REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Misc Civ Appli 119 of 2007

NELSON MUGUKU……..APPLICANT

Versus

KIKUYU TOWN COUNCIL……..RESPONDENT

JUDGMENT

This is an Application for Judicial Review. The ex parte Applicant, Nelson Muguku seeks the following orders against the Respondent, the Kikuyu Town Council:-

a) That an order of certiorari do issue to remove into the High Court and quash the decision of the Respondent to licence businesses on the road reserve surrounding plot No. 41, Kikuyu;

b) That an order of mandamus do issue compelling the Respondent to remove all the illegal structures erected on the road reserve and plot No. 41 Kikuyu;

c) That an order of prohibition do issue prohibiting the Respondents from allowing the Construction of or licensing any businesses to operate on the road reserve around plot No. 41 Kikuyu;

d) That the costs of this Application be provided for.

The Notice of Motion is supported by a Verifying and further Affidavit sworn by the Applicant on 10th February 2007 and 27th April 2007 respectively, and statement dated 16th February 2007. The Application was opposed and Muchangi A.W. the Town Clerk of Town Council of Kikuyu swore a Replying Affidavit dated 3rd April 2007 and skeleton arguments dated 18th April 2007.

The background to this case is that the Applicant is the registered owner of plot No. 41 Kikuyu, has constructed a storied building on it. The Applicant contends that the Respondent has licenced 3rd parties to construct unsightly Kiosks on the road reserve in front of the Applicant's building. That the Commissioner of Lands had indicated that the structures were on a road reserve, vide a letter of 2nd November 2000. That the environment of the area has been adversely affected by the Kiosks and despite requests made to the Respondent to remove the Kiosks, it has not been done. The Applicants therefore contends that the Respondent has acted outside the scope of his powers when he allowed people to operate kiosks on road reserves, that the exercise of the Respondents' powers is illegal and the Applicant stands to suffer irreparably.

The Applicants were represented by Mr. Waweru who submitted that though the Respondents are attempting to lay blame on the Commissioner of Lands, there is evidence to the effect that the Commissioner of Lands nullified the allocation done in respect of that land vide a letter Mk 1- 4 and that allocations were illegal. That the Respondent has the statutory power to issue licences for erection of buildings and whether or not one had title to land , the Respondent must give consent and issue a licence for change of user of the land. That being a neighbour of the road reserve, the Applicant should have been consulted before the issuance of the licences. Reliance was made on the case of **KUNSTE HOTEL LTD V R CA 234/95** where the court held that the decision making body in exercise of its discretion should hear all the affected parties. That the Applicant was not accorded that opportunity before licences for change of user was done.

In reply to the objection raised by the Respondent regarding the description of the Respondent as **KIKUYU TOWN COUNCIL"** instead of "**TOWN COUNCIL OF KIKUYU**" it was submitted that that description was not consistent with the Respondents pleadings and in any event the Respondents have been properly identified and no prejudice will be suffered by that mistake and the court was urged to do substantive justice. In support of that contention, the Applicant relied on the case of **LT COLONEL JOSEPH MWETERI IGWETA V MUKIRA M'ETHARE** where the court held that a party's right should not be defeated on mere technicalities in procedure.

In opposing the Application, Mr. Mumo urged that the Respondent is not properly described as the Council was created vide legal notice 78 of 1991 and the Respondent should be referred to as '**TOWN COUNCIL OF KIKUYU'**. That the Applicant knows the history of the plot in issue in that the plot is no longer a road reserve as it has been allocated and a reference number given to it as Kikuyu Township/305. The Respondent also submitted the map of the area. That the allotting authority is the Commissioner of Lands and the parties to whom the plot was allocated are known to the Applicant, as Edith Gathoni Kariuki, Hannah Murige and Samuel Njoroge as per NM 2 which is a letter written to the Allottees canceling the allotments. That blame is being shifted to the wrong party who is also aggrieved because its land has been allotted without its knowledge.

Further it is the Respondents contention that it is the Commissioner of Lands who brought about this situation at hand because the plot was allotted on 15th December 2000, the Registrar Index Map (Rot M) was awarded and the plot was given a number by the Government Officers. That the Commissioner of Lands and all those parties should have been brought into these proceedings to explain.

Lastly Counsel submitted that no licences have been issued to allottees because they would have been exhibited before court.

I have now considered all the Affidavits and annextures filed, the Statement of facts, skeleton submissions by both Counsel. The first issue I will deal with is whether the Respondent is properly described and hence properly before the court. Mr. Mumo referred the court to Legal Notice 78 of 1991 which created the Township of Kikuyu. At paragraph 4 thereof, there was established the Township of Kikuyu, and Town Council to be known as Town Council of Kikuyu. This was pursuant to Section 5 & 28 of the Local Government Act. Under S. 28(3) of the Local Government Act, every Town Council shall be a body corporate with perpetual succession and a common seal and shall be capable in law, of suing and being sued and acquiring, holding and alienating land.

In this case, the defendant should have been sued in the name of Town Council of Kikuyu. There is no doubt that the Counsel before court acts for the Town Council where the land is situate. There is no other such Council to confuse with. In my view, it would be splitting of hairs to lock out the Applicants on account of a misdescription of a name only. The Respondent is known and is before the court and this court will endeavour to do substantive justice by giving the parties equal opportunity to be heard. I wish to echo the Court of Appeal in decision the **Lt. Col. Igweta Case (Supra)** that it would not be possible in the year 2007, for a bona fide litigant before the High Court of Kenya to be defeated by mere technically, slip or mistake. I would hold that the Respondent would not suffer any prejudice by the misdescription.

It is the Applicants contention that the structures which are allegedly licenced by the Respondents have

been built on a road reserve and that is why an order of prohibition is sought. For the court to issue such an order, it would have to be established whether the plot in question is a road reserve. There is indeed evidence on record and which the Respondent does concede that the said land had been allotted to three identified individuals, Samuel Njoroge, Edith Gathoni and Hannah Muringe Munene as per the letter dated 21st April 2004, exhibited by the Applicants in the further Affidavit (NM 2). According to that letter, the allotment of the land was revoked. The Respondents were not aware of this letter (NM2). It is only the office of the Commissioner of Lands, Surveys and the parties named as allottees who can shed light on the current position of these plots. In Judicial Review, all parties that may be affected by an order of the court have to be served and an Affidavit of service filed in court before the hearing of the Notice of Motion. Order 53 R 3 (2) stipulates as follows; "**3 (2) The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer there of to do any action in relation to the proceedings or to quash them, or any order made therein, the Notice of Motion shall be served on the presiding officer of the court and on all parties to the proceedings**

(3) An Affidavit giving the names and addresses of and the place and date of service on all persons who have been served with the notice of motion, shall be filed before the Notice is set down for hearing, and if any person who ought to be served under the provisions of this rule has not been served, the Affidavit shall state that fact and the reason why service has not been effected, and the Affidavit shall be before the High Court on the hearing of the Motion."

In this case, if any of the orders sought were to be granted, they would affect the alleged 3 allottees who are not aware of these proceedings. Whether or not the allotment of land in question is proper or not, the rules of natural justice have to be observed and the court cannot therefore condemn these parties unheard. Similarly the Commissioner of Lands whose office allegedly made the allotment and alleged subsequent revocation should have been served to confirm the current position of the plot. It cannot be established on affidavit evidence who the owner of the plot is or whether it is a road reserve. Failure to serve all who may be affected by this court's orders in the parties a Judicial Review Application is fatal to the Applicant as they will be condemned unheard. Consequently, the court would not issue an order of prohibition without establishing the ownership of the land and without knowing its current status. The Applicant blames the Respondent for not hearing them before issuing of licences. He relied on the **KUNSTE CASE,** that every party that is affected should have been heard. In the same breadth, the other parties that may be affected by this court's orders should be given a fair hearing before this court. They may have a different story to tell in any event.

An order of certiorari is sought to quash the licences issued to the people who have constructed alleged illegal structures on the plot. I have seen the pictures of the site, (NM 4). Indeed if that is the situation on the land, the Applicants seem to have a genuine complaint of encroachment. But the Respondent deny issuing any licence. However, No licence allegedly issued to the owners of the kiosk or illegal structures were exhibited. Under order 53 Rule 7 (1) Civil Procedure Rule, it is mandatory that the order, warrant or record whose validity is challenged be lodged with the court, verified by an affidavit, before or at the hearing of the motion, failing which the Applicant has to give a satisfactory account to the court for none compliance.

The Rule reads:-

"**7 (1) in the case of an Application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the Applicant shall not question the validity of any order warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by Affidavit with the Registrar or accounts for his failure to do so to the satisfaction of the High Court."**

No licences were lodged with the court either before or at the hearing of the motion and so far no explanation has been given as to the failure to lodge a copy thereof. The court does not give orders in vain and it needs to see what is being challenged before an order of certiorari can issue.

In the case of **SAMSON KIREREA M'RUCHU V MINISTER FOR LANDS & SETTLEMENT CA 21/1999,** the Court of Appeal held that failure to lodge the decision or order sought to be quashed renders the motion a nullity. That would be the fate of this Motion and an order of certiorari would not issue.

Though it is the duty of the Respondent to remove illegal structures from the Town Council, the Applicants would need to establish that the structures are indeed illegal. As earlier observed, the licences alluded to were not exhibited in court. As noted above also, the court needs proof that the land on which the structures stand is indeed a road reserve. Lastly, I would observe that if indeed the Respondent is aware that they have not issued any licences to the kiosk owners, then the said structures which are kiosks that seem to be without plan should be removed. Further the finding of this court that parties who are likely to be affected by this court's orders and those who brought about this situation are not parties, ie the Commissioner of Lands, are not parties to this Application, the orders sought would not be granted as the court would be breaching the 'audi alteram partem' rule that no party should be condemned unheard and all the other reason given in this judgment. In the result, I find that this application is unmeritorious, it is hereby dismissed with the Applicant bearing the costs.

Dated and delivered this 3rd day of October 2007.

R.P.V. WENDOH

JUDGE

Read in the Presence of:-

Mr. Makori for the Applicant

Daniel: Court Clerk