



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Misc. Appli. 1488 of 2005

REPUBLIC APPLICANT

VERSUS

KIAMBU LAND CONTROL BOARD RESPONDENT

EX-PARTE BURNABY PROPERTIES LIMITED

JUDGMENT

The application dated 21st October, 2003 seeks an order of mandamus to issue to compel the respondent to provide its decision in writing in the prescribed manner and signed by or on behalf of the chairman or other person presiding and if consent is refused the Tribunal to give reasons for the refusal.

Alternatively an order for certiorari to issue to remove into the High Court and to quash the decision of the Kiambu Land Control Board made on 4th August 2005.

In addition an order of mandamus do issue to compel the respondent to consider afresh the applicant's application for consent and grant consent to transfer without questioning the legality of the public auction held on 10th June, 2004 by Garam Investments in Nairobi on behalf of the principal Southern Credit Banking Corporation Ltd.

The grounds relied on are:-

- (1) That the respondent has abdicated a statutory duty imposed on it under s 16(1) and (2) of the Land Control Act Cap 302.
- (2) That the respondent has acted in excess of jurisdiction by taking into account irrelevant considerations.
- (3) That the respondent failed to take into account relevant considerations.
- (4) The respondent acted in excess of jurisdiction by adjudicating the legality of the public auction. The applicants relied on skeleton arguments filed on 3rd March 2006.

The respondent Board has filed an affidavit by one Michael N. Ole Tialal sworn on 1st March 2006.

The affidavit depones interalia:

- (1) That the Board met on 14th August, 2005

(2) That during the deliberations one Grace Wanjiku objected to the transaction being approved for consent and the consent was deferred.

(3) That one Esther Wakanyi Thande appeared and objected to the transaction on the strength of HCCC 302/2004 Milimani and that the case was pending in court hence the reason for refusal.

(4) That the reason for the refusal is indicated in MTN 3 which is a minute recording.

In addition the respondent relied on skeleton arguments filed on 6th March 2006.

I have considered the above and wish to point out as under.

a) HCCC 302/2004 Milimani is between TABERA CLEARING AGENCY Ltd and SOUTHERN CREDIT BANKING CORP. LTD and both objectors to the consent being granted were not parties to the suit nor is the applicant a party.

b) Whereas the decision as per the Boards minutes appearing as item 78 indicate that the matter was differed the decision as per MNT 73 – which is in a prescribed form is a refusal for the reasons indicated – i.e. the Owner Mrs Thande as the registered owner raised an objection and produced documents indicating that there is a case pending in court. It is important to add that the applicant as buyer at a public auction is not a party to the proceedings relied on by the Board. The Boards reliances on the case introduces an irrelevant consideration which is not set out in s 9 of the Land Control Act. The decision having been given in writing as required under s 16 the court is entitled to consider the relevancy of the reasons given.

The Boards decision whether it is postponement of the decision as alleged or refusing the application must be in the prescribed manner and in writing as per section 16 of the Act. It cannot therefore validly be contained in minutes as a decision.

It is clear to the court that the Board did act in excess of its jurisdiction by considering irrelevant considerations including the propriety of the sale as per the proceedings relied on. The Board ought to have considered only the relevant considerations as set out in s 9 of the Act and it did not do so.

In the result as this court has repeatedly held a statutory body has the duty to understand and give effect to the law empowering its decision making. A body entrusted with a discretion or power must direct itself properly in law. Where a body fails to do so it steps out of its jurisdiction. Thus, where it asks the wrong questions as in this case or where it takes into account matters which it was not directed by law (or Parliament) to take into account this Court would be perfectly entitled to intervene and quash the decision.

For the above reasons the Board's decision of 4/8/2005 is hereby forthwith removed into the High Court and quashed.

The court refuses to grant the mandamus as per prayer 1 because a decision of refusal was duly communicated to the Bank as a chargee pursuant to the statutory sale and also as a co-applicant.

The second order of mandamus is refused because this court's duty is to consider the decision making process of the challenged body and when it finds that the decision was not properly reached, it quashes the decision for the targeted body to make a fresh decision in accordance with the law. It is not the function of the court to make the decision on behalf of the targeted body which is what the order of mandamus seeks to do.

For the avoidance of doubt the decision of the Board dated 4th August, 2005 is forthwith removed into this court and quashed and as regards costs they shall follow the event – ie awarded to the applicant.

DATED and delivered at Nairobi this 24th day of March, 2006.

J G NYAMU

JUDGE