



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

**Misc Civ Appli 1732 of 2004**

**IN THE MATTER OF AN APPLICATION UNDER SECTION 84 OF THE CONSTITUTION OF KENYA FOR THE ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS**

**AND**

**IN THE MATTER OF LAND REFERENCE NO.7714/350 AND THE REGISTRATION OF TITLES ACT/CAP 281 OF THE LAWS OF KENYA**

**BETWEEN**

**JAMES JORAM NYAGA ..... 1<sup>ST</sup> APPLICANT**

**ABIJA JAMES NYAGA ..... 2<sup>ND</sup> APPLICANT**

***VERSUS***

**THE ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**THE MINISTER FOR PUBLIC WORKS AND HOUSING ..... RESPONDENT**

**RULING**

On 16<sup>th</sup> December, 2004 the applicants, James Joram Nyaga and Abija James Nyaga filed a Originating summons under section 70, 75 and 84 (6) of the Constitution of Kenya Rule 9 of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules, 2001 and all other enabling provisions of law).

The applicants seek the following declarations; that they are the owners of land parcel known as L.R. No.7741/350 and that the invasion of the said land by the Respondents and its employees and subsequent demolition of structures thereon was unlawful and unconstitutional and violated the applicants rights to property as protected by section 75 of the constitution.

The applicants seek the following orders;

- (a) The Respondents to effect a surrender of LR No.774/350 to the applicants unconditionally and to pay materials damages in terms of the value of the demolished structures on the said parcel of land in the sum of Kshs.2,700,000.00.
- (b) The Respondents pay compensatory damages for the loss of user of all that parcel of land known as LR No.7741/350 and for the inconvenience and anguish caused to the applicants for the unlawful, unconstitutional, whimsical and illegal conduct of ordering and effecting an invasion and demolition of the applicants property being LR No.7741/350 contrary to the applicants' rights under section 75 as read with section 70 of the constitution of Kenya.
- (8) In the alternative, an order does issue compelling the Respondent to give full compensation in value of LR No.7741/350 including developments undertaken thereon, to the applicants following the repossession of the LR No. 7741/350 by the 1<sup>st</sup> Respondent in the sum of kshs.6,200,000/=.
- (9) The Respondents do pay costs of this action.

This matter was supposed to come up for hearing on 15<sup>th</sup> May, 2006 but on 6<sup>th</sup> April, 2006 the Respondents had filed the chamber summons dated 31<sup>st</sup> February, 2006 seeking orders that the parties be allowed to adduce viva voce evidence; that the affidavits filed in this application be treated as pleadings and the costs of the application be provided for. The application was supported by the affidavit of Kyalo Mwaniki.

The grounds upon which this application is premised are that; the parties are not agreed on the correctness or sufficiency of the issues as set out in the Originating Summons, and supporting affidavit; that the issue before court is not strictly constitutional but ownership of land and that issue of ownership cannot be determined through affidavit evidence; That the applicant will not be prejudiced by adduction of viva voce evidence and that in the interest of justice, viva voce evidence be adduced. The application was expressed to have been brought under Rule 9 & 11 (a) of the Constitution of Kenya (Protection of Fundamental Rights & Freedoms of the Individual) Practice and Procedure Rules, 2001 and order 36 rules 8, 10 and 12 of the Civil Procedure Rules.

Briefly, Mr. Mutinda submitted that the Respondents have opposed the Originating summons through the affidavit of Senior Deputy Secretary Ministry of Roads and Public Works who denies that the applicant is the owner of the plot in issue and that the issue of ownership is at the very core of this suit, and since issues are not agreed upon, there is need for parties to adduce viva voce evidence. Whereas the applicant claims the suit land to be theirs, the Respondents case is that the said land was acquired by the Government in 1975 and is not available for allocation to anybody. He relied on the case of RASHID ODHIMABO ALLOGOH & 245 OTHERS v. HACO INDUSTRIES where the Court of Appeal held there where there is an allegation of violation of constitutional rights, the court had to hear the parties and applicant had to prove, the violation if facts were not agreed upon or admitted, by way of affidavit or viva voce evidence under order 36 Civil Procedure Rules. According to the Respondents other issues raised by the applicants are the issue of valuation and, whether notice of demolition was given to the applicants.

In opposing the application, Mr. Nyaoga, counsel for the applicants objected to the manner in which the application was brought, that is under, 2001 Rules (Chunga Rules) which were revoked by the coming into force of the constitution of Kenya (supervisory jurisdiction and Protection of Fundamental Rights and Freedoms of the individual)

High Court Practice and Procedure Rules, 2006 that came into effect by a legal notice No.6 of 17<sup>th</sup> February, 2006.

According to Mr. Mohammed there are no uncontroverted facts in this matter as the applicants are the registered owners of the suit land, the land is part of land repossessed by the Government in 1975, that there is correspondence between Government departments over the replanning of the suit land and after their opinion, the applicant applied and was granted a lease hold interest in the suit land. In 2003, the Government with the use of Bulldozers pulled down the applicant's house and evicted them for the said

plot and this is what prompted this application because their rights to ownership of land guaranteed under the constitution were violated. It is Mr. Nyaoga's contention that the Respondent have not filed any documents to controvert the applicants case and that no fraud has been alleged to warrant the taking of viva voce evidence.

It was Mr. Nyaoga's further contention that there being no dispute as to the facts, the Respondents can only raise issues of law. He believes that the application was brought to delay this application disposal of this matter.

It is true that by the time this application now under consideration was filed, the constitution of Kenya (Protection of Fundamental Rights and Freedoms of the individual) Practice and Procedure Rules, 2001 had been revoked by legal notice 6 of 17.6.2006, which ushered in the new Rules under the Constitution. The Originating Summons had however been filed under the 2001 Rules. Considering the public interest underlying this case in that there may be many other cases that will come up like the present because of the demolition exercise undertaken by the Government in 2003, this court is unlikely to accede to the striking out of this application on account of incompetency. The court will rather look at the substance other than the form and consider the merits instead. In any event, Regulation 36 (1) of the Rules made under the constitution in 2006, provides that any matter pending in court under legal notice 133 of 2001 shall be continued under these rules. The originating summons was instituted under the 2001 Rules and will therefore proceed under the new Rules. Similarly the chamber summons brought subsequent to the originating summons will be deemed to have been brought under the same rules and for the reasons given above.

The main ground of opposition by the Respondents is that since this land had initially been repossessed by the Government, it cannot be allocated. Section 75 of the constitution and section 6 (1) of the Land Acquisition Act set out the conditions which must exist prior to the Minister directing the Commissioner of Lands to compulsorily acquire land in question. The Respondents claim that the land from which the suit land as excised was acquired for purposes of providing a road by pass – which I believe is public interest. Infact there is no dispute that the land was so acquired.

The Court of Appeal upheld that decision. Now the question is if acquisition of land is supposed to be for a public interest and by a public body, can the same land be allocated or be sold for private purposes as seems to have happened in this case? I think this is the core issue before us. This is a question of law and that being the case I believe that the said acquisition having taken place long ago in 1975, it is doubtful that the court will get the persons who dealt with the said process anyway. I believe we have documents kept by the lands office & Officers who are in custody can swear affidavits annex the said documents and this matter can ably be concluded on affidavit evidence. There is no good reason to call witnesses. It will unnecessarily delay the matter. I wish to point out here that under the new Rules under the Constitution, Order 36 Civil Procedure Rules does not apply as it did in the 2001, Rules. Under order 36 Rule 9 Civil Procedure Rules, affidavits can be converted into pleadings and the matter proceeds like a suit. Under the 2006 Rules, applications under section 70 – 83 of the Constitution are brought by way of petition, not by originating summons. May be the court would be moved under its inherent powers to accept viva voce evidence to be adduced under the current Rules.

From my observations above, I decline to grant the Respondents application. I will order that this case proceed by way of affidavit evidence and the Respondents be at liberty to file further affidavits and annex the relevant documents.

The applicants will have leave to file further affidavits and annexures if necessary.

Dated and delivered at Nairobi this 7<sup>th</sup> day of June, 2006

R.P.V. WENDOH

JUDGE