



**REPUBLIC OF KENYA**

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

**ELC. MISC. APPLN. NO. 265 'B' OF 2011**

**REPUBLIC .....APPLICANT**

**VERSUS**

**THE COUNTY COUNCIL OF MASAKU .....RESPONDENT**

**AND**

**LOISE KAMENE DAVID.....INTERESTED PARTY**

**DAVID KITEMA NDOLO .....EX-PARTE APPLICANT**

**JUDGMENT**

1. In the Notice of Motion dated 8<sup>th</sup> December, 2011, the Ex-parte Applicant is seeking for the following orders:

***a. An order of certiorari do issue to remove into this Honourable Court for purposes of being quashed the decision of the County Council of Masaku issued through the office of the County Council through one D.M. Makau for the County Clerk vide letters dated 15<sup>th</sup> July, 2011 and 3<sup>rd</sup> October, 2011 being notices/demands to the Applicant to demolish or pull down the Applicant's Plot No. 128 at Kathiani Market.***

***b. An order of mandamus do issue against the County Council of Masaku and or its officers or relevant committees to visit the site of Plot Numbers 2 and 128 at Kathiani market and thereat to undertake a re-inspection of the two plots, taking correct and accurate measurements of both the front shops and the backrooms of the plots and taking into account the original and existing sizes and extend of the construction by the original owner/developer prior to partition and to re-assign each plot and its developments its correct size including the backrooms as built up by the original owner and as determined and shared out to the original owner's heirs by the clan and family elders vide their records of 18<sup>th</sup> October, 2005 as 20ft x 100ft for Plot No. 2 (hotel sold to the Interested Party) and 10ft x 100ft for Plot No. 128 (butchery sold to the Applicant) such that none of the two plots shall be exposed to demolition.***

***c. The costs of this Application be provided for.***

2. According to the Ex-parte Applicant's Statutory Statement and the Supporting Affidavit, Plot No. 2 measuring 30ft x 100ft at Kathiani market was owned by the late Zakayo Mutua (*deceased*); that the said Zakayo had fully developed the suit land comprising two shops, a hotel, a pit latrine and a bathroom and that upon his death, his heirs shared out the plot.

3. The Ex-parte Applicant deponed that some of the deceased's heirs, Peter Mboka Mutua and Ngumbi Mutua sold their 20ft x 100ft hotel section and the backrooms to the Interested Party while Philip Masivo Mutua and Mbithi Mutua sold to him the butchery section measuring 10ft x 100ft.
4. It is the Applicant's case that the original land measuring 30ft x 100ft was then sub-divided into two whereafter his portion was registered as plot number 128 while the Interested Party's portion retained the initial number 2; that both plots were to share a common corridor for access to the backrooms, pit latrines and bathrooms and that despite payment of the inspection fees, the County Council of Masaku did not visit the original plot to take measurements of the two partitions.
5. According to the Applicant, the County Council proceeded to wrongfully and arbitrarily alter the sizes of the two plots with the consequences that gave a measure of 8ft x 100ft for his plot and increased the Interested Party's plot to 22ft x 100ft instead of 20ft x 100ft.
6. The Applicant finally deponed that the Council has refused to heed to his request for re-inspection and correction of the records to reflect the true measurements of the two plots.
7. According to the Applicant, the demolition notices that were issued to him on 15<sup>th</sup> July, 2011 and 3<sup>rd</sup> October, 2011 by the Respondent were issued without according him an opportunity to demonstrate and proof that his plot is 10ft x 100ft and that it has not encroached on the Interested Party's plot.
8. In response, the then County Clerk of the Respondent deponed that the plots in question are registered in the Respondent's records as follows: Plot No. 2 measuring 22ft x 100ft in the name of the Interested Party and Plot No 128 measuring 8ft x 100ft in the Applicant's name.
9. According to the Respondent, in between the original Plot No. 2 and Plot No.3, there was a service lane of 8ft for use by the public and that the Ex-parte Applicant had the 8ft lane registered as a plot in the year 2007 in his name which became plot number 128 measuring 8ft x 100ft.
10. It is the Respondent's case that the open lane now known as Plot No. 128 did not at any time belong to the purported sellers; that the registration was marred with irregularities and fraud and that the same was developed without approved building plans.
11. On her part, the Interested Party deponed that she is the legal owner of Plot No. 2 measuring 22ft x 100ft which she purchased; that the Ex-parte Applicant encroached onto the 8ft service lane which had been left for use by the general public and that what he purported to buy was public land.
12. In his Supplementary Affidavit, the Ex-Parte Applicant deponed that the buildings in the suit land have remained as per the original developments by the original owner; that the Respondent declined to take measurements as requested and that they both bought what was in existence.
13. The Applicant's counsel submitted that the decision to demolish the Plaintiff's plot was reached in breach of the rules of natural justice as to a fair hearing and without giving the Applicant an opportunity to be heard.
14. Counsel submitted that the Respondent acted in breach of its duty to act on the application to inspect the subject plot, take proper measurements, verify the true plot sizes on the ground and give each party a hearing.
15. The Interested Party's advocate submitted that the Respondent no longer exists in law; that there are no grounds that have been given to warrant the grant of the orders of Judicial Review and that the letters issued by the Respondent cannot amount to a decision which can be subjected to Judicial Review.
16. According to the Interested Party's advocates, the Applicant should have filed an ordinary suit and not the current suit.

17. Counsel submitted that the Applicant grabbed a public land and encroached on a portion of the Interested Party's Plot No. 2.
18. The evidence before me shows that when the late Zakayo Mutua died, the family members deliberated on how to share his estate.
19. According to the minutes of 18<sup>th</sup> October, 2005, Peter Mboka and his mother Mbula, was given 20ft comprising the hotel together with the backrooms while Masivo with the children of his elder brother and their mother were given 10ft on the side of the butchery together with the backrooms.
20. The Interested Party has not denied that indeed she purchased the side that had the hotel and the backrooms, which, according to the minutes of the clan measured 20ft and not 22ft.
21. The Applicant has exhibited an agreement dated 19<sup>th</sup> February, 2006 showing that he purchased the developed butchery and the seven (7) backrooms measuring 10ft x 100ft for Kshs. 320,000, which was registered as Plot No. 128.
22. The Applicant has also exhibited a document showing that on 25<sup>th</sup> July, 2006, the Respondent participated in the sub-division of plot number 2 thus giving rise to the Applicant's plot measuring 10ft x 100ft.
23. However, in its letter dated 10<sup>th</sup> July, 2007, the Respondent informed the Applicant that the "Works, Town Planning and Market Committee had approved the registration of Plot size 8ft x 100ft. No explanation was given as to how the plot had changed from 10ft to 8ft.
24. Instead of responding to the Applicant's query as to what happened to the 2ft of land that he had bought, the Respondent informed the Applicant vide its letter dated 15<sup>th</sup> July, 2011 that he had "*encroached on plot number 2 registered under one Loise Kamene David.*"
25. The Respondent has not informed this court if at all it afforded the Applicant an opportunity to be heard before concluding that he had encroached on the Interested Party's land.
26. The evidence shows that on 3<sup>rd</sup> October, 2011, the Respondent informed the Applicant to pull down the building within fourteen (14) days, and if not, it will pull it down.
27. Again, there is no evidence to show that the Applicant was given a hearing before the decision of informing him to pull down the building was arrived at.
28. Although the Respondent and the Interested Party now claim that the Applicant's plot is actually public land, that was never communicated to the Applicant in the letters I have mentioned above.
29. In view of the fact that the Applicant did buy a piece of land which was developed by the seller, it follows that the entire building, including the building occupied by the Interested Party, was legally put up. The Respondent cannot isolate the Applicant's building for demolition on the ground that no approvals were sought and granted, and leave the Interested Party's building standing.
30. Considering that the Applicant was never heard before the Respondent made a decision to demolish his buildings, and in view of the fact that the Respondent indeed consented to the sub-division of the original plot number 2 into two, I find that the orders being sought in the Application should be granted.
31. I therefore allow the Application dated 8<sup>th</sup> December, 2011 as prayed.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 9<sup>TH</sup> DAY OF NOVEMBER, 2017.**

**O.A. ANGOTE**

**JUDGE**