



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Miscellaneous Application 124 of 2007

IN THE MATTER OF AN APPLICATION FOR ORDERS IN THE NATURE OF JUDICIAL REVIEW

AND

IN THE MATTER OF THE RATING ACT AND THE LOCAL GOVERNMENT ACT

BETWEEN

REPUBLIC APPLICANT

VERSUS

THE MUNICIPAL COUNCIL OF LIMURU..... RESPONDENT

EX PARTE: DAVID NGURE KIENJEKU

JUDGMENT

David Ngure Kienjeku, the ex parte Applicant herein, claims to be the registered proprietor of all that parcel of land known as Limuru/Town/132 on a lease from of Municipal Council of Limuru, the Respondent herein. That with effect from 25/01/06 the lessor, the Council, refused to accept rents and site value rates from Ngure. Ngure is challenging the Council's decision. The Respondent has opposed the application.

The issues for consideration in this motion are:-

1. whether the Respondent's decision is unreasonable, oppressive and irrational.
2. Whether the Respondent has considered irrelevant matters

In the Notice of Motion dated 22/2/07, Ngure seeks one prayer of mandamus to compel the Council to accept site value rates and rents in respect of the suit property. Ngure has deponed that the Council is under a legal obligation to accept payments for site value rates in respect of the suit property as he had been paying the said rates since he purchased the plot. That the reason given by the Council for declining to accept the rents is that some other persons are claiming to

be the proprietors of the said land. He urged that the existence of other claimants over the suit land is no good reason for the Council to refuse to accept his rates and rents and that if this situation persists, he may be blamed for refusal to pay the rates and rents in respect of the suit land. Lucy Njoki Njage, the Town Clerk of the Council swore an affidavit in reply, in which she depones that their decision is merited, because in July 2006, the Council received a letter from Limuru Wendani Women Group, in which the Group complained that the suit property which was initially known as Plot 84 Rongai, was illegally transferred to Ngure. They confirmed from their records that the suit land had been allocated to the women group and as of 1988, the Council used to levy rent from the said women's Group (LMN 2 (a) and (b) a demand from the said group. The Respondent contends that they declined to accept rents since they were notified of the dispute by the Group. That vide circular No.10/2003, the Permanent Secretary Ministry of Local Government directed that all irregularly allocated plots within a councils jurisdiction be repossessed (LLM 3) and since the plot had been allocated to the Group, it may have been irregularly allocated and hence the Councils' decision to decline accepting payments of rents/rates. That apart from the dispute on the ownership of the property, some rate payers filed **HMISC. 239/06 REP V MUNICIPAL COUNCIL OF LIMURU** ex parte **JAMES WAIGANJO**, challenging a Valuation Roll for 2000 for failure to comply with the valuation for Renting Act Cap.266. Leave was granted and the same was to operate as stay of implementation of the Roll. As at the time this affidavit was sworn, the matter was still pending ruling of the court and that is another reason why the Respondent could not collect rates till that dispute is determined. That if the Respondent went ahead to collect rates, it would have been held to be in contempt of court order. The Council denied having acted unreasonably or irrationally or in an oppressive manner considering the pending dispute of ownership. It is denied that Ngure, has suffered any loss but is only apprehensive that the Council will levy penalties for non-payment of rates. That there is no such threat.

Under S 2 of the valuation for Rating Act, Cap 266 Laws of Kenya, a rateable owner has the meaning assigned to it by section 7. A rateable owner means the owner of a registered freehold or tenant for life or a lessee of that property holding under a registered lease for a definite period not less than 25 years or the natural life of the person. S 3 of the Rating Act Cap 267 imposes a duty on the Local Authority to levy rates. S 17 of the same Act empowers the authority to demand for outstanding rates from any person who has defaulted in payment. One of the duties of the Council under the Act is to levy rates and those rates are only levied against a rateable owner. The question is whether Ngure is a rateable owner. It is admitted the Ngure had been paying rates in respect of the disputed plot but that the Council only declined to accept the rates after the Council received a complaint from Limuru Wendani Women Group. The letter of complaint is dated 20/7/06. The Council checked and found that the said Women Group had been paying rates on the plot from 1977 till 1988. It is evident that this land was allocated to Ngure some time in 1987 as evidenced by his certificate of lease dated 13/10/87. The Council contends that though Ngure was in possession of the certificate of ownership, it could be subject to challenge and that is why the Council decided to stop accepting the rates. Since the law is that only rateable

owners, or a lessee for life, tenant for life, can pay rates, there being a dispute on ownership, I find that the Respondent acted reasonably in the circumstances in not recognizing any of the two as owners of the plot. What is unreasonable or irrational conduct? In **PROVINCIAL PICTURES LTD V WEDNESBURY (1948) 1 KB 223**, the court defined irrationality to mean pg.228

“For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call to his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to that he has to consider. If he does not obey these rules, he may truly be said to and often is said, to be acting unreasonably: Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority.”

Later in **COUNCIL OF CIVIL SERVICE UNIONS V MINISTER FOR CIVIL SERVICE (1985) IAC 374**, see pg.410 Lord Diplock defined irrationality as follows:-

“ ‘By irrationality’ I mean what can now be succinctly referred to as “Wednesbury unreasonableness” ..

It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer

In my considered view, the Council’s decision to decline to accept rates from Njure because of a dispute over ownership of land cannot be irrational or so unreasonable that no sensible man can arrive at it.

Though Njure has alleged that the decision to decline accepting rates is oppressive, it has not been demonstrated how it is oppressive. It would be deemed to be oppressive for example, if the Council had imposed high rates that are impossible to pay.

Njure seeks an order of mandamus. The scope of an order of mandamus is well defined by Halsbury’s Laws of England 4th Edition Vol. 5 pg.111 para 89, which was cited in **R V KENYA NATIONAL EXAMINATION COUNCIL ex parte GITHINJI CA 266/1996**. The Treatise Says:

“The order of mandamus is of a most extensive remedial nature and is, in form a command issuing from the High Court of Justice directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue to the end that justice may be done, in all cases where there is a specific legal right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”

Para 90

“The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”

The prayer sought cannot be granted because Njure wants the Council to perform its duty which is discretionary in nature, in a particular manner, that is, accept site value rates and rents. Acceptance of rates and rents is based on a condition that the property must be rateable. If the Council is not satisfied that Njure is a rateable owner or lessee, this

court would be usurping the Council's powers in allowing the prayer sought.

The Council declined to accept rates after there was a complaint from a Women's group that the land belonged to them thus raising a dispute over ownership of the said land. That dispute would have to be resolved first and the rateable owner determined before the Council can levy the rates. If the court were to grant this order, it would through the back door, be recognizing the applicant's right of ownership of the disputed plot yet this is not the forum to determine such rights. Lastly, there is a court order that barred the Council from collecting rates and the order sought would not be granted by this court in any event.

Lastly, Order 53 Rule 3 (2) Civil procedure Rules requires that an Applicant serve the Notice of Motion on all parties that may be affected by the court order sought. Order 53 Rule 3 (3) then mandates the applicant to file an affidavit of service showing all the parties served and the mode of service. The Council indicated to Ngure that there was another person interested in the suit land. This is evident from the letter of demand from C.A. Tom advocate dated 12/10/06. If any orders are to issue in this case, they will directly affect the Women Group who have claimed an interest in the land. The Group should have been served pursuant to Order 53 Rule 3 (2) Civil Procedure Rules. This rule embodies the tenets of natural justice that no person should be condemned unheard. Limuru Wendani Women Group is a party directly interested in the suit property, the subject of this application and should have been served. That provision is mandatory and failure to serve the Group renders this application fatally defective and the Notice of Motion should be struck out.

In conclusion, I find that apart from the application being incompetent, it is also lacking in merit and it is hereby dismissed with costs to the Respondent.

Dated and delivered at Nairobi this 26th day February of 2010.

R.P.V. WENDOH

JUDGE

Present:

Mr. Nzioki holding brief for Ngugi for Respondent

Muturi: Court Clerk