



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

Miscellaneous Civil Application 4 of 2009

SAMWEL KIPLIMO ROTICH.....APPLICANT

VERSUS

THE KIPKELION TOWN COUNCIL.....RESPONDENT

RULING

Judicial Review

I: Background

1. The applicant Samwel Kiplimo Rotich filed judicial review proceedings before this court seeking leave to quash decision of the respondent, the Kipkelion town council from demolishing structures on its business plot No. 7/3 unsurveyed.
2. The applicant was allocated the unsurveyed plot No. 7/3 to run a petrol station. A licence used to operate a business, was issued by the respondent. The respondent issued notice to demolish the premises.
3. The ex parte applicant was granted leave to file judicial review proceedings.
4. A subsequent suit 38/09 was stayed under section 6 of the civil procedure Act being identical to this application.

II: Preliminary Objection

5. The respondent disclosed as Kipkelion County Council filed a Preliminary Objection whereby they claimed that the said Kipkelion Town Council does not exist in law. That the correct entity to sue is the Town Council of Kipkelion.
6. The respondent relied on the case law of Nairobi city council v Chris Evarad & Others suing as the Lang'ata District Association.

Where Mwera J struck out the matter before him as having been brought against a non entity.

7. In reply the applicant relied on a fair ruling by various Judges that the said Judges held to the contrary.

8. In the case of Mwangi & 6 others -v- Wote Town Council KLR{E&L}616 Wendoh J under order 1 r

10 Civil procedure rule misdescription of parties can be cured by amendments.

9. The case of Paul Gathongo Richu-v- Nairobi City Council whereby the rationale of rendering contracts null and void due to misdescription of parties ought not to stand.

10. Spencon Kenya Ltd v Municipal council of Kericho HCC 727/99 also had arguments on similarities as did.

11. Mugoya construction and Engineering Ltd v Board of Trustees National Social Security Fund HCC.671/08.

12. The argument herein is quite simple. The local Government Act Cap 265 Laws of Kenya provides for the establishment of Nairobi Town or municipality councils. The official names as per their charter and gazetment would normally be “the City Council of... “Town Council of ...” etc. whether the description is Kericho town council as has been noted in this case it is therefore a non entity.

13. There are therefore a group of Judges who have held that there are misdescription of the City Council of an area, say Nairobi. Instead Nairobi City Council has been used, then the person sued is a non-entity. These Judges who have decided these are Lenaola J, Nambuye J, and Mwera J. The sets of Judges I am now given here decided otherwise.

14. There is a clear indication of conflicting decisions herein. I would be persuaded that this matter be placed before the court of appeal to determine the correct position.

15. It is important to note that a Judge of the High Court is not bound by a fellow judge’s decision save those decisions are precedents.

16. I hereby would find in my opinion, that courts are ruled by law. The charter of a municipality gives it, its exact description. Anything contrary to that, is a non entity.

17. I would accordingly uphold the Preliminary Objection and accordingly strike out the said proceedings.

DATED this 3rd day of August, 2009 at **KERICHO**

M.A.ANG’AWA

JUDGE

Advocates

E.M. Orina advocates instructed by the firm of M/S E.M. Orina & Co. advocates

for the exparte applicant – present

S.Ojienda advocate from M/S Ojienda & Co. advocates by M/S Ojienda &

Co. advocates for the Respondent – present