottees of that plot. It is therefore not clear what interests the 3rd applicant has over plot 57. Even though he does not demonstrate that right in this cause, he is the one that swore the verifying affidavit in this matter. For that reason alone, that the verifying affidavit was sworn by a person who has no interest in that plot, the Chamber Summons will fail. The background upon which the applicants seek leave is that they were allocated that plot on 6th July 1999. On being allocated, they began to operate a business of timber on that plot. Later, they erected a pit latrine thereon. That from the date of the allocation of that plot to them, they have paid all the requisite rates to the respondent. That although all the while from 1999 the plot had been private land, on 27th May 2011 the area councilor James M'Itonga Miriaga acting as an agent of the respondent threatened in public to pull down the applicants' structures on that plot. On 31st May 2011 that the councilor in the company of the chairman of Mitunguu Market directed the public service vehicles to begin to operate from that plot. They, in other words, designated that plot to be a public service terminus. The deponent of the verifying affidavit further stated that unless the respondent is stopped it will proceed to put into effect its threats and thereby give the impression that the plot is public land. The deponent of the verifying affidavit further stated that there is a suit before the Principal Magistrate Court Nkubu being Civil Case No. 32 of 2011. In that case, the respondents herein have sued all the applicants and at the time when this matter was heard in this court, the Nkubu court had issued an *ex parte* injunction restraining the applicants from entering occupying, constructing a building or dealing in any manner with plot 57. The *inter partes* hearing of that Nkubu matter was due on 8th June 2011. However, before that date reached, these applicants filed on 2nd June 2011 the present action before this court. The clerk of the County Council of Meru the respondent herein, swore the affidavit in opposition to the orders sought by the applicants. He stated in his affidavit

- 4. That I believe that the applicants have not demonstrated any intention by the respondent to demolish the alleged applicants' structures on plot No 57 Mitunguu market.***
- 5. That the respondent is a creature of section 28 of the Local Government Act Cap 265. That further, section 28(3) provides that the respondent is a body corporate with perpetual succession.***
- 6. That the respondent makes its decisions through its various departmental committees and such decisions are ratified by the full council meetings after scrutiny and such decisions are then communicated to the relevant persons through my office.***
- 7. That the decisions of the respondent are to be found in the minutes of the departmental committees or the full council minutes.***
- 8. That to the best of my knowledge, there has not been made any decision to demolish any structures on plot No. 57 Mitunguu Market.***

9. That the only structure near plot No. 57 is a toilet constructed using timber and roofed with iron sheet.

10. That in response to paragraph 7 of the affidavit verifying the facts relied upon, I wish to reiterate that councilors of the respondent are elected by the area residents of the wards within the jurisdiction of the respondent.

11. That I further state that councilors are not agents of the county council, but are the elected representatives of the citizens living inwards within the jurisdiction of the respondent.

12. That there is no time the respondent has ever decided to demolish any structures on plot No 57 Mitunguu Market and as such I believe that the allegations that there is such a decision is meant to elicit sympathy from the Honourable court.

The applicants did not file nor did they seek leave to file a supplementary affidavit to controvert what was stated in that replying affidavit. That being so, the statements that are made in that replying affidavit can be taken to be the correct position. The respondent denied making a decision to demolish the applicants' structure. The respondents are of view that if there is any threatened demolition, it is by the area councilor and the market chairman in their personal capacity. There is no basis laid before this court to merit the orders that are sought by the applicants. This is because the applicants relied on a verifying affidavit by a person who has no interest in the plot No. 7 and also because the applicants have failed to show the respondent has made an order to demolish that plot. For the reasons given in this ruling the Chamber Summons dated 2nd June 2011 is dismissed with costs to the respondent.

Judgment by:-

**MARY KASANGO
JUDGE**

Dated, signed and delivered at Meru this 21st day of July 2011.

**LESIIT J.
JUDGE**