



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS**

Civil Misc 174 of 2005

REPUBLIC.....APPLICANT

AND

TOWN CLERK, MUNICIPAL COUNCIL OF MACHAKOS.....RESPONDENT

AND

SHAMMY KYKEE YUSUF.....INTERESTED PARTY

AND

MARTHA KALOVA NZIVO.....EXPARTE APPLICANT

RULING

The application before the court is dated 14.10.05. It sought the Judicial Review Order of Mandamus to issue against the Machakos Municipal Council Clerk to compel him to grant the exparte applicant consent to transfer a property – L.R. No. Machakos Municipality/Block 1/458 in favour of the Interested Party- Shabby Kyee Yusuf.

The facts show that the Respondent council sent a letter to the applicant dated 11.2.05 denying the applicant the necessary consent to enable such a transfer. The reason then given is that there was a competing interest over the plot.

On the other hand, the applicant averred that the council has always received rents, rates and other arising charges or dues, which the applicant always paid. In addition, the applicant holds a 99 year lease from 1.8.2003 over the plot which is already developed. He is the sole proprietor under R.L.A and there is no court dispute to her knowledge, she claimed.

On the above facts Mr.Mung'ata representing the applicant sought the order of mandamus.

On the other hand, Mr.Musyoka for the Respondent, opposed the application, relying on the replying affidavit sworn by a Senior Officer of the Council – respondent, one Joseph Koech. The latter deponed that the Respondent Council indeed refused to issue the consent to transfer the subject plot of land to the applicant but gave the reason that the piece of land was being claimed by another or other persons who asserted to the Council, that they had bought the plot from the applicant.

I have carefully perused the material in this file. While the applicant denies other person's interests in

the ownership of the plot otherwise referred to as plot No. 43 –Muthini Site & Service Scheme or as Muthini Service Scheme Plot No. 167, Machakos Town, there are the following documents whose content make clear reference and claim to the plot of land now before this court. The documents include:-

- a) Copy of a letter written by one Mrs Prabha Shashikant Halji Maru to the respondent Council's Town Clerk dated 13.11.90, stating that the plot in question had been repurchased from one Martha Kalova at a price already paid in full to her. Photocopy of the sale and Assignment Agreement was attached.
- b) Copy of a letter from M/S Mule –Kavila & Company Advocates, acting on behalf of their client – Veronicah Nduku Mbithi, to Machakos Municipal Council, dated 18.10.2002. The letter claimed that Plot No. 167 (later corrected to read as No. 43) Muthini Service scheme, Machakos had been re-purchased from P.S.L. Maru by the said Veronica Nduku Mbithi and that the plot should not be allowed to be transferred to anybody else.
- c) Copy of a letter by Pius Nzioka Muia to the District Commissioner, Machakos, and dated 11.3.2003, requesting the District Commissioner not to allow a transfer of the plot No. 43 Muthini Estate because there was a pending High Court case concerning same. The letter was copied to the Town Clerk of the Respondent Council.
- d) A letter dated 30.1.2006 by Mule Kavila Advocates to the Deputy Registrar of this court stating that their client Veronicah Nduku Mbithi had bought Muthini Scheme Plot No. 167, had an interest to be joined as an Interested Party in this application. The letter also pointed out that Veronicah Nduku Mbithi was the Defendant in Mombasa High Court Civil Case No.85 of 2004 whose Judgement was expected in February,2006. It also pointed to Machakos High Court Civil Case No. 167 of 1997 as having developed into the above mentioned Mombasa suit where the parties were Prabha S.L. Maru vs Veronicah Mbithi Nduku.

All the above mentioned references appear to concern the same plot, the subject of this proceedings. The conclusion commending itself after perusal of the above documents is that the piece of land referred to herein as Muthini Site and Service Scheme No.43 Machakos, (sometimes as No.167 Machakos), was originally allocated to the applicant herein Martha Kalova Nzivo who sold it to Prabha S.L. Maru, who in turn sold it to Veronicah Nduku Mbithi.

There is evidence that purchase prices exchanged hands between the concerned parties. There is also conclusive evidence that Martha Kalova Nzivo, despite having originally sold the plot in question to Prabha S.L. Maru and having received full purchase price on written agreements, has lately purported to sell the same plot to one Shammy Kyee Yusuf at a price almost a thousand times the prices he received from the first purchaser, Prabha S.L. Maru.

The above was in my view the issue the Respondent had to contend with in deciding whether to give or withhold the consent to the latest sale. There is also the an unignoble issue that the matter had landed in the court, both in Machakos and later in Mombasa and that resolution was awaited.

Could the Respondent under these circumstances, have easily ignored these factors and proceeded to grant the consent sought by the applicant? Was it its public duty and obligation to ignore all the requests and warnings given to it not to grant the consent until the various interests are protected and issues answered?

In my view and finding the Respondent Council acted wisely not to immediately grant the consent sought by the applicant herein. Clearly the council would have trampled upon various parties' interests in giving the consent. Indeed the Council might possibly have offended the court before which a suit concerning the piece of land pended. In my further view, Land Control Boards of which the respondent was one, have a discretion to refuse granting consent to alienate a property where such would be contrary to law, Public policy or against other peoples interests.

I also observe that one party concerned in this tussle actually wrote to this court seeking to be joined

as an interested party. However, there is no indication that he was properly advised by the court as to what he should do to be joined. May be the party's advocates did not do enough to protect his client's interest. Otherwise the party should have been joined and should have had an opportunity to be ventilate his/her interest as authorized under Order 53 Rule 6 of the Civil procedure Rules.

It is my final view however that the applicant has failed to prove adequately that she is entitled to an order of Mandamus to direct the Respondent Council to issue the required clearance and consent to transfer the plot No. 43, Muthini Site and Service Scheme to Shammy Kyee Yusuf. Accordingly the applicants application is dismissed, with costs to the Respondent. Orders accordingly.

Dated and delivered at Machakos this **30th** day of **January, 2007**

D.A. ONYANCHA

JUDGE