



RACHEL AUMA OWITIAPPLICANT

VERSUS

MUNICIPAL COUNCIL OF KISUMURESPONDENT

JUDGMENT

The petitioner amended petition dated 17th April 2012 prays for the following orders:-

- (1) That the Honourable Court do declare that the Respondents failure, refusal and /or neglect to approve her proposed building plans is violation of the Petitioner's rights under Article 47 of Constitution.**
- (2) That the Honourable Court do issue the writ of mandamus against the Respondent and / or issue an Order compelling it to approve the Petitioner's submitted plans as aforesaid.**
- (2A) That the humble petitioner be awarded general and or other damages for violation of her fundamental rights.**
- (3) That the Respondents do bear the costs of this Petition.**

The petitioner purchased the land parcel number Kisumu Municipality Block 5/746, by then designated as Block 5/357-358-134 Makasembo from one **Joseph Gathamba Maina** on 20th December 2001. The said Mr. Maina had been allotted the property by the respondent on 4th January 1999. All these are contained in the petitioners affidavit sworn on 1st November 2011. Further the petitioner has continued to pay the relevant rates to the respondent.

The petitioner however contents that the petitioner despite numerous letters and reminders has refused to approve the necessary building plans which it is holding. This according to her is in complete breach of her fundamental rights as per the constitution.

In response the respondent through its clerk one **Christopher Rusana** objected to this petition. It contents that the said plot has been repossessed and given to another deserving person as the petitioner or the allottee failed to comply with the stipulated rules requiring that the property be developed within twelve (12) months after being allotted.

The respondent further attached the minutes of the full council which revoked the allotment to the petitioner of the suit property. There is further a gazette notice inviting members of the public to bid for the repossessed plots which included that of the petitioner.

The issue to determine is whether indeed the respondent action breached the fundamental rights of the petitioner as enshrined in the constitution. Parties apart from their oral submissions choose to file written submissions to support their case.

From the affidavit evidence on record it is not in dispute that Mr. Maina was allotted the suit property on 4th January 1999. He proceeded to accept the terms by signing on the letter of offer and in particular on the condition attached to the same.

Condition 6 of the offer stated:-

“Time allowed for construction and completion of the building shall be twelve (12) months”.

No. 7 States **“ Failure of plot owners to erect a building within their stipulated time shall cause the council to repossess the plot without further reference to the plot owner”**,

It is instructive reading from the Sale Agreement dated 20th December 2001 between the petitioner and Mr. Maina that by the time she purchased the property the same had not been developed. The application for development and which she paid for approval was on 2nd December 2010 about ten (10) years from the date of the allotment and purchase.

Was the respondent therefore in breach of the relevant constitutional provisions?.

The relevant Section relied on by the petitioner is Article 47 (1) and (2) which states:-

47 (1) Every person has the right to administrative action that is expeditious efficient, lawful, reasonable and procedurally fair.

47 (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

The minutes of the respondent dated 19th February 2010 shows that the petitioner plot was one of those which were repossessed. The same was buttressed by the gazette notice dated 15th October 2010.

Interestingly by then and afterwards the respondent continued to receive the rates and approval fees from the petitioner. I further note that the petitioners letters dated 26th September 2011, 24th September 2011, 28th February 2011, 6th June 2011 as well as 8th December 2010 went unanswered by the respondent.

The failure to respond to the petitioner letters for whatever they were worth clearly breached Article 47 (1) and (2) of the constitution earlier own quoted. The only response was by the replying affidavit filed herein.

This recalcitrance action by the respondent was inefficient, unlawful, unreasonable and unprocedural and time wasting to say the least. There was no reason shown by the respondent why it failed to respond to the letters and yet quick to receive payments from the petitioner. At most it ought to have rejected the cash since at any rate it had revoked the allotment.

The other fundamental issue to determine is whether the respondent acted illegally in repossessing the property from the petitioner. As earlier on observed the petitioner failed to develop the property. As a matter of fact the plans which she applied for approval were those of the year 2010.

The approval fee of Kshs. 21,300 was paid on 30th December 2010. Ordinarily the respondent ought to have approved the plans or atleast communicate to the petitioner expeditiously of its failure to approve.

However, the earlier on quoted condition of allotment demanded that developments ought to have been commenced within twelve (12) months from the date of allotment.

For the petitioner to commence development about ten (10) years later was inordinate delay. The

petitioner atleast ought to have complied with the requisite rules and condition of allotment.

The respondent is statutorily mandated to own properties such as the case at hand. It is further mandated to oversee the necessary housing and infrastructural development within its jurisdiction. The respondent in my view acted within its mandate in revoking the allotment of the suit property.

I further observe that the respondent did not act arbitrarily. The plots ear marked for repossession were several which included that of the petitioner. The petitioner further gazetted its decision and advertised the plots affected for alienation to other deserving people.

I do therefore find this action by the respondent to be in line with Article 40 (3) (b) of the constitution which states:-

40 (3) The state shall not deprive a person of property of any description or of any interest in or right over property of any description unless the deprivation.....

(b) Is for a public purpose or in the public interest and is carried out in accordance with this constitution and any Act of parliament that :-

(i) Allows any person who has an interest in or right over that property a right of access to a court of law”.

If the procedure adopted by the respondent in revocation was wrong the same ought to have been ventilated in a Judicial Review Proceedings. In any event it was for Public interest that the same was repossessed.

Having come to the above findings therefore I do hold that the revocation of the allotment by the respondent was within its mandate. The petitioner indeed failed to meet the rules set out for allotment. What is the petitioner remedy?

As regards the non responsiveness by the respondent to the petitioners plea, demands or requests, I am inclined to rely on the observation made by my brother Justice Majanja in **Isaac Gathungu Wanjohi & others =vs= The AG & other Nairobi HCC Petition Number 154 of 2011**. The purposes and duty of any statutory body is to serve its constituents with utmost care speed and diligence. I find the action by the respondent of **“I do not care”** attitude appalling.

All the personal letters by the petitioner as well as her lawyer went unanswered. The only time they respondent was when this matter was filed in court. In fact from their replying affidavit, they make no mention of the said correspondences.

For this reason I do order that the respondent pay to the petitioner the sum of Kshs. 150,000 being general damages for breach of Article 47 of the constitution. The same be paid within the next thirty (30) days from the date herein.

I do further order that the respondent do refund to the petitioner all the amount of money it has received from the date it revoked the allotment of the petitioners allotment from 19th February 2011. This amount be paid within the next thirty (30) days from the date of delivery of this judgment.

For the reason that the property has been revoked, I shall make no order on prayer 2 of the petition.

The petitioner shall have the costs of this petition.

Dated, signed and delivered at Kisumu this 13th of July 2012.

H. K. CHEMITEI

JUDGE

In the presence of:

Musomba Advocate for petitioner

Sam Onyango Advocate for Respondent.

HKC/aa0