



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
JUDICIAL REVIEW NO. 63 OF 2012
IN THE MATTER OF APPROVAL FOR BUILDING OF FENCE
IN NAIVASHA MUNICIPALITY BLOCK 8/57
AND
IN THE MATTER OF AN APPLICATION FOR AN ORDER OF
MANDAMUS BY WAY OF JUDICIAL REVIEW
BETWEEN
REPUBLIC..... APPLICANT
AND
THE TOWN CLERK,
MUNICIPAL COUNCIL OF NAIVASHA1ST RESPONDENT
MUNICIPAL COUNCIL OF NAIVASHA2ND RESPONDENT
***EX-PARTE* – BONIFACE MUNYINYI MUKURIA**

RULING

1. The *Ex-parte* Applicant, **Boniface Munyinyi Mukira**, instituted the Notice of Motion dated the 19th October, 2012 seeking the orders set out hereunder against the Respondents *inter alia*:
 - a. That this application be certified as urgent and the same be heard on a priority basis.
 - b. That this honorable court do hereby grant the applicant, an order of mandamus by way of judicial review calling for and compelling the Respondents to approve the request and/or plan by the applicant to put-up a temporary fence around his plot **Naivasha Municipality Block 8/57**.
 - c. That costs of this application be provided for.
2. The *Ex-parte* Applicant relies on the grounds on the face of the application, the statutory statement and a verifying Affidavit.
3. The facts before the court are that on or around June 2012, the *Ex-parte* Applicant who is the registered proprietor of Naivasha Municipality Block 8/57 filed an application before the 2nd

- Respondent for approval of a temporary fencing of the said property. He submitted the application together with copies of the fencing plan.
4. The 2nd Respondent however refused to approve the plans and upon been pressurized by the *Ex-parte* Applicant's Advocates by way of a demand letter, responded vide a letter dated 20th September, 2012 stating that the reason it declined to approve the plans was because of a dispute touching on the property whereby allotment letters had been issued by the Commissioner of Lands hiving nine plots out the suit land.
 5. The *Ex-parte* Applicant denies knowledge of any persons claiming ownership of his property and reaffirms that he is the sole registered owner of the same.
 6. Despite having been served with the application to the Respondents failed to file any response.
 7. **Mr. Karanja**, the learned counsel for the *Ex-parte* Applicant made oral submissions in support of the application. He submitted that by failing to approve the plans, the Respondent discriminated against the *Ex-parte* Applicant because a similar application had been made by an owner of an adjacent property and was approved.
 8. Further, he stated that the application was not opposed by the respondents nor did they provide the particulars of the person(s) claiming interest over the suit land. He prayed that the court do grant an order of mandamus calling for and compelling the respondents to approve the Applicant's application.

ISSUES FOR DETERMINATION

9. This court reiterates the fact that Respondents were served and failed to put in any response therefore the matter proceeded *ex-parte*. Taking into consideration Learned Counsel's submissions for the applicant this court finds the following issues for consideration.
 - i. Whether the Respondents refusal to approve the plans is discriminatory, unfair and/or unreasonable.
 - ii. Whether the court should exercise its discretion and grant the order for mandamus to the applicant
 - iii. costs

ANALYSIS

10. The Respondent is mandated with the function and the legal duty of approving building plans within the Naivasha Municipality. There is no other legal body or entity that is mandated to perform such a task and the duty lies solely with the Respondent.
11. The Respondent alleges that there is a dispute that has arisen over the applicant's property and yet despite this the Council continued to demand and still levies rates over the Applicants property and also continues to collect the rates from the applicant. This is evidenced by the annexure marked as '**BMM1**'.
12. Likewise the Commissioner of Lands accepted Land Rent from the applicant and issued him with a Rent Clearance Certificate. Refer to the annexures '**BMM1**'. This action of accepting and the receipting of monies paid does not obtain if a dispute was actually in existence.
13. Upon being served with the application by the applicant it was incumbent upon the Respondent to file a response and annex the documents in support of their refusal. This was not done and therefore the Respondents action of refusal to approve the plans can be deemed to have no basis and also to be deemed unreasonable.
14. The applicant annexed the Respondent's approval of plans for a similar temporary fence to an adjacent property and submits that not only is the Respondents refusal unreasonable but is also unfair and discriminatory.
15. This court opines that Mandamus is a prerogative order issued in cases where there is need to compel public officers to perform a duty..
16. The order sought is also discretionary and the court must also be satisfied that that there exists no other appropriate legal remedy available to the applicant other than an order for mandamus.
17. This court is satisfied in this instance that the Respondent's failure to approve the applicant's plans is discriminatory and this inaction has also deprived the applicant of his right to privacy to his property and the right to enjoyment thereof.

18.This court is satisfied that there exists no other appropriate legal remedy other than mandamus available to the applicant.

FINDINGS

- 19.The action of the Town Clerk Naivasha Municipality in failing to perform the function of approving the applicant's plans is found to be unfair and unreasonable and also discriminatory.
- 20.This court finds that this is a suitable case in which this court can exercise its discretion and finds that there is no other appropriate or **'specific remedy and by reason of the want of that specific remedy justice cannot be done unless a mandamus is to go, then a mandamus will go.'** These are the exact words used by Lord Mansfield in the case of **R V. Bank of England (1780) 526** on the words to use in the construction of this finding.

CONCLUSION

- 21.The application for an order of Mandamus is found to have merit and will hereby issue as prayed
- 22.An Order for Mandamus will issue and be directed at the Town Clerk Municipal Council of Naivasha compelling him to perform his statutory duty of approving the Applicant's plan to put up a temporary fence around the property known as **NAIVASHA MUNICIPALITY BLOCK 8/57.**
- 23.The plans to be approved within forty-five (45) days of service of this order, in default the applicant be at liberty to apply.
- 24.The applicant shall have costs of this application.

It is so ordered.

DATED, SIGNED and DELIVERED at Nakuru this 10th day of March, 2014.

A. MSHILA

JUDGE