



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**JR. NO. 19 OF 2017**

**REPUBLIC.....APPLICANT**

**VERSUS**

**COUNTY GOVERNMENT OF MERU.....RESPONDENT**

**JULIUS BUNDI.....INTERESTED PARTY**

**ISABELLA MWENDWA M'ANGAINE.....EXPARTE APPLICANT**

**JUDGEMENT**

**BACKGROUND**

By a Notice of Motion brought under order 53 Rule 3 CPR, the Exparte Applicant sought the following orders:

- 1. THAT an order of certiorari be issued to remove to this court the decision of the Municipal Council of Meru pursuant to the minutes of the special town planning works and Housing Committee meeting held on 13<sup>th</sup> June, 2011 in the committee room Hall at 11.30 am in respect of Municipal Council of Meru Plot Number BP/MCM/16(7) and 23(17) and quash the same.**
- 2. The costs of this application be provided.**

**APPLICANT'S CASE**

The Exparte Applicant in his verifying affidavit and statement of facts stated that the Interested Party is her legally wedded husband but are currently living separately after they developed irreconcilable differences. He deponed that she is the sole registered owner of Plot no. BP/MCM/16 (7) while plot no. 23 (17) was acquired jointly with the Interested Party Julius Bundi who is also her husband.

She also deponed that the Interested Party who is an employee of the 1<sup>st</sup> Respondent fraudulently and/or through conspiracy and collusion with officials of the 1<sup>st</sup> Respondent caused the Interested Party's name to be inserted in the 1<sup>st</sup> Respondents records in respect of the said plot causing a confusion that they were joint owners. The Exparte Applicant further stated that the Interested Party colluded with the 1<sup>st</sup> Respondent by writing a letter purporting to own the said plots jointly with her which letter was relied upon in incorporating the names of third parties including some of their children to be joint owners of the said plot. Based on that request the Respondent through a special town planning, works and Housing Committee meeting held on 13<sup>th</sup> June, 2011 recommended as follows:

- (a) That Hilda Kunri, Frida Makandi, Tito Mwirigi, Timleon Mutembei and Fiona Gacheri be included in the ownership of plot Nos. BP/MCM/16(7) and 23 (17) previously jointly owned by Julius Bundi and Isabella Mwendwa.**
- (b) That the new status quo regarding ownership of plot Nos. BP/MCM/16 (7) and 23 (17) remains until otherwise advised by all the partners.**

The Exparte Applicant also deposed that the said recommendation by the 1<sup>st</sup> Respondent through its special committee, Town Planning Works and Housing wrongly tampered with his plots which actions were done in breach of her Constitutional right to property and the rules of natural justice as she was not given a chance to be heard.

She now wants those proceedings and the recommendation finding a property she owns to be brought before this Honourable Court for purpose of being quashed.

**RESPONDENT'S CASE**

The Respondent did not file any grounds of opposition or a replying affidavit. It can therefore be said, rightly so, that the Respondent had not taken any position in this dispute

### **INTERESTED PARTY'S POSITION**

The Interested Party in his replying affidavit sworn on 9<sup>th</sup> December, 2011 deponed that the Exparte Applicant's application is riddled with outright lies and misinformation and is founded on a desire to greedily possess all the entire family property at the expense of other members of the family. He further deponed that they jointly acquired plot No. BP/MCM/16 (7) from one John Maingi on the 21<sup>st</sup> January 1998 and attached a copy of sale agreement. The Interested Party stated that they also jointly bought Plot No. BP/MCM/23 (17). He deposed that in a letter dated 23/05/2011, he notified the Exparte Applicant that he would move the counsel to have properties registered in their joint names and those of their children but the Exparte Applicant did not attend the council offices to ventilate her case.

### **SUBMISSIONS BY THE EXPARTE APPLICANT**

The Exparte Applicant submitted that they are husband and wife with the Interested Party but live separately after their marriage broke down. She stated that when they were living together, they acquired some properties jointly while they acquired others separately. She said that she acquired alone plot No. BP/MCM/16 (7) but they acquired plot No. 23 (17) jointly with the Interested Party. The Exparte Applicant also stated that sometime in the year 2011, the Interested Party and the 1<sup>st</sup> Respondent fraudulently and secretly altered the records of ownership kept by the 1<sup>st</sup> Respondent in respect of Plot No. BP/MCM/16 (7) thereby inserting the name of the Interested. The Exparte Applicant also stated that the Interested Party in collusion with the 1<sup>st</sup> Respondent altered her records of plot No. 23 (17) which was previously owned jointly with the Interested Party. She cited the following case:

#### **1. Pashito Holdings & Another –Vs- Ndungu & 2 Others [HCCA NO. 138 OF 1997] NAIROBI.**

### **RESPONDENT'S SUBMISSIONS**

The Respondent submitted that during the defunct Municipal Council of Meru ( 1<sup>st</sup> Respondent) numerous requests and communications were received regarding plot No. BP/MCM/16 (7) and BP/MCM/23 (17) between the Exparte Applicant and the Interested Party who are husband and wife respectively. She further submitted that on 13<sup>th</sup> June, 2011, the defunct Municipal Council of Meru held a special town planning works and housing committee meeting to consider a request presented by the Interested Party to include the spouse's children in the ownership of the council properties. The Respondent further submitted that based on those complaints that the Exparte Applicant was disposing of their jointly acquired properties, the committee made the reasonable decision to adopt the Interested Party's proposal to incorporate their children in order to safeguard their interests. In conclusion, the Respondent submitted that the special town planning, works and housing committee recommendation was presented to the full council meeting the same day who adopted the same in accordance with the laid down procedure.

### **INTERESTED PARTY'S SUBMISSIONS**

The Interested Party submitted that he was the one who transferred stall No. BP/MCM/16 AND 23 to the joint names with the Exparte Applicant vide a letter to the Respondent dated 6/7/99. Consequently, a constructive trust was created and that Judicial Review proceedings cannot exhaustively determine an issue of trust.

### **DECISION**

I have carefully considered the Notice of Motion dated 23<sup>rd</sup> November 2011 the verifying affidavit and the statement of facts. I have also perused the minutes of the special town planning works and Housing Committee which was adopted by the full council meeting the same day on 13<sup>th</sup> June, 2011. I have as well considered the submissions by the parties and the applicable law. The gist of this Judicial Review concerns the decision of the defunct Municipal Council of Meru through a full council meeting who adopted the recommendation of a special town planning, works and housing committee. The recommendation of the said special committee was as follows:

**(a) That Hilda Kuuri, Fridah Makandi, Tito Mwirigi, Jimleon Mutembei and Fiona Gacheri be included in the ownership of plot Nos BP/MCM/16 (7) AND 23 (17) previously jointly owned by Julius Bundi and Isabella Mwendwa.**

**(b) That the new status quo regarding ownership of plot Nos BP/MCM/16 (7) and 23 (17) remains until otherwise advised by all the parties.**

The Respondent in their minutes referred herein above admitted that both the Exparte Applicant and the Respondent were previously joint owners. The special committee meeting referred to a letter from the Interest Party Julius Bundi which was requesting for incorporation of their children in the ownership of the plots. I agree with the submissions by the Exparte Applicant who was a joint tenant with the Interested Party that she was not accorded a fair hearing when the Respondent unilaterally acted on a letter written by the Interested Party. The Respondent also acted impartially when it considered a letter by the Interested Party who was one of their employees without giving the Exparte Applicant a right to be heard. In Misc. **App No. 24 of 2006 (Meru) between; Republic –Vs- Attorney General( 1<sup>st</sup> Respondent), Registrar of Societies (2<sup>nd</sup> Respondent) Nkubu Revival Christian Centre (Interested Party)**, the learned Judge Justice M. J Anyara Emukule ( as he then was) cited with approval the old case of **Cooper –Vs- the Board of Works for the Wardworth District (1863) 321 J.C.P 185 1 143 E.R 414** where the court held as follows:

**“ The contention on the part of the Plaintiff has been that although the words of the statute taken in their literal sense without any qualification at all would create justification for the act which the District Board has done the powers granted**

**by that statute are subject to a qualification which has been repeatedly recognized that no man is to be deprived of his property without an opportunity of being heard.”**

When the Respondent acted on a letter written by the Interested Party who was one of their employees, they acted unfairly and without the rules of natural justice being accorded to the Exparte Applicant herein.

In my respectful opinion, when the Respondent received the request from the Interested Party, they were under clear obligation to invite the Exparte Applicant to respond to the allegations raised therein before making any decision. The Respondent failed to give the Exparte Applicant a right to be heard which is a cardinal principle of Natural Justice. By failing to do so, the Respondent acted illegally and in breach of the rules of Natural Justice which in my view are classic grounds for the grant of the Order of certiorari.

I also note that the suit properties being Plot Nos. BP/MCM/16 (7) and BP/MCM/23 (17) are leasehold interests in properties held by the 1<sup>st</sup> Respondent which is a public entity ought to be subjected to public participation before incorporating other persons to the existing leasehold interest.

In the upshot, this court has no option but to allow the Notice of Motion dated 23<sup>rd</sup> November, 2011 and grant the order of certiorari as sought. Consequently, I hereby issue an order of certiorari to remove to this Honourable court the decision of the Municipal Council of Meru pursuant to the minutes of the special town planning works and Housing Committee meeting held on 13<sup>th</sup> June, 2011 in the Committee Room Hall at 11.30 am in respect of Municipal Council of Meru Plot Numbers BP/MCM/16 (7) and 23 (17) and quash the same. The Respondent shall bear the costs of this Judicial Review proceedings. It is so ordered.

**DATED AND SIGNED THIS 18<sup>TH</sup> DAY OF OCTOBER, 2018.**

E. C. CHERONO

**ELC JUDGE - KERUGOYA**

**DELIVERED IN OPEN COURT AT MERU THIS 31<sup>ST</sup> DAY OF OCTOBER, 2018**

LUCY N. MBUGUA

**ELC JUDGE - MERU**

**In the presence of:**

C/A: Janet/Galgalo

C.P Mbaabu H/B for Mwanzia for Exparte Applicant