



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA
Misc Civil appli 29 of 2004

REPUBLICAPPLICANT

VS

1. MUNICIPAL COUNCIL OF BUSIA

2. COMMISSION OF LANDS.....RESPONDENTS

J U D G M E N T

By a motion dated 10.3.2004 pursuant to the provisions of Order LIII rule 3 of the Civil Procedure Rules Julius Orina manwari and Florence Nyanchama Manwari hereinafter referred to as the applicant sought for an order of certiorari to bring into this court for quashing the decision of the commissioner of lands through the town clerk, Municipal council of Busia vide a letter dated 25th February 2004 in which the aforesaid town clerk had ordered the applicants to demolish developments on plot number BUSIA TOWNSHIP/458. The duo also prayed for costs. It is evident that the motion was served upon the town clerk, Municipal Council of Busia but he filed no responses. On the other hand the commissioner of lands filed a preliminary objection to resist the motion. When this motion came up for hearing, representatives of the commissioner of lands and the municipal council of Busia the did not attend hence the application proceeded for hearing ex parte. The preliminary requirements set out under Order LIII were complied with by the applicants when they filed the motion i.e. the notice to the Deputy Registrar of this court was served, a verifying affidavit and same statutory statement were filed too.

The brief facts of this matter are that sometimes in the year 1996, one Winfred Akello Kasyamani was allocated an unsurveyed commercial plot D via a letter of allotment signed by the commissioner of lands dated 7th October 1996. It would appear the aforesaid allottee sold and transferred the undeveloped plot to the applicants herein vide a form of transfer dated 10th September 1997 and the transaction was duly sanctioned by the commissioner of lands. The applicants then paid the required stamp duties to the collector of stamp duties on 17th September 1997. A certificate of lease was issued to the applicants on 25th March 1998 and the unsurveyed commercial plot D came to be known as Plot No. Busia Township/458.

The applicants upon obtaining the certificate of lease commenced the construction of a three storey building on the aforesaid property and they were at the floor level of the 2nd storey when they received a letter dated 25th February 2004 which read in part as follows:

“RE DEMOLITION OF STRUCTURES ON PUBLIC UTILITY PLOTS WITHIN BUSIA MUNICIPAL COUNCIL

The Government Policy is to repossess all land which had been planned and/or earmarked for the use by the public. Your Plot No. PDP W. 62.94.3 (D) has been identified as a public utility and hence this is to give you (7) seven days NOTICE from the date hereof to remove at

your own volition the structure standing thereon failure to which the same shall be demolished by the council without further reference to you and at your own cost. Treat this matter as most urgent.”

The contents of this letter alarmed the applicants who were then prompted to file the motion the subject matter of this Judgment.

The applicants raised three main grounds in support of the motion. The first ground argued is to the effect that the Respondents reached at their decision without affording the applicant an opportunity to be heard and hence they contravened the rules of natural justice. The applicant also raised the second ground which was to the effect that the reasons given in support of the said decision was not compatible with the position on the ground. The applicants saw the Respondents' action to have been as actuated by malice in that they waited until the applicants constructed their building upto the 2nd storey before issuing the demolition notice.

The third and final ground put forward by the applicant is that the suit premises is situated in a location which does not fall within the category of public utility land.

The second respondent filed a preliminary objection complaining that the commissioner of lands did not issue the offending notice hence the holder of that office should not have been sued.

I think this court is bound to consider any responses filed by a litigant even in the absence of their attendance. I have already shown that the 2nd Respondent filed a preliminary objection which in effect has distanced the office of the commissioner of lands from the decision to issue the notice. The crux of the matter is that the 2nd Respondent does not approve that decision. I have perused the material placed before this court and I am satisfied that the applicants have failed to establish the nexus between the office of the commissioner of lands, and the notice issued by the Municipal council of Busia. There was no need to join the 2nd respondent to the proceedings. I therefore strike out the name of the 2nd respondent from the proceedings. I will not grant costs because no representative appeared in court to press for costs.

The remaining matter is the dispute between the applicants and the 1st respondent. The applicants must first establish that they have a sufficient interest over the property in dispute. The applicants have annexed to the verifying affidavit sworn by Julius Orina Manwari, copies of the green card and the certificate of lease to show that they are the registered proprietors of Plot No. Busia Township /458. Their rights are therefore protected under the provisions of sections 27 and 28 of the Registered Land Act. The applicants have also shown in the aforesaid affidavit that they have put up a permanent structure on Plot No. Busia Township/458 and that they have so far spent a sum in excess of Ksh.10,000,000. The existence of the structure is recognized by the 1st Respondent in the offending notice.

My conclusion over this issue is that the applicants have shown that they are right proprietary interest over L.R. NO. BUSIA/458 which is sufficient enough to enable them institute these proceedings.

The regime of Judicial review is mainly concerned not with private rights neither the merits of the decision being sought to be upset but it is concerned with the decision making process which ensures that the individual is given a fair treatment by the decision maker. The applicants are complaining that they were not given a chance to be heard by the municipal council of Busia before issuing the demolition notice. I have perused the notice issued by the town clerk. The same does not specify under which provisions of the law the town clerk was invoking to issue the same. I can only guess that may be he meant to exercise his powers under the provisions of Section 129 of the Local Authorities Act chapter 265 laws of Kenya. The exercise of those powers are Judicial in nature which have affected the rights of the applicants. The notice was issued without giving the applicants a hearing. All that is fundamentally demanded of the decision maker is that his decision in its own context be made with due regard for the affected parties' interests and accordingly reached without bias and after giving the party or parties a chance to put his or their own case. The town clerk in this case has a duty to act fairly and within the administrative process. I am satisfied that the town clerk acted capriciously in this matter.

The applicants have also alleged that the property in dispute is not compatible to what is on the ground. In a nutshell the applicants were of the view that the property did not fall within a public utility land. I think Judicial Review proceedings are not concerned with the merits of the decision which this ground postulates. Consequently I refuse to consider this ground.

The final ground argued is that the applicants alleged that the town clerk was actuated by malice. To be fair, I think malice was not established hence this ground must fail.

In the end I will allow the motion on the ground that the 1st Respondent failed to give the applicants a right of hearing before issuing the notice. The upshot therefore is the motion is allowed with costs to the applicants.

DATED AND DELIVERED THIS 4th DAY OF February 2005

J.K. SERGON

JUDGE