



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**JR. MISC. APPLICATION NO. 177 OF 2015**

**IN THE MATTER OF AN APPLICATION BY THE APPLICANTS HEREIN FOR JUDICIAL  
REVIEW UNDER ORDER 53 OF THE CIVIL PROCEDURE RULES**

**REPUBLIC .....APPLICANT**

**VERSUS**

**NAIROBI CITY COUNCIL OF NAIROBI..... RESPONDENT**

**EX-PARTE APPLICANTS**

**IGNATIUS KABIRU MWARIRI & 12 OTHERS.....1<sup>ST</sup> APPLICANT**

**STEPHEN KURIA MWANGI..... 2<sup>ND</sup> APPLICANT**

**GEDIO MUSEMBI..... 3<sup>RD</sup> APPLICANT**

**GEORGE OMONDI..... 4<sup>TH</sup> APPLICANT**

**SAMWEL WAINANA..... 5<sup>TH</sup> APPLICANT**

**FREDRICK OCHIENG..... 6<sup>TH</sup> APPLICANT**

**DONALD MAIONA GICHUKI..... 7<sup>TH</sup> APPLICANT**

**GEOFREY MAINA CHEGE..... 8<sup>TH</sup> APPLICANT**

**JOHAN MAINA..... 9<sup>TH</sup> APPLICANT**

**CHARLES OTIENO..... 10<sup>TH</sup> APPLICANT**

**JOSEPH MBOCHI..... 11<sup>TH</sup> APPLICANT**

**BERNARD ONYANGO..... 12<sup>TH</sup> APPLICANT**

JOANES OCHEING MADEDE..... 13<sup>TH</sup> APPLICANT

(Above suing on their own behalf and on behalf of all the 43 traders/members

of Rabai Road Motor Garage) and:

ESTHER NYAMBURA T/A TREASURER PARK ENTERPRISES.....14<sup>TH</sup> APPLICANT

SAMUEL MAINA T/A MWIRERI SCRAP METAL.....15<sup>TH</sup> APPLICANT

## JUDGEMENT

### Introduction

1. By a Notice of Motion dated 10<sup>th</sup> June, 2015 the applicants herein seek the following orders:
  - a. **That an order of certiorari do and is hereby granted to quash the Respondent's decision or removal notice dated 4<sup>th</sup> June 2015 or any other notice purporting to remove the Applicants and or interfering with the applicant's business at Rabai Road in respect of Plot no. 60/139 Rabai Road in Nairobi.**
  - b. **That an order of prohibition do and is hereby granted to prevent the Respondent, its servants, agents, employees or anybody else whatsoever acting on its behalf from implementing its purported Removal Notice dated 4<sup>th</sup> June 2015 or any other notice purporting to remove the Applicants and or interfering with the Applicant's business at Rabai Road in respect of Plot No. 60/139 Rabai Road in Nairobi.**
  - c. **Costs to be awarded to the Applicants.**

### Ex Parte Applicant's Case

2. According to the applicants, Rabai Motor Garage is a registered society under Cap 108, Laws of Kenya which was registered on 5<sup>th</sup> September 2006.
3. It was averred the 1<sup>st</sup> to 13<sup>th</sup> Applicants are among over 30 traders at Rabai Motor Garage for over 20 years in Nairobi where they get income to sustain their families and relatives since 1989. It was averred that pursuant to the said allotment/licence the Applicants and their parents/relative took possession and started carrying out business at the said premise.
4. However, by a seven (7) days' notice dated 4<sup>th</sup> June 2015, which was meant to expire on 11<sup>th</sup> June 2015, the Respondent illegally, unlawfully, maliciously, unreasonably and without any colour of right purported to issue a removal notice to the applicants to remove themselves from Plot No. 60/139, Rabai Road in Nairobi.
5. It was the applicants' case that the said notice was unreasonable and contrary to the Ruling and order of this honourable court dated 29<sup>th</sup> Januarys 2015 in JR HMisc. Appl. No. 96 of 2012 (Nairobi) between the same parties when a similar notice was nullified by this Court.
6. It was averred that the Applicants have been paying the amounts of grant to the business premises (sic) to the Respondent and had paid a sum of Kshs.15,000,000/= being Single Business Permit for 2015 which was duly approved and was to expire on 31<sup>st</sup> December 2015. The Respondent thereafter had been issuing receipts in payment of the business premises to the Applicants. It was further averred that the suit premises has motor vehicles worth millions of Kenya shillings and is therefore impossible to reallocate the business premises within a short period as given by the Respondent.
7. According to the applicants, the Respondent illegally, unlawfully, maliciously, unreasonably and

without any colour of right purported to remove the Applicants and change ownership and transfer to other people the said premises at Rabai Road in Nairobi. It was their case that the Respondent was purporting and colluding with the applicants' neighbours to take possession of the Applicant's premises upon expiry of the said notice on 11<sup>th</sup> June 2015 in an unreasonable and illegal manner.

8. The applicants contended that their businesses were not on the road and that indeed there are other business such as a petrol station between the main road and the Applicant's premises and that the Respondent was not intending to carry out any public developments on the said premises but to unlawfully re-allocate the same.

9. To the applicants, the actions by the Respondent's actions were irrational, malicious, illegal, biased, unlawful, capricious, unreasonable and against the rules of natural justice and were bound to render the Applicants and their families to suffer great loss and damage.

### **Respondent's case**

10. In opposition to the application, the respondent confirmed that indeed the Applicants were issued with removal notice from the suit property. It was however contended that the basis of the said notice and contrary to the Applicants' position was that the applicants had not been allocated the said land hence the reason they have not attached an allocation letter. To the Respondent the applicants were temporary occupation license holders as a result of which they were issued with single business permit to operate garage in the said property.

11. In the Respondent's view, the notice to vacate was not contrary to the Judgment issued previously by this Court which noted that the Applicants were indeed licensees and the said license could be terminated by the Respondent.

12. According to the Respondents since the said previous case was filed on the 26<sup>th</sup> March 2012 and determined on 29<sup>th</sup> January 2014 there was sufficient and long time for the Applicants to look for an alternative place and vacate the suit premises and hence the reason the Respondent issued the applicant with the notice dated 4<sup>th</sup> June 2015, taking into account excess of one year six months the Applicants had between the time there case was filed till time when the case was determined. In the Respondent's view, the Applicant had more than ample time to relocate and vacate the suit premises and as such at the time they were issued with the notice they were not given an unreasonable time to vacate as they had the benefit of reading the said judgment and they equally knew the status of their occupation in the said property hence the reasonable thing would have been to vacate the property.

13. It was therefore averred that it was only fair and in the interest of justice that the Applicants vacate the suit property as the Applicants were now bent on not only refusing to vacate the suit property but also misusing this Court to frustrate the Respondent and enjoy the orders of this Court to stretch and maintain their status in the suit property. In the Respondent's view, this suit was filed with unclean hands and ought to be dismissed as it would be greatly prejudicial to the Respondent for the orders sought being granted as the Court would be setting a precedent of having applicants rush to court in a bid to elongate and forestall time to vacate the premises of the Respondent having been given more than ample time to vacate.

### **Determinations**

14. I have considered the issues raised herein which were similar to the issues raised in **Ignatius Kabiru Mwariri & 14 Others vs. City Council Of Nairobi & Another [2014] eKLR.**

15. In that case the Court found that the applicants' occupation of the suit parcel of land was by way of a Temporary Occupation Licence, and that the same does not create an interest in land in question as was held in **Faraj Maharus vs. J. B. Martin Glass Industries & Others Civil Appeal No. 130 Of 2003 [2005] 2 KLR 289.**

16. However, the Court found based on **Omar & 8 Others vs. Murania & Another [2006] 1 KLR (E&L) 206** that a licensee as opposed to a trespasser is entitled to a notice before the licence is terminated. The Court proceeded to find that:

**“Taking into account the 7 days notice given which in my view was not reasonable as well as the reasons given for the repossession of the disputed land which reasons based on the material on record are not convincing, it is my considered view that the Respondent’s action was unreasonable.”**

17. The Respondent now argues that in light of the fact that the applicants had ample time between the time they instituted the previous proceedings and the time when they were determined the 7 days’ notice given presently was sufficient. However as rightly submitted by the Respondent, the Court dealt with the issue in the following terms:

**“These proceedings were instituted on 26<sup>th</sup> March, 2012 which is now more than 1 year ago. Ordinarily that would have been more than sufficient notice to enable the applicants relocate from the suit premises...One may argue that in the instant case, the object for which application is made has already been realised as the applicants have had more than enough time to relocate from the disputed land. That however does not derogate from the fact that the Respondent’s action was unreasonable.”**

18. In other words the period taken when a party was challenging a decision which the Court eventually found to be unreasonable cannot be reckoned in computation of time for the purposes of deciding whether the notice was reasonable or not. By nullifying the original notice, the status quo ante the said notice was restored with the effect that the notice was rendered null and void and was of no consequence and could not be relied upon in subsequent actions. It follows that after the judgement of this Court, the Respondent was obliged to give a fresh legal notice notwithstanding the earlier one.

19. As this Court had found that the 7 days’ notice was in the circumstances unreasonable and the circumstances have not changed, it follows that even the instant 7 days’ notice is similarly unreasonable.

### **Orders**

20. It follows that this Motion on Notice succeeds and I grant the following orders:

- 1. I grant an order of Certiorari removing into this court for the purposes of being quashed the Respondent’s decision or removal notice dated 4<sup>th</sup> June 2015 purporting to remove the Applicants and or interfering with the applicant’s business at Rabai Road in respect of Plot no. 60/139 Rabai Road in Nairobi which decision is hereby quashed.**
- 2. I further grant an order prohibiting the Respondent from removing the applicants’ from the said property unless a reasonable notice is duly given.**
- 3. The applicants will have the costs of these proceedings.**

**Dated at Nairobi this 1<sup>st</sup> day of March, 2016**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Mr Kurauka for the Applicant***

***N/A for the Respondent***

***Cc Patricia***