



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
MISC CIVIL CASE 390 OF 1996
IN THE MATTER OF: AN APPLICATION BY HUBERT SEIFERT & OTHERS
FOR ORDERS OF MANDAMAS, PROHIBITION AND
CERTIORARI
AND
IN THE MATTER OF: LOCAL GOVERNMENT ACT CAP 265, LAWS OF
KENYA, THE MUNICIPAL COUNCIL OF MOMBASA
REPUBLICAPPLICANT
VERSUS
MUNICIPAL COUNCIL OF MOMBASA.....RESPONDENT
EXPARTE: HUBERT SEIFERT AND OTHERS

J U D G M E N T

Pursuant to the provisions of Order LIII rule 3 of the Civil Procedure Rules, Hubert Seifert, Kamau Njendu, Wangari Ndegwa, Moses Ochanda, Protas Mugao, Eliud T. Waiyaki, Lanchardt Danica and Precilla Zwickelbauer hereinafter referred to as the applicants took out a motion against the Municipal council of Mombasa hereinafter referred to as the 'Council'. On the 2nd day of September 1997, the motion was amended. In that amended Motion the applicants sought for two main prayers namely:

- (i) *An order of certiorari to remove into this court the decision of the Council dated 25th June 1996 approving the application for change of user in respect of Plot No. 3157/I/MN Nyali, Mombasa from one unit for residential house to twelve maisonettes and a mosque.*
- (ii) *An order for prohibition to prohibit the council from further proceeding under that decision dated 25th June 1996.*

When served with the motion, the council and the interested parties namely Mohamed Nazir Kassim Ali Kassam Ali Adman and Mohamed Adman opposed the same by filing replying affidavits and grounds of opposition.

The facts leading to the filing of the aforesaid are brief and largely uncontested. Sometimes in the year 1996 the interested parties applied to the council to approve their building plans in respect of one unit of a residential house on plot No. 3157/I/M.N. The council appears to have approved the application. Thereafter the interested parties applied to the council for a change of user so that they could build twelve maisonettes and a mosque on the said plot instead of a unit residential house. On the 17th day of 1996, the Council's Town planning and works sub-committee considered the application and recommended to the Town planning and works committee to approve the same. On 25th June 1996, the Council's Town Planning and Works Committee adopted the sub-committee's report and recommended to the full council to approve the change of user. When the applicants who are residents of Nyali Estate heard of this they felt aggrieved hence they were prompted to take out the aforesaid motion to frustrate the implementation of the decision.

It is the arguments of the applicants that they were entitled to be informed and consulted by the council before approving such an application. In that regard they accused the council of breaching the rules of natural justice. It is also alleged that the council failed to follow the provisions of rule 12(2) (b) (ii) of the Development and use of Land (Planning) Regulations 1961.

It is further the submission of the applicants that the interested parties and the council were obliged under the lease to obtain the consent of the Commissioner of Lands for any change of user. The council was also criticized for approving change of user in breach of the conditions set out in the lease and in excess of its jurisdiction. The council has been accused of usurping the powers of the Commissioner of Lands. The applicants alleged that the Council's decision will result in congestion in the area, increased noise and that the value of their properties will go down.

On their part the interested parties and the council urged this court to dismiss the motion on various grounds. It is the submission of the interested parties that the conditions set out in the lease are matters between the lessor and the lessee in which the applicants are not a party hence they have no locus standi to take out these proceedings. It is the argument of the interested parties that the council acted within its mandate given by its By-laws and the other written laws. The council through an affidavit sworn by its then town clerk Mr. Mutuma Angaine averred that it acted within the powers given to it under the Local Government Act. It is the submission of the council that it was not bound to consult the owners of the adjoining land before making such an approval. It is also the averment of the council that it had jurisdiction to consider and determine the application.

I have considered the rival submissions. I have also taken into account the material placed before this court. The issues which arose for my determination in this dispute are basically two in number:

First, is whether or not the council acted in excess and or without jurisdiction? Secondly, whether or not the council acted in breach of the rules of natural justice?

On the first issue, I have already stated the positions taken by each side in this matter. It is not denied that the council's planning and works committee recommended for approval the interested parties' application for change of user. Under regulation 4 of the Development and use of Land (Planning) Regulations 1961, the Minister Responsible for Physical Planning may by an order published in the Kenya Gazette constitute a local authority as an interim planning Authority for the area of that local authority's jurisdiction. There is no evidence that the Municipal Council of Mombasa was not made an interim planning authority. There is no doubt that an interim planning authority has the jurisdiction to consider applications in respect of change of user. In fact under section 5(1)(e) of the Physical Planning Act, Cap 286 Laws of Kenya, the law recognizes that Local authorities play a role in entertaining and determining such applications on the advise of the Director of Physical Planning. After a careful consideration of the matter I have come to the conclusion that the council acted within the law hence had jurisdiction to determine the interested parties' application. In fact under section 32(3) of the Physical Planning Act, the council is enjoined to consider such as application but must take into account the special conditions stipulated in the lease. In this case, it has been said that the council approved the application for change of user in breach of special conditions set out in the lease. Of course in this case the lease in respect of the land in dispute was not filed in court. This court can only assume that the lease

is similar to the leases in respect to the parcels of land in possession of the applicants. The physical planning Act has spelt out the remedies available to an aggrieved party. That obviously goes to the merits of the council's decision which is not the concern of public law which basically looks at the decision making process.

On the second issue, it has been stated that the council acted in breach of the rules of natural justice. It is the submission of the applicants that the council should have consulted them as the adjoining land owners before approving the interested parties' application for change of user. The decision now being contested is a recommendation made by the council's planning and works committee. In my mind I think the applicant's concerns appear to be genuine. The question is at what stage must they be consulted? I am assuming the recommendation by the council's planning and works committee is yet to be tabled before the full council's meeting for approval. It will be over indulging the applicants if they were to be heard at the committee stage. Under the physical planning Act any proposal for change of user must be published in the Kenya Gazette. In such a notice objections are invited and that is when the applicants will have a right of hearing. In my view the applicant's accusation is premature. I am satisfied that the council did not breach the rules of natural justice.

For the above reasons I hereby dismiss the motion with costs to the council and the interested parties.

Dated and delivered at Mombasa this 18th day of June 2007.

J.K. SERGON

J U D G E

In open court in the presence of Mr. Wameyo for the applicants

Kasmani for the 1st Interested Party

Khatib for the 2nd Interested Party

Khatib h/b for swaleh for Respondent.