



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 21 OF 2013 (J.R)

(FORMERLY J.R. NO. 35 OF 2011 EMBU)

IN THE MATTER OF KIRINYAGA COUNTY COUNCIL FINDINGS AND RECOMMENDATIONS DATED 14TH FEBRUARY 2011

REPUBLIC OF KENYA.....APPLICANT

KIURA GACHOKI.....EX-PARTE APPLICANT

VERSUS

COUNTY COUNCIL OF KIRINYAGA.....1ST RESPONDENT

KAMAU GACHOKI.....2ND RESPONDENT

JUDGMENT

This Ruling arises from the Notice of Motion dated 10.7.2011 filed in JR No. 35 (Embu), supported by a verifying affidavit, statements of facts and annexures thereto. The Applicant is seeking an order for certiorari to quash the findings and recommendation by Kirinyaga County Council defunct dated 14th February, 2011. The application is also supported by a supplementary affidavit sworn by one Perminus Mwai Kiura who was substituted with the leave of the Court after the original applicant passed on. That application is opposed with a replying affidavit sworn by the first Respondent Francis Kamau Gachoki on 2nd December, 2018.

APPLICANT'S CASE

The Applicant's position is that he was allocated the suit property Plot No. 2 Kiandai in 1963 by the then Embu African District County Council vide A.D.C Trade and Market Committee MIN No. 8/63.

In the same year, he took possession of the plot and submitted building plans which were approved and that he has been paying council rents and rates since then to-date.

On 14.2.2011, a group of councilors from Kirinyaga County Council purported to hold a meeting and ordered that the 2nd Respondents' name be included in this plot as a co-owner. He stated that the actions by the said councilors is illegal, unlawful, unconstitutional and a nullity abinitio as it is only a Court of law, or a tribunal that can deprive him of his right under the law.

He submitted that as a result of those actions, his constitutional right to protection of property has been compromised.

2ND RESPONDENT'S CASE

The 2nd Respondent stated that indeed the Applicant was allocated Plot No. 2 Kiandai Market in 1963 but since he had no money to develop the plot and since it was a condition of them to develop the plot within a stipulated period failing which it was to be repossessed, the Applicant approached the 2nd Respondent who is also his brother to join hands and help him in the development of the plot to save it from being repossessed.

The 2nd Respondent who was interested in helping his brother agreed on conditions that they go to the Council and request to have the plot sub-divided into two portions measuring 35 ft by 100 feet each.

Sometime in the year 2014, a dispute arose between the two brothers which was escalated to the 1st Respondent Council where both the 2nd

Respondent and the Applicant were asked to produce their documents in support of the dispute.

After hearing both sides and their respective documents the 1st Respondent decided that the suit Plot No. 2 Kiandai be sub-divided into two portions. The 2nd Respondent was to be registered as owner of the developed Plot 2A and the Applicant to be registered as owner of the undeveloped portion described as 2 B. The 2nd Respondent then commenced construction on his plot and continued paying rate to the County Council. The Applicant on his part constructed a semi-permanent house in his portion of the plot.

ANALYSIS AND DECISION

I have considered the application, the verifying affidavit, statement of facts and the annexures thereto. I have also considered the replying affidavit and the submissions by the parties. It is trite law that the remedy of Judicial Review traditionally looks into the decision making process and not the merits of the decision itself. That position has since changed with the enhancement of the **Fair Administrative Action Act. Section 7 (2) (1) of the Administrative Action Act** provides as follows:-

“A Court or tribunal under sub-section (1) may review an administrative action or decision, if the administrative action or decision is not proportionate to the interest or rights affected”

In the case of **REPUBLIC VS KENYA NATIONAL EXAMINATION COUNCIL EX-PARTE H.N.G SUNG AS A FRIEND AND PARENT OF A.H.N (2016) e K.L.R G.V Odunga J** stated:-

“This position is the one prevailing in England as was highlighted by Lord Steyn in R (Daly) V Secretary of state for Home Department (2001) 2 AC 532 where it was held that:

(1) Proportionality may require the reviewing Court to assess the balance which the decision maker has struck, not merely to see whether it is within the range of natural or reasonable decision;

(2) Proportionality test may go further than the traditional grounds of review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations and;

(3) Even the heightened scrutiny test is not necessarily appropriate to the protection of human rights.

The Courts have over the years developed a framework within which to conduct a proportionality analysis which is usefully summarized by De smith, Woolf and Jowel, Judicial Review of Administrative Action, Fifth Edition (pp 594-596) that it is,

“A principle requiring the administrative authority, when executing discretionary powers to maintain a proper balance between any adverse effects which its decision may have on the right, liberties or interest of person and the purpose which it pursues”.

I have looked at the minutes and the decision of County Council of Kirinyaga Ordinary Works Town Planning Markets and Housing Committee meeting held on 10th March 2011 at 11.00 a.m.

The same shows that before the decision was arrived, both the Applicant and the 2nd Respondent were present and the 2nd Respondent explained how he was invited by the Applicant who is his brother to save the suit property from being repossessed by the 1st Respondent for failure to develop the same.

The 2nd Respondent then developed one portion of the plot. The committee in the decision stated as follows:-

“The Committee verified the documents thoroughly whereby it came out clearly that through the receipts held by Kamau Gachoki reflected the two names (referred as Kamau Gachoki and Co.) and also the construction made by Kamau Gachoki”.

RECOMMENDATION

That Kamau Gachoki be added to the plot and subsequently be divided as follows:-

Part 2 A Kamau Gachoki (developed)

Part 2 B Kiura Gachoki (undeveloped) and Since Kiura Gachoki deceived the Committee by hiding facts regarding ownership, members nullified minutes No. WTPM & H 71/2005 forthwith”

From the proceedings and decision by the 1st Respondent, it is clear in my mind that the decision took into consideration the procedural aspect as well as the merits of the case. The decision maker in my view arrived at a natural and reasonable decision considering the contributions made by the 2nd Respondent in assisting the Applicant to construct a building on the suit land to save the property from being

repossessed by the County Council of Kirinyaga.

This Honourable Court takes judicial notice that it is one of the terms and conditions for allocation of a plot within urban/town councils that one must present a development plan and construct within a certain period failing which the plot will be repossessed by the lessors.

The Applicant is said to have been allocated the suit land in 1963 and up-date, he has not presented an approved development plan for construction. The explanation given by the 2nd Respondent that the original allottee/Applicant in this case approached his brother the second Respondent to assist in developing the plot to safe being repossessed in my view was the reason why the same was not repossessed.

The reasons by the 1st Respondent to share the suit plot equally between the Applicant and the 2nd Respondent was the most logical equitable thing to do in the circumstances.

For all the reasons I have given, I find the Notice of Motion dated 10th July, 2011 lacking in merit and the same is hereby dismissed. I order each party to bear his own costs of this application in view of the fact that the Applicant and the 2nd Respondent are brothers.

READ, SIGNED and DATED at Kerugoya in open Court this 14th day of June, 2019.

E.C. CHERONO

ELC JUDGE

14TH JUNE, 2019

In the present of:

(1) Applicant/Advocate – absent

(2) Respondent/Advocate - absent

(3) Court Assistant - Mbogo