



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Misc Appli 325 of 2005

REPUBLIC.....APPLICANT

VERSUS

COMMISSIONER OF LANDS

MUNICIPAL COUNCIL OF MOMBASA.....RESPONDENTS

AND

SALIM ALI TAIB

AHMED ALI TAIB

FAIZ ALI TAIB.....INTERESTED PARTIES

EX-PARTE APPLICANT.....NEW NYALI COMMUNITY GROUP

R U L I N G

The substantive matter before this court is the Notice of Motion dated 9th June 2005. In this motion, New Nyali Community Group, the exparte applicant herein, sought for the following orders against the Commissioner of Lands and the Municipal Council of Mombasa, hereinafter referred to as the 1st and 2nd Respondents respectively:

- (a) An order of certiorari to quash the decision of the 1st Respondent of 4/3/2005 of effecting a change of user of Plot No. MN/I/3229 from that of residential to a Mosque.
- (b) An order of Certiorari seeking to quash the decision of the 2nd Respondent of 4/3/2005 of approving building plans, change of user and developments in respect of Plot No. MN/I/3229.
- (c) An order of prohibition to prohibit the 1st Respondent from implementing and enforcing the decision complained of in (a) above.
- (d) An order of prohibition to prohibit the 2nd Respondent from implementing and enforcing the decision complained of in (b) above.
- (e) Costs of these proceedings.

When the motion came up for hearing, the 2nd Respondent raised a preliminary objection against the entire motion. The preliminary objection is expressed in a notice dated 1st August 2005. This is the subject matter of this ruling.

Mr. Khatib, learned advocate for the 2nd Respondent urged this court to strike out the motion on the ground that the *ex parte* applicant has no locus standi to file these proceedings. It is argued that the applicant is neither a body corporate nor an individual hence it has no legal standing. Secondly, it has also been argued that the decision sought to be impugned has not been filed hence there is nothing to quash. Mr. Nowrojee, learned advocate for Salim Ali Taib, Ahmed Ali Taib, Faiz Ali Taib the interested parties herein, supported the arguments advanced by Mr. Khatib in support of the preliminary objection. Mr. Nowrojee pointed out that the *ex parte* applicant brought these proceedings on behalf of other people without first seeking for leave to institute a representative action. The learned advocate further pointed out that the motion has no foundation to stand on in that the verifying affidavit of Hezron Awiti Bollo had been withdrawn hence the motion has no evidence to sustain it.

When faced with these preliminary issues Mr. Asige, learned advocate for the *ex parte* applicant urged this court to dismiss the preliminary objection. He pointed out that when this court granted leave it must have considered the issues now being raised by the Respondents. It is Mr. Asige's view that this court should not revisit the issues because it would be sitting as an appellate court on its own decision. Mr. Asige further pointed out that the *ex parte* applicant was a registered corporate body with the Ministry of Social Services hence it is capable of suing and being sued. It is also the argument of Mr. Asige, that given a chance at the hearing, the applicant will be able to explain the non-existence of decision now being sought to be quashed under order LIII rule 7 (1) of the Civil Procedure rules. Mr. Asige conceded that Mr. Hezron Bollo withdrew from these proceedings but he is of the view that he left the verifying affidavit he swore on behalf of the *ex parte* applicant intact.

I have carefully considered the able submissions raised and argued by the learned advocates appearing for the parties to these proceedings. Let me start by considering the preliminary raised by Mr. Asige regarding the jurisdiction of this court. Mr. Asige has claimed that this court should not entertain the preliminary points raised because the same issues were considered by this court at the time of granting leave. It is the submission of Mr. Asige that this court is now *fuctus officio* hence it will be sitting as an appellate on its own decision if it were to consider the preliminary objection. With respect to Mr. Asige, that is not the legal position. The position is that when this court hears an application for leave to institute judicial review proceedings like in this case, its decision remain basically provisional. This is so in view of the fact that only one side will have been heard and hence it is open for the issues raised *ex parte* to be canvassed at the hearing of the substantive motion or by a separate application to set aside the *ex parte* order. In this regard, the court of Appeal had an occasion to consider the issue in the case between **Aga Khan Education Service [Kenya] And Ali Seif and 2 others C.A. No. 257 2003** in which the court of appeal expressed itself as follows:

So once there is an arguable case, leave is to be granted and the court, at that stage, is not called upon to go into the matter in depth. Again, by their very nature ex parte orders are provisional and can be set aside by the judge who has granted it, of course if the judge is still available to do so. We think that if the judge who granted leave cannot sit, for one reason or the other, then another judge would be perfectly entitled to hear the application to set aside the grant for leave, for the jurisdiction is available to all judges of the superior court."

It is clear from the above statement of law that the preliminary objection argued by Mr. Asige must tumble. The same is dismissed. Having disposed of that issue, let me now consider the substance of the 2nd Respondent's preliminary points of law. The first issue is whether or not the applicant has the locus standi to institute these proceedings. It is admitted that New Nyali Community Group is a community based organization registered as a self help group by the Ministry of Social Services. It is not shown under what law the *ex parte* applicant was registered. Mr. Asige did not assist in this matter. It is not claimed whether or not the applicant is registered as a society under the Societies Act (Cap 108 Laws of Kenya

could be true that the members of New Nyali Community Group have been affected by the decisions of the Respondents, but the applicant has no capacity to sue or to be sued in law. In the circumstances I am convinced that this preliminary objection should be sustained. The preliminary point was properly raised in that the question as to sufficient interest ought not to be dealt with as a preliminary issue at the leave stage, but should be postponed until the full hearing of the substantive application which is the case in this matter.

The second preliminary issue raised is the effect that the decision sought to be quashed has not been annexed to the verifying affidavit as per the provisions of Order LIII rule 7(1) of the Civil Procedure Rules. I have examined the above provisions. It was incumbent upon the applicant to account for his failure to show a copy of the decision sought to be quashed before the hearing of the motion to the satisfaction of this court. There is no affidavit evidence to explain the reasons why copies of the decisions complained of have not been supplied. In the end I find this preliminary point as well founded hence it is upheld. This renders the entire motion fatally defective.

The other issue touches on the withdrawal of the verifying affidavit of Hezron Awiti Bollo. It is conceded that Mr. Hesron Awiti Bollo withdrew from these proceedings. The role he played was that he swore the verifying affidavit which formed the foundation of the motion. The verifying affidavit he swore in support of the motion clearly stated that he made the averments on his behalf and on behalf of the other members who appended their signatures to the authority they gave to him. That authority contains 16 names of people and the plots they reside on. In my view the fact that Mr. Hezron Awiti Bollo withdrew from these proceedings did not mean that the verifying affidavit went with him. Perhaps his individual averments will be disregarded but the other 16 members who gave him authority to depone will be called upon if need be to offer evidence as to the veracity of the facts deponed by Mr. Hezron Awiti Bollo. In view of my above finding I hold that this particular preliminary point must fail.

In the end and on the basis of the above reasons, the preliminary objection is hereby sustained. I hereby strike out the entire motion with costs to the 2nd Respondents and the interested parties.

Dated and delivered at Mombasa this 26th Day of February 2007.

J.K. SERGON

J U D G E

In open court in the presence of Mr. Khatib for 2nd Respondent, Mr. Nowrojee for interested parties and Mr. Mwakireti h/b for Mr. Asige for the applicant