



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC CIV. APPLI. 17 OF 2007

REPUBLIC

VERSUS

THE CITY COUNCIL OF NAIROBI RESPONDENT

AND

WIDE REACH LIMITED INTERESTED PARTY

EX-PARTE

THE CHURCH COMMISSIONERS OF KENYA APPLICANT

JUDGMENT

The application dated 5th October, 2007, seeks an order of certiorari to remove into the High Court for purposes of it being quashed, the decision made by the City Council of Nairobi on 3rd October, 2006, approving the construction of a billboard on portion of LR 209/5775/Nairobi.

The factual background is that the Applicant surrendered a portion of its property known as LR 209/5775 Nairobi to the Commissioner of Lands. The surrendered portion is known as LR 209/5775. On the surrendered portion the Respondent Council has made a decision to allow the Interested Party to erect a billboard, pursuant to the provision of the Land Planning Act on the ground that the City Council owns all public land in Nairobi.

It has not been seriously disputed that the surrendered portion of the property was to be used solely for the construction of roads with the understanding that in the event that the construction of the road did not proceed, the Applicant would be at liberty to use the land for other purposes that it would deem fit. The Court has seen the relevant correspondent concerning the surrender.

The Court has taken into account all the affidavits file by all the parties including written submissions and the authorities relied on.

To my mind, the turning point is the issue of ownership of the surrendered portion. If the land in law belongs to the Applicant the City Council would have no business treaty if as owned by it and would have no right to allow the erection of a billboard. Similarly if the land belongs to the Respondent Council it would have the right to allow the intended user.

It is significant to note that LR 209/577511 was surrendered to the Commissioner of Lands and not to the City Council of Nairobi and it is also quite evident that exhibit EM2 at page 6 of the Applicants bundle of exhibits that as a condition of surrender the Commission of land stated expressly that if the land was not required for road purposes the Applicant would be free to consider other uses.

The second turning point is that since the order sought is certiorari, application for leave should have been made not later than six months after the date of the proceedings or such shorter period as may be prescribed by an Act ... see Order 53 rule 2. It is not in dispute that the decision under challenge was made on 3rd October, 2006 and the application for leave was not made until 4th October, 2007 one year later. Leave was granted on 5th October 2007. Objection has been taken that there cannot be any basis for granting the order of certiorari in view of the provisions of Rule 2 and also the Law Reform Act.

Turning to the first point this court is not confronted by any need to break any new ground. In terms of the relevant jurisdiction this is a well trodden area I find that the City Council has no right of ownership of the land and has not shown any such ownership in terms of the governing Act namely the registration of Titles Act. Since the Commissioner has not used the surrendered land for the intended purpose namely road construction the land in question is held in trust for the applicant and the Commissioner cannot use it for any other purpose. This is the holding in the following cases

ANIAZ MOHAMED v COMMISSIONER OF LANDS & ANOR HCCC 423 of 1998.

AND

JAMES JORAM NYAGA & ANOR v THE ATTORNEY GENERAL & ANOR 2007 e KLR and pages 6-21.

It follows therefore that the Respondent Council has no right to the land both under the registration of Lands Act and the Local Government Act cap 265. section 162 of the Local government act does not confer any right to the respondent to create any right on land held in trust by a third party making the Commissioner of Lands. The decision to allow the erection of a billboard was therefore made in excess of jurisdiction or without jurisdiction. The Respondent is a creature of statute and it has no heritage of rights except those conferred by statute. When it purports to act outside statute it acts ultra vires.

Moving on to the second issue I find that the six months limitation would not apply where the Respondent had no jurisdiction to make the challenged decision since there is no decision at all. It was a nullity from inception. There cannot run against a nullity. Ouster clauses such as rule 2 cannot apply in situations where there was no jurisdiction to make the challenged decision. Once a nullity always a nullity.

The second reason is that the challenged decision is not covered by rule 2 at all see the case of ***REPUBLIC v JUDICIAL COMMISSION OF INQUIRY INTO THE GOLDENBERG AFFAIR AND 30 OTHERS ex-parte HON MWALULU and others (2004) e KLR page 48-9.***

I accordingly order the removal to the court of the decision made by the Respondent on 3rd October, 2006 into this Court and the same is forthwith quashed by an order of certiorari issued in terms of prayer 1 of the application.

The City Council and the Interested Party to pay costs to the Applicant in equal shares.

DATED and delivered at Nairobi this 24th day of October, 2008.

J.G. NYAMU

JUDGE