



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(Milimani Law courts)
MISC APPLI 576 OF 2005

REPUBLIC APPLICANT

V E R S U S

1. CLERK TO KANGEMA TOWN COUNCIL

(MR. MICHAEL NJOGU).....1st RESPONDENT

2. KANGEMA TOWN COUNCIL.....2nd RESPONDENT

EX-PARTE

- 1. KANGEMA JUA KALI ASSOCIATION**
- 2. CYRUS GACHOKA MUNYIRI**
- 3. JAMES MWANGI NJAU**

R U L I N G

By an application brought by Way of a Notice of Motion dated 11-05-2005, the ex-parte Applicants, Kangema Jua Kali Association acting by one Cyrus Gachoka Munyiri and James Mwangi Njau the Chairman and Secretary of the Kangema Jua Kali Association, a society registered under the Societies Act (Chapter 108, Laws of Kenya) (the Applicants) sought the orders following-

(1) An order of ***Mandamus*** to compel the Clerk to Kangema Town Council (***Mr. Michael Njogu***) to perform his statutory duties by convening, attending and advising the Town Planning Committee meeting of the Kangema Town Council to consider the application for development permission made to him on 14th December, 2004 for Plot No. Kangema Township/102 and to ensure that the Kangema Town Council approves or disapproves the said application for development permission expeditiously.

(2) An Order for ***prohibition*** to prevent the Town Clerk, the Chairman and members of the Kangema Town Council from acting contrary to the rules of natural justice in relation to the occupation, use and development of the plot Kangema Township/102 by the Applicants; to stop further harm, loss and damage to the Applicants herein,

(3) An order that the Applicants herein be **compensated** by the Respondents for trespass, loss of earnings and loss of benefits accruing to the development of the said plot; due to the negligence of the Respondents.

(4) An order that the **costs** of the application be paid by the Respondent.

The application was premised upon the grounds set out in the statutory statement dated and filed on 25-04-2005, and the Verifying Affidavit of James Mwangi Njau the 3rd Ex-parte Applicant; and Secretary of the Association.

The Ex-Parte Applicant's case is that the Association is the beneficial owner of the piece of land known as Kangema Township Plot No. 102 (the Plot). The Plot is held in the name of the Permanent Secretary to the Treasury (Incorporated) a body corporate established under Chapter 101 of the Laws of Kenya as Trustee for the Ministry of Research, Science and Technical Training Technology for Kangema Jua Kali Association of KANGEMA (the Association). The Plot is held on a lease for a term of 99 years by the County Council of Murang'a (Lessor) from 1-10-1996. The lease was issued on 26-11-1998 and the Certificate of Lease (Title Deed) was issued on 5-03-1999. It is clear from both the Lease, and the Certificate of the Lease that the Plot is held by the Permanent Secretary to the Treasury as trustee for the Ministry of Research Training Technology for Jua Kali Association of Kangema. There is therefore no doubt that the Association is the beneficiary of the Plot.

Under the terms of the Special Conditions attached to the Lease the Lessee, (in this case the Association) condition No. 2 in particular, was required to submit plans (including block plans) showing the position of buildings and systems of drainage for the disposal of sewage, surface and sullage water, drawing elevations and specifications of the buildings of the lessee (the Association) proposes to erect within 24 months of the actual registration of the lease, and complete erection of buildings subject to any amendment of drawing by the Local Authority.

Special conditions No. 4 enables the Lessee (the Association) to surrender the land if it is unable to complete the developments on the Plot. Special condition No. 5 restricts the use of the Plot to buildings to be used for **"inoffensive light industrial purposes with ancillary offices and stores."** ..

The Association's case is that it has attempted to comply with all these conditions and has in particular on its application of 14th December, 2004 sought permission from the Respondent to commence buildings on the Plot but that the Respondent has refused to convene a meeting as it is required to under the various provisions of the Local Government Act (Cap 265, Laws of Kenya) as well as the Physical Planning Act, 1996. For those reasons the Association prays for appropriate orders of mandamus to compel the Respondent to convene and consider the Association's application to commence the use of the Plot by members of the Association.

The Respondent (**Michael Njogu**), the Town Clerk of Kangema Town Council does not accept these contentions, that he has refused to convene a meeting to consider the Association's application for leave to commence use of the Plot, subject to approved building plans. Although he did not appear either in person or through an Advocate, the 1st Respondent by a Replying Affidavit sworn before one Kimwene Joshat, a Commissioner for Oaths of P. O. Box 8, Murang'a and filed on 8-04-2005 denies that the Respondents have declined to approve the Association's use of the Plot. This Respondent states on oath that the Respondent has always acted in good faith in respect of the application for the development of the site by the Applicant and has considered whether-

(a) Jua Kali activities are compatible with the surrounding institutions including Kangema Health Centre, Kangema Law Courts, the New KCC Milk Plant,

(b) the Construction and expansion of Kangema Police Station, construction of a bus park, extension of Kangema Health Centre and extension of Kangema Stadium in light of the new

Development Plan for the Township.

(c) a convenient and alternative site be allocated for Jua Kali Activities.

The Town Clerk has attached to his Replying Affidavit aforesaid copies of extracts of Minutes of the Meetings of the Town Council's **Special Works, Town Planning, Markets, Public Health, Housing and social services Committee held on 3-12-1999 (the 1st meeting) 11-05-2000, (the second meeting) and 26-07-2001 (the third meeting).**

At the 1st meeting under minute 38/99 item (ii) entitled **Jua Kali Site**, the Committee said:-

1. (ii) Jua Kali Site

The members recommended the site marked 4² which had been under the Ministry of Public Works to be reserved for the Jua Kali artisans instead of the area marked 1⁴ on the map plan.

In the 2nd meeting under Min. 2/2000: **PLAN FOR KANGEMI TOWN** the Committee minuted-

“The Plan for Kangema Town was not yet completed. The Chairman of the Town Planning and the Clerk had attended various meetings at Murang’a concerning the plan. There were a few amendments being made e.g the Jua Kali site to be moved and be conveniently sited near the Kangema Polytechnic and next to the light industrial plots. The Police Station to be extended towards Council (offices) to create enough room for the proposed bus park. The Hospital plot to be extended towards Kangema Law Courts area, stadium also be extended. Sewerage site was left aside for the Planner to decide where to conveniently plan for it. The Chairman informed the Committee that the departmental heads of the ministries affected by the Plan were all present and satisfied with the plan.”

Under Min. 33/2001 and under the heading **APPROVAL OF BUILDINGS PLANS**, “**Kangema Jua Kali Association**” the said special purposes committee said:-

“The Committee was informed the Association was insisting on putting up structures in a land which was next to the K.C.C. Milk Plant which was not earmarked for Jua Kali purposes.”

After deliberating on the issue it was resolved that-

“Any building should be to the earmarked alternative site next to the Ministry of Works Yard.”

What the Affidavit of the Town clerk does not cover is what has happened to the Association's application for development permission made to the Council on 14-12-2004. It does appear that no formal determination has been made on that application. It needs to be determined and responded to.

The Affidavit does not also refer to the previous proceedings in the subordinate court, namely Kangema Senior Resident Magistrate's Court Civil Case No. 37 of 1997, in which the Council sued the Association's Chief officers and which the council sought orders of injunction to restrain the Association's members from using the Plot the subject of those proceedings). The court dismissed the Council's suit with costs. The Association was in a sense successful but was still not allowed to erect any shed on the plot.

So the Association went to court again, in Murang'a Principal Magistrate Civil Case No. 36 of 2000 against the Council seeking orders in essence to restrain the Council from in any way from interfering with the Association's members use of the subject Plot. Although an interlocutory consent order was recorded on 15-02-2000 but issued on 19-02-2002 (nearly two years later) allowing the Association's members to work in the subject Plot, the Association's suit was per the subordinate court's judgment delivered on 1-10-2004, largely unsuccessful, as the court found as a matter of fact and law, that the Association's members ***conduct of constructing sheds without approval plans which they admit, was***

illegal.

It is this decision which led the Association to file an application for approval on 14-12-2004. It is this application which has prompted these proceedings because the Council or the Defendants have not convened a meeting of its Special Committee, to determine the Association's Application. It is also unfortunate that the Council's Clerk does not state in his Affidavit whether or not the Council's decisions or resolutions reached at the meetings first referred to above were ever communicated to the Association or its principal officers – Chairman, Secretary and Treasurer at their usual address for I suspect that if those decisions were communicated to the Association, the wishes of the Association's members for permission to erect artisan sheds on the subject Plot or alternative Plot, would have been determined and met long ago.

Be that as it may, it is clear to me that this is a very simple and clear matter. The Council is well aware of its own duties and powers under the Local Government Act, (Chapter 265 Laws of Kenya) which it must exercise in compliance also with the provisions of the Physical Planning Act, 1996. The Association's principal officers appear to be reasonably versed with these requirements, and I have no intention of citing here any proviso or section of those laws. The problem does not lie with lack of knowledge of either of those provisions or implementation thereof. The problem lies in the logistics of planning on the ground. Is it desirable to have an artisan's shed, blasting and beating away metals and car-body parts to shape, plane and nailing bits of wood into furniture, and associated works of painting or spraying, and all the attendant environmental noise and smell next to a Health Centre, a Milk Plant, or the Law Courts?. The Council has obviously considered these issues, and come to the conclusion that such a situation would be highly undesirable. The Council has, sensibly in my view, recommended that the artisans be allocated an alternative site next to a Polytechnic, and Public Works area whose activities are similar to and complement those planned by the artisans. I accept and agree with this recommendation.

Unfortunately the Association's answer has been unknown as there was no evidence that any offer of the new site has ever been communicated to them, or the Permanent Secretary to the Treasury (Incorporated) who holds title to the site Plot as trustee for the Ministry of Research Technology (for Jua Kali Association of Kangema). For this same reason the Association is also not aware of the acreage of the alternative site. These matters might have been clarified if the Council's Town Clerk had had the courtesy of attending court although it was clear that he had been consistently served with the various hearing dates.

The first Special Condition to the Lease of the subject site is that-

“no buildings shall be erected on the land nor shall additions or external alterations be made to any buildings otherwise than in conformity with plans and specifications previously approved in writing by the Local Authority. The Local Authority shall not give approval unless satisfied that the proposals are such as to develop the land adequately and satisfactorily.”

From the minutes of the various meetings held by the Council in consultation with other planning agencies of the Government, the Council came to the conclusion that ***it was*** not satisfied that the proposals (***of the Association***) are such as would be appropriate ***as to develop the land adequately and satisfactorily in the revised planning for the town's various required services***. The Council's Special Committee for planning therefore resolved to re-arrange the location of the various services in an environmentally friendly manner, provided that the Association does not lose its plot for that would be illegal unless due procedure for forfeiture was followed under the terms in which the plot was originally granted. I think that the decision taken by the Council in the interests of over-all proper, planning of the Town's services, is both commendable, proper, and environmentally sound.

To determine the matter, and to progress and secure both the interests of the Association's members as well as the wider public interest in the enlightened and proper town planning and observance of environmental requirements as echoed both in the Physical Planning Act 1996, the Local Government Act (aforesaid) and more particularly detailed in the Environment Management and Co-ordination Act 1999 (No. 8 of 1999), I propose to, and hereby make the following orders-

(1) I affirm and declare that the Town Council of Kangema has the legal duty and obligation to convene and hold a meeting of its appropriate Committee on town planning to consider, and determine the Association's Application dated 14-12-2004. The Town Clerk of Kangema Town Council shall therefore convene and have such meeting held within thirty (30) days of the date of this order;

((2) The Town Clerk shall communicate to the Association's Chairman at the Association's registered Postal Address as well as by recorded delivery, within seven (7) days of the date of such decision allocating the Association the new site described as marked 4² in the Council's meeting of 3-12-1999;

(3) The Council shall also resolve that the title to the new site shall be issued in the name of the Permanent Secretary to the Treasury Incorporated under Chapter 101, Laws of Kenya and on the same terms as per the lease relating to Kangema Title No. Township/102 issued on 26-11-1998 and to take effect either as of 1-10-1996 or the date of issue as the Commissioner of Lands shall decide or shall deem fit;

(4) Pending the issue of such title the Council shall clearly demarcate, and point out to the Association's elected officials (the Applicants herein) the beacons to the new site, AND shall allow the Association's members to take over the new site (60) days from the date hereof.

(5) The old title No. Kangema Township/102 shall be surrendered only upon the issue of the new title in terms stated in the old title save the commencement date if the Commissioner of Lands shall so decide;

The above orders do I believe meet principal prayers sought by the Applicants and the Response of the Respondents. I do not think that the Applicants are entitled to either prohibitory orders or orders for compensation. I do not therefore propose to make any such orders.

Finally on the issue of costs, I hold the view that if both the Chief Officers of the Association and Senior Officers of Kangema Town Council had not been ***engaged in dialogue of the deaf***, so much time (over nine years since the allocation of the site to the artisans by the Murang'a County Council) would not have been lost. Many young men and young women would have acquired both skills and experience which are incalculable in any monetary terms. I do not therefore propose to award costs to the Association, and each party will bear its own costs.

If for any reason either the Association or Council need clarification of the orders herein, either party shall be at liberty to apply.

There shall be orders accordingly.

Dated and delivered at Nairobi this 10th day of May, 2006.

ANYARA EMUKULE

JUDGE.