



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NYERI

Judicial Review 5 of 2011

REPUBLICAPPLICANT

Versus

TOWN CLERK OTHAYA TOWN COUNCIL1ST RESPONDENT

PROVINCIAL ENTERPRISE DEVELOPMENT

OFFICER, CENTRAL2ND RESPONDENT

And

**SIMON GACHOKA KIAGO, EUSEBIO MWANGI
IRUNGU,**

JOHN PATRICK KAGOMBE GATHII

**(suing as the Chairman, Secretary and Treasurer
respectively**

of OTHAYA JUA KALI ASSOCIATIONEX-PARTE APPLICANT

JUDGMENT

The application before the court is a notice of motion under order 53 rule 3(1) of Civil Procedure Rules for an order of Mandamus to issue to compel the Town Clerk Othaya town Council and the Provincial Enterprise Development Officer Central to give members of Othaya Jua Kali Association access to use and occupation of Othaya Jua Kali worksite (plot PDP Ref. No. 345)86/1) and that an order of prohibition do issue against the Town Clerk Othaya Town Council and the Provincial Enterprises Development officer central not to deliver possession and use of Othaya Jua Kali Worksite to persons other than the members of Othaya Jua Kali Association.

The notice is grounded upon the fact that the applicants Association is the bonafide allottee of the

subject premises and there is no dispute of such allotment and that the Town Clerk Othaya Town Council and the Provincial Enterprise Development Officer have caused members of the Applicant Association to be evicted with their trade items from the subject premises and the Respondent have otherwise sought to impose other persons who are not members of the applicant having caused the members to be evicted with their trade items which actions are unreasonable, constitute abuse of power misuse of authority and in breach of principles of good administration.

It is supported by an affidavit of EUSEBIO MWANGI IRUNGU sworn on the same date in which he deponed that on 24th February 2011 the respondents and their officers backed by an elite group of administration police officers Development invaded the subject Jua Kali worksite dispersed members of the Applicants society who were keeping guard over their trade items and tools to the custody of the 1st Respondent leaving of the some tools locked inside and that on 25th February 2011 the Respondent started allocating sheds within the subject Jua Kali worksite to strangers who were not members of the applicants society and that the said allocation is being conducted without any regard to the entitlement by the applicants society to the worksite.

The application is opposed and in opposition thereto the 1st Respondent has filed a replying affidavit through James Mbugua Kuria the Town in which he has stated that the subject matter of this application does not belong to the applicants who came when being many years after the worksite was set aside. He further deponed that the exparte applicant is a member and an exclusive organization that does not represent all the Jua Kali artisans and that at no time did the town council of Othaya intend and allotted the said worksite to them. He further deponed that if the application is allowed their genuine Jua Kali Artisans will be thrown back to the street and in the process interfere with the planning of the town.

The parties herein agreed that the application be heard by way of written submissions which have now been filed before the court.

On behalf of the applicants it is submitted that the applicants association was formed for the purposes of streamlining the Jua Kali section and that the said has a membership of about 100 Jua Kali Artisans from Othaya. That the said worksite was reserved for the applicants association who took occupation and use of the site in the year 2010 but the respondents denied the applicants access to and use of hate worksite in January 2011 and sought to impose other stakeholders as occupants of the site and that the first respondent has commenced leasing of out of the site to the general Public on a first come first served basis at a monthly rent payable thereto. The exparte applicant has submitted that the bonafide Jua Kali Artisans are artisans due to receive Jua Kali identification cards from the Ministry through their Jua Kali Association.

It was further submitted hat the acts complained of being acts directly attributed to the respondents and which acts the respondents have directly admitted committing files in the face of the rules and principles upon which the worksites were erected. That the respondents have departed from the governing policy and offend the against the registration expectation of the applicants. That the 2nd Respondent acts of adversely seeking to manage and collect rent from the subject worksite is against the published policy that government officers should not undertake such acts to avoid instances of corruption and that it goes against the principles that the government should limit itself to provision of service and that the government should not play inter venturous role in the section as per sessional paper No. 2 of 1992 and therefore such non-absence of the published policy makes such acts illegal ultra vires and an abuse of authority which to prerogative orders sought.

It was further submitted that the 1st respondent statutory power and discretion to deal with the property must be exercised subject to the public trust underlying the same.

On behalf of the 1st Respondent it was submitted by way of preliminary objection that the application is defective in that the same is supported by a supporting affidavit which was not part of the primary documents filed together with the application for leave and that the verifying affidavit is fatally defective in that the same is sworn by the counsel for the applicants who has not disclosed his source of

information.

It was submitted that the notice of motion is supported by the affidavit of EUSEBIO MWANGI IRUNGU as stated in this judgment and that the said affidavit was not part of the original documents filed together with the application for leave as is required under order 53 Rule 4 which provides that

4(1) copies of the statement accompanying the application for leave shall be served with notice of motion and copies of any affidavit accompanying the application for leave shall be supplied on demand and no grounds shall be subject as hereafter in this role provided be relied upon or any relief sought at the hearing of hate motion expect the grounds and relief set in the said statement.

(2) the High Court may on the hearing of the motion allow the said statement to be amended and may allow further affidavits of any other party to the application and where the application intends to ask to be allowed to amend his statement or use further affidavit he shall give notice of his intention and of any proposed amendment of his statement and shall supply on demand copies of such affidavits.”

It was therefore submitted that the applicants breached this mandatory provision of the law and therefrom should not be allowed.

It is worth to note that the applicant in her submission has conceded to this submission though the same has found silence on Article 159(2) (d) of the new Constitution to which mere procedural lapse that does not affect the substance.

It is further submitted that the verifying affidavit envisaged under order 53 is one that verify the correctness of the facts relied upon and to support her submission that the same ought to be expunged from record the 1st Respondent has submitted the case of **REPUBLIC V ELDORET MUNICIPAL COUNCIL EXPARTE PATRICK NALIANYA WANYINYI & Another (2005) EKLR** and **NAIROBI MISC. 607/2002 R V THE LAND DISPUTES TRIBUNAL LIMURU and others** which I have read and shall comment upon shortly in this judgment.

On the substantive issues the 1st Respondent has submitted that the applicants have not exhibited evidence to show that the suit land was issued to them and that the applicant is a members' organization which cannot be said to represent the entire Jua Kali Artisans in Othaya Town. It was further submitted that the suit land was set aside in 1986 as a Jua Kali worksite to cater for Jua Kali Artisans within Othaya Town while the exparte applicant came into existence on 26th February 2004.

It was further submitted that the orders sought are incapable of being granted the shades having already been allocated to third parties a fact that the exparte applicant has acknowledged in its pleadings issuing the orders would be an exercise in futility as there is nothing to stop in support of his the 1st Respondent has submitted the authority of **KENYA NATIONAL EXAMINATION COUNCIL v REPUBLIC exparte GODFREY GATHENJI and others Civil Appeal No. 266 of 1996.**

It is further submitted that the order of mandamus compels the performance of a public duty imposed by statute where the person or body of whom the duty is imposed fails to or refuse to perform the same it is therefore submitted that mandamus cannot quash what has already been done and that the exparte applicant has not shown the public duty ruled to its, of this submission the 1st respondent has urged the court to dismiss the application.

The second respondent has also taken the same approach with the 1st Respondent and submitted that the applicant has not complied with the rules and therefore the application is misconceived bad in law and incurably defective. It is based upon the submission that the application for leave made on 9/2/2012 without filing affidavits and therefore by 15th February 2011 when the notice of motion was filed the application was already in breach of order 53 rule 1 and in support the applicant submitted the case of **SANGHANI INVESTMENT LTD v OFFICER IN CHARGE NAIROBI REMAND & ALLOCATION PRISON NAIROBI MISC. APPL NO. 99 OF 2006**

It is further submitted that the orders sought can not be granted because the decision sought to be prohibited has already been made and therefore the court cannot act in vain and that even if the respondent would be compelled to deliver possession of the premises by way of mandamus the interpretation of such order would be rendered impossible because they have already been allocated to one Republic and the 2nd Respondent has also submitted the Kenya National Examination Councils case in support of its submission.

It is further submitted that the 2nd respondent has proved that the suit land is public land registered in the name of the Government of Kenya and further that it has a public duty to deliver and allocate the same for the benefit of Jua Kali Artisans generally. It is submitted that the ex parte application have not established any proprietary interest to the suit land and therefore the grant of orders sought would constitute interference with the discretion of the 1st and 2nd respondents the 2nd respondent has therefore to get the court to dismiss the application.

From the pleadings herein it is clear to my mind that the issues for determination is whether the applicant has made a clear case for the grant of orders sought and whether the application before the court is defective.

The submissions by the respondents and which is conceded by the ex parte applicant the same is in violation of the express and mandatory statutory provisions of order 53 which provides that no application for mandamus prohibition or certiorari shall be made unless leave thereof has been granted according to the rule and that copies of statements accompanying the application for leave shall be supplied upon demand and therefore on the authority of Sanghani Investments Ltd v Officer in Charge of Nairobi Remand the ex parte application can not rely upon the affidavit which is not properly before the court.

However notwithstanding the above the provisions of article 159(2)(d) now mandatory the courts to decide on the matters without due regard to technicality and therefore hold that the said affidavit however irregularly filed is of assistance to the court in deciding on the issues in dispute and therefore dismiss the 1st respondents preliminary objection on the same.

Having ruled on the above the next issue is whether the applicant is entitled to orders sought. I have had a look at the court of appeals decision in the Kenya Examination Case and is of the considered opinion that the orders sought are not available to the ex parte applicant. It is admitted in the affidavit of Eusebio Mwangi Irungu that the Respondents and their officers has taken control of the suit premises and allocated the same to other artisans rather than the ex parte applicant and therefore there is nothing for this court to prohibit the respondents from doing since the ex parte applicants have already been evicted. It is also clear that Mandamus is an order that compels the performance of a public duty imposed by statute where the body or the person on whom the duty is imposed fails or refuses to perform the same. It is therefore clear from the material presented before the court that mandamus is among remedy for the applicant herein. Since it is apparent from the facts that the Respondent have allocated the said worksites to Jua Kali Artisans as was expected by the policy and therefore the issue as to whether the ex parte applicants were the only Jua Kali Artisans who were supposed to be allocated the shades has not been brought out by the applicant and therefore the court can not find fault with the respondents for doing a duty which they were required by policy to do. There is no evidence tendered to show that the members of the applicant are not amongst those allotted shades by the respondents. I have also noted that the management of the said work shades were left to the discretion of the respondents and there is no evidence tendered to show that they have abused the exercise of the said discretion by issuing the said plots directly to the Artisans without going through the ex parte applicant.

I therefore find no merit on the notice of motion herein and dismiss the same with costs to the respondents.

Dated and delivered at Nyeri this 9th day of July 2012.

J. WAKIAGA
JUDGE