



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Misc Appli 615 Of 2004

PETER NJUGUNA GITAU 1ST APPLICANT

JOHN MUCHERU KIBE 2ND APPLICANT

VERSUS

THE TOWN CLERK MUNICIPAL COUNCIL 1ST RESPONDENT

THE MUNICIPAL COUNCIL OF NAKURU 2ND RESPONDENT

RULING

By a notice of motion dated 17th December, 2004, the applicants sought the following orders:

- (a) An order of certiorari to remove to this court and quash the proceedings and the decision made by the Town Clerk of the Municipal Council of Nakuru on 17th November, 2004 cancelling or withdrawing single business permit no. 0000086/2004 for a car wash on plot number Nakuru/Municipality Block/10/2.***
- (b) An order of prohibition against the respondents to bar them from interfering with the applicants' business of car wash on account of lack of business permit pursuant to the respondents' decision of 17th November, 2004.***
- (c) An order of mandamus to compel respondents to reinstate or re-issue or renew the single business permit to the second applicant.***

The application was supported by an affidavit sworn by the first applicant, Peter Njuguna Gitau. He deposed that he was the registered owner of a parcel of land known as Nakuru/Municipality block 10/2 (hereinafter referred to as "***the suit premises***"). He stated that towards the end of 2003 the second respondent started interfering with his quiet enjoyment of the suit premises by encroaching into it and he filed a suit in the Chief Magistrate's court at Nakuru, CMCC No. 2673 of 2003 and obtained permanent orders restraining the second respondent from interfering with his property.

In January, 2004, the applicants decided to start a car wash business on the suit premises and applied to the second respondent for a single business permit and upon payment of the requisite fee the same was issued, permit no. 0000086/2004. The applicants complained that the respondents had been harassing, intimidating and frustrating them in the running of their business by arresting their employees and having them charged in various cases. On 13th October, 2004 the first respondents wrote to Nakuru water and Sanitation Company instructing it to disconnect water supply to the suit premises in an effort to further

frustrate the applicants' business.

On 17th November, 2004 the first respondent cancelled the applicants' single business permit and proceeded to arrest the applicants' employees. The applicants said that they were not consulted before the cancellation of their business permit and argued that the respondents' act was ultra vires the Local Government Act.

The respondents filed a replying affidavit sworn by Mr. Joseph W. Kangethe, the Town Clerk, Municipal Council of Nakuru. He stated that the injunction orders issued against the respondents in Nakuru CMCC 2673 of 2003 were never confirmed and they had since lapsed. He deposed that the second respondent issued a single business permit to the second applicant to operate a car wash business on the suit premises but the licence was specifically meant for informal sector, who were to be allocated open spaces. The deponent further stated that he had been advised by Engineering Works and Environment departments of the council that the suit premises were not appropriate for car wash business as it caused grave danger to other members of the public, road users and destruction to road surfaces and pavements and that was why the applicants' licence had been cancelled. The town clerk further deposed that the suit premises were irregularly allocated to the first applicant as the plot had been reserved as a public utility plot for the second respondent who was therefore entitled to regulate its use. He said that the second respondent's officers only arrested the applicants' employees after cancellation of the single business permit as there were no valid orders restraining the respondents from cancelling the business permit.

Having carefully considered the affidavits filed herein by both parties as well as the submissions made by counsel, it is not in dispute that the first applicant is the registered proprietor of the suit premises. The respondent argued that although the first applicant was the registered proprietor of the suit premises, the allocation of the same to him was done irregularly because the plot was intended to be for public utility. They relied on a memo dated 14th April, 2005 addressed to the Town Clerk by the Municipal Engineer.

No other evidence was adduced by the respondents to prove the said allegation. The Engineer went on to state the following as regards the suit premises:

“It is recommended for revocation of the allotment of the said property by the Report of the Commission of Inquiry into the illegal/irregular allocation of Public Land, volume 1 serial number 181 page 194. The council had the intention to commence with the said revocation by cancellation of the said permit first to deter any future development of the same.”

The respondents did not annex a copy of the aforesaid report to their affidavit. Even if there was a finding by the said commission of inquiry that the suit property was illegally or irregularly allocated to the first applicant, the respondents cannot resort to extra judicial means to take back the plot. They have to go to court, file the appropriate suit and advance their arguments therein and thereby grant the first applicant an opportunity to defend himself before the court makes its decision, one way or the other. If the recommendations of the said commission of inquiry were to be implemented in such a casual manner as suggested by the respondents herein and in the absence of an appropriate legal frame work, the sanctity of titles to land would be rendered meaningless and that can easily breed chaos. The suit premises may or may not have been set aside for public utility, that is a matter that requires appropriate determination but for now, the certificate of lease issued to the first applicant on 1st April, 2003 is conclusive evidence that it is a private property.

While the respondents are vested with power to cancel licences which the council has issued under the provisions of **section 165(1)(b)(iii) of the Local Government Act**, it can only do so for good reasons and in the appropriate manner but not maliciously or as a way of frustrating the licence holder so as to advance its intentions of acquiring the premises over which the licence applies as has clearly been demonstrated by the second respondents' Municipal Engineer, see annexure “JWK2” in the respondents' replying affidavit.

I find that the respondents acted in bad faith in cancelling single business permit no. 0000086 which it had issued to the second applicant. The respondents had all the particulars regarding the suit premises

and if it had any good reasons for refusing to issue the said permit, it should have done so rather than grant the permit and thereafter purport to cancel the same unlawfully.

I also note that on 27th January, 2004 the Chief Magistrate's court at Nakuru, CMCC No. 2673, issued an order to restrain the second respondent by itself, its servants and/or agents from interfering with the suit premises pending the hearing and determination of the suit. The court was not told whether that suit was heard and finalised. The court was also not told whether those orders were vacated. The order as extracted showed that the suit was mentioned on 27.1.2004 and the plaintiffs' advocate made submissions and thereafter the court issued a **permanent injunction** restraining the Municipal council of Nakuru from interfering with, alienating, erecting beacons and/or in any way dealing with the suit premises until the suit was heard and determined. The said order was served upon the council. While the propriety of the said order is questionable because a permanent injunction cannot be issued in an interlocutory application before a suit is heard and finally determined, there is an appropriate procedure for applying for discharge or variation or setting aside of an injunction order by any party dissatisfied with such an order, see **order XXXIX rule 4 of the Civil Procedure Rules**. A party cannot just decide that since an injunction order does not seem to be valid it will not obey it. The respondents should have moved to court to challenge the order instead of taking the law into their own hands. Two wrongs never make a right.

I therefore allow prayer one of the said application and hereby issue an order of certiorari to quash the decision of the respondents of cancelling single businesses permit no. 0000086 of 2004 for car wash business on the suit premises as the same was done in bad faith and in breach of a court order. I further issue an order of mandamus to compel the respondents to reinstate or re-issue a car wash permit to the applicants upon payment of the appropriate fees. If the respondents wish to have the first applicant's title to the suit premises cancelled or nullified for any good reason, it should, upon complying with the order herein, commence appropriate proceedings. The respondents will bear the costs of this application.

DATED AT NAKURU THIS 31st DAY Of March, 2006

D. MUSINGA

JUDGE

31/3/2006

Ruling delivered in open court in the presence of Mr. Mbech for the respondent and Mr. Mbutia holding brief for Mr. Ndubi for the applicant.

D. MUSINGA

JUDGE

31/3/2006