



**REPUBLIC OF KENYA**

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

**MISC. APPL. NO. 43 OF 2014**

**IN THE MATTER OF AN APPLICATION BY WILSON MASILA MUEMA  
.....APPLICANT**

**FOR LEAVE TO APPLY FOR ORDERS OF PROHIBITION AND  
MANDAMUS**

**AGAINST**

**THE COUNTY SECRETARY, THE COUNTY GOVERNMENT OF  
MACHAKOS.....RESPONDENT**

**AND**

**IN THE MATTER OF ARTICLE 40 OF THE CONSTITUTION OF KENYA, 2010, THE LAND  
REGISTRATION ACT NO. 3 OF 2012, THE COUNTY GOVERNMENT ACT, NO. 17 OF 2012  
AND PHYSICAL PLANNING ACT, CAP 286 LAWS OF KENYA**

**JUDGMENT**

1. The court is moved via a Notice of Motion dated 31<sup>st</sup> July, 2014 seeking for the following orders:-
  - a. Court be pleased to issue order of prohibition directed against respondent from rejecting the payment of due rates for **Machakos Municipality Block 1/756**(suit plot).*
  - b. Court be pleased to issue an order of mandamus directed against the respondent compelling him to consider application for approval of development plans for suit land.*
  - c. Costs*
2. The Application is based on **Order 53 Rule 3(1)** of the **Civil Procedure Rules 2010** and **Section 8** and **9** of **Cap 26 Laws of Kenya**.
3. The Application is supported by the Affidavit of **Wilson Masila Muema** sworn on 3<sup>rd</sup> March, 2014, Verifying Affidavit sworn on 3<sup>rd</sup> March, 2014 and statutory statement dated on 3<sup>rd</sup> March, 2014.
4. The Respondent did not file any Replying Affidavit but only filed and exchanged submissions with Applicant after agreeing to canvass the Application via written submissions.

5. The Applicant deponed that on 24<sup>th</sup> June, 2009, he was allocated the suit land and the same was ratified by the Town Council, the predecessor of the County Government of Machakos and that all the requisite fees was paid.
6. The Applicant submitted that he is a holder of a lease and certificate of title of the suit land and that he got the change of user of the suit plot approved.
7. However, on submitting the development plan to the Respondent, the respondent neglected or failed to reply to the application by either approving or disapproving of the same.
8. The applicant deponed that he has offered to pay any dues including the fees for approving the plans but the Respondent, through its subordinates has declined to receive the payments.
9. According to the applicant, the demand written to the Respondent has gone unresponded to; that the Respondent has failed to approve or formally communicate reasons as to why it cannot handle the application and that the Respondent is infringing on his constitutional rights to enjoy his property. It is the Applicants' case that the Respondent is neglecting to discharge its statutory duties.
10. The Applicant deponed that he is being deprived the benefit of his property contrary to **Article 40** of the **Constitution** that under **Section 30** of the **Land Registered Act No. 3 of 2012**, a certificate of lease is a *prima facie* evidence of ownership as it shows he holds the lease and that the Respondent has not challenged or impugned the title.
11. It is the Applicants' case that under **Section 29(c) and (d)** of **Physical Planning Act (P.P.A)**, local authorities are required to consider all applications for development. The Applicant deponed that **Section 33(2)** requires communication on such applications to be made within 30 days. If there be a refusal to approve, it was urged, reasons to accompany such communication should be given. The Applicant relied on the case of **Kenya National Examination Council vs Njoroge & 9 others 1997 eKLR** on the issuance of orders of prohibition and mandamus.
12. The Applicant also cited the case of Municipal Council of **Mombasa vs Republic & another (2002) eKLR** and **Republic vs Municipal of Mombasa exparte Kamau J.G. Njenga (2013) eKLR** where it was held that the local authority had a duty to consider to grant or not approval of development plans. The court upheld the content of **Article 47** of the **Constitution of Kenya** and granted mandamus orders.
13. The Respondent opted not to rebut any of the facts in the deponed Affidavits or file grounds of objection. It only opted to file written submissions. The Respondent is thus taken to concede the deponed facts as set out by the Applicant.
14. However in its submissions, the Respondent contends that the orders sought cannot be granted. Relying on various authorities, the Respondent's advocate submitted that the Applicant cannot succeed in the instant Application as he must first quash the decision disapproving his application dated 15<sup>th</sup> February, 2012. Counsel submitted that the prohibition should be preceded by a certiorari order, and so is mandamus. The case of **Republic vs Permanent Secretary to Cabinet and Head of Civil Service exparte Nganga (2006) eKLR. Machakos HC.MISC. 72 2010 Republic vs Makueni Land Dispute Tribunal** was referred to.
15. The facts of the case herein are not disputed. The Applicant was allocated and holds the lease certificate for the suit plot. On 23<sup>rd</sup> January, 2012 he sought for the approval of development plans of the suit plot from the then Municipal Council of Machakos. On 15<sup>th</sup> February, 2012, the Council declined to approve the application on the grounds that:

*a. The suit plot is under the custody of the council.*

*b. The proposed development was not in harmony with zoned regulations of residential single*

*dwelling units.*

16. However, on 8<sup>th</sup> March, 2012, pursuant to a discussion between the clerk to the Council and the Applicant, a re-submission of the application was made. It has not been denied that such re-submission was made and that it never elicited any reply. A reminder was done on 15<sup>th</sup> September, 2012, with no response from the clerk.

17. On transition to County Government, the Applicant forwarded the same documents to the Respondent's office reminding it of the re-submitted documents. On 26<sup>th</sup> November, 2013, the Applicant wrote and delivered a demand notice to the Respondent but the same was also ignored prompting the instant suit after a further demand of 24<sup>th</sup> January, 2014.

18. The Applicant submits that he has been deprived of user of his plot contrary to **Article 40** of the **Constitution of Kenya**.

19. The Respondent contends that unless the decision of 15<sup>th</sup> February, 2012 is impugned, the Applicant cannot get the reliefs of prohibition or mandamus.

20. In the advent of the new Constitution, the Respondent is obligated under **Article 47** of the **Constitution of Kenya** to accord the applicant an answer to his application by either approving or declining his Application. The Applicant remains the owner of the plot but cannot develop it and the Respondent is ignoring him. Since the title documents held by the Applicant stand unimpugned, the Applicant is entitled to user and benefit of his property under **Article 40** of the **Constitution**.

21. The court therefore agrees with the Applicant that the Respondent has to make a decision to approve or to disapprove the plans.

22. The court thus makes the following orders;

*a. The Respondent be and is hereby compelled to communicate the decision on approval or otherwise on the development plan of **Machakos Municipality Block 1/756** within 45 days.*

*b. The dues payable to be received in event the approval is granted.*

*c. The Respondent to pay the costs of the Application.*

It is so ordered.

**Dated and Delivered at Machakos this 27<sup>TH</sup> day of JANUARY, 2017.**

**O. A. ANGOTE**

**JUDGE**