

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW NO.42 OF 2013

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE JUDICIAL REVIEW
PROCEEDINGS FOR ORDERS OF MANDAMUS**

SHAYONA TIMBER LIMITED APPLICANT

VERSUS

DIRECTOR OF PHYSICAL PLANNING, COUNTY

GOVERNMENT OF NAKURU 1ST RESPONDENT

COUNTY SECRETARY, COUNTY GOVERNMENT

OF NAKURU 2ND RESPONDENT

RULING

By an application dated 7th October 2013 brought pursuant to provisions of **Order 53 Rule 1 (2)** and **Rules 1(4) Civil Procedure Rules**, the applicant SHAYONA TIMBER LTD seeks orders of mandamus against the respondents (i.e. Director of Physical Planning, County Government of Nakuru, and the County Secretary, County Government of Nakuru) to compel them to issue change of user, in relation to the Applicant's Plot No.LR 9950/8.

This is on grounds that the respondents have declined to approve the application for change of user for the parcel which belongs to the applicant. The respondents' refusal is described as being activated by bad faith and intended to deprive the applicant of its constitutional and property rights.

In the supporting affidavit sworn by **JAYEN MOTICHAND DODHIA** (the applicant's Managing Director) deposes that the company purchased the parcel of land from Crawford Richard Ingram by a sale agreement dated 25th September 2009. At the time of the purchase, the Government had expressed interest in compulsory acquisition of the said parcel. The applicant then sued the Commissioner of Land in Nakuru High Court **Judicial Review Application No.2 of 2010** and obtained orders stopping the acquisition. Later, the Government, through the Commissioner of Land issued the Applicant with a lease certificate. However, when the applicant attempted to fence the property, the Kenya National Highway Authority pulled down the fence. Subsequently the applicant sued the Kenya National Highway Authority in Nakuru High Court **Judicial Review Application No.2 of 2010** and obtained an order of injunction restraining them from interfering with its quiet possession and use of the land. The orders dated 28/06/2013 indicated that it was issued to **"protect the plaintiff from deprivation of property by the State."** It is instructive that this order was issued in fulfilment of an application which sought for injunctive orders pending the hearing and determination of the suit.

The applicant applied for change of user as he wishes to set up a petrol station on the land, saying it is strategically located and would be appropriate for such a lucrative enterprise. The request for change of user was rejected on grounds that the land belongs to Kenya National Highways Authority as per the letter written by the Municipal Council of Nakuru **dated 14th June 2013**. Of course the land has never belonged to the Kenya National Highways Authority (KNHA) **ONLY** in so far as the applicant holds a

Title. So why did KNHA oppose his attempts to fence the place? The dispute between the applicant does not appear to have been concluded, the ruling by Waithaka J. clearly was given on the basis of a certificate of urgency issued in **HCCC No.149 of 2012 Shayona Timber Ltd V Kenya National Highway Authority**, where the applicant sought an order of **TEMPORARY** injunction. The complete proceedings in HCCC No.149 of 2012 have not been annexed to confirm to this court that the said suit has been concluded, and the interest of KNHA extinguished through a legal process.

My own perception is that this application is brought so as to deliberately short circuit the outcome of HCCC No.149 of 2012, and in my view it is brought in bad faith and with a lot of mischief.

Consequently I decline to issue the orders sought and the application is dismissed with costs to the respondents.

Delivered and dated this 16th day of May, 2014 at Nakuru.

H.A. OMONDI

JUDGE