



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW APPLICATION NO.6 OF 2015

MARGARET WAITHIRA NJIHIA (Suing as legal representative of the Estate of the late FRANCIS NJIHIA GITATU (Deceased).....APPLICANT

VERSUS

COUNTY GOVERNMENT OF NAKURU.....RESPONDENT

LUCY NJERI KARIUKI (Sued as the legal representative of the Estate of the late ZAKAYO KARIUKI GWATHIINTERESTED PARTY

JUDGMENT

(Application for certiorari; respondent allotting a plot to the applicant and later revoking the allocation; plot allocated to applicant after a repossession based on non-payment of rents; emerging that there were no rent arrears on the plot and the same ought not to have been repossessed; respondent then proceeding to reinstate the initial plot owner; applicant applying for the reinstatement to be quashed on basis of illegality, unreasonableness and failure to be heard; no illegality or unreasonableness on the decision; opportunity to be heard given; decision was aimed at correcting a mistake; no irrationality; only issue to be pursued being compensation; application dismissed)

1. This is a judicial review motion that was filed on 20 March 2015 and amended on 15 May 2015. The prayers sought are as follows :-

- i. Certiorari to bring before this Honourable Court and quash the decision of the respondent purporting to repossess and re-allocate Business Plot Number 49 situated within Maai Mahiu Trading Centre as communicated vide a letter reference No. NSC/PLOTS DISPUTE/VOL.1-2015 dated 16th February 2015.
- ii. That the costs of this Application be provided for.

2. The case of the applicant as provided in the Statutory Statement and Verifying Affidavit, is that she is the widow and administratrix of the Estate of one Francis Njihia (deceased). It is averred that there was a notice of repossession of plots issued on 1 September 2009 issued by the respondent after which the late Njihia applied for and was on 12 March 2010, allocated the plot No. 49 situated in Maai Mahiu Trading Centre. He paid the requisite fees and took possession of the plot. He then developed it after obtaining planning approval from the County Council of Nakuru. He paid the rates due thereafter. On 16 February 2015, the respondent did send to the applicant a notice that they have decided to have the plot revert back

to its previous owner one Zakayo Kariuki, who was named as interested party. He has since died and was substituted with his personal representative, one Lucy Njeri Kariuki. It is the view of the applicant that the decision of the respondent is unlawful, unreasonable, capricious, arbitrary and in breach of the rules of natural justice and ultra vires the provisions of the respondent's By-Laws and the Physical Planning Act, Cap 286. It is also said to be an infringement of the applicant's right to property under Article 40 of the Constitution.

3. The respondent has opposed the motion through the replying affidavit of Joseph Motari, who is its County Secretary and Head of Public Service. He has deposed that on 12 March 2012, the Clerk to the County Council of Nakuru received a letter from the Public Trustee requesting to know how the Plot No. 49 changed ownership from Zakayo Kariuki to Francis Njihia. On 1 May 2012, the wife of the late Zakayo Kariuki, wrote another letter complaining about illegal construction on the suit premises. On 3 December 2014, she wrote another letter requesting for an order reversing the suit property back to its original owner. Upon receipt of this letter, it is deposed that the County Secretary directed that investigations be undertaken. He did later receive a report on the status of ownership of the property. It is averred that before reaching the impugned decision, an opportunity was given to the applicant to avail ownership documents vide a letter dated 4 November 2011. It is contended that the action undertaken by the respondent to revert back the suit property to the interested party was legal since the property did not qualify for repossession in the first place. It is the view of the respondent that the applicant ought to vacate the suit property and seek redress elsewhere.

4. The interested party filed Grounds of Opposition and raised two grounds being :-

- a. That the application is fatally defective.
- b. That the application is without merit.

5. In his written submissions, Mr. Geoffrey Otieno for the ex-parte applicant, inter alia submitted that the notice of 16 February 2015 was issued in bad faith and amounts to abuse of the respondent's powers. He submitted that once an allotment letter was issued, the property could no longer be available for allocation. He relied on the case of ***Rukaya Ali Mohamed vs David Gikonyo Nambacha, Kisumu HCCA No. 9 of 2004***. He submitted that it was unreasonable for the respondent to now ask the ex-parte applicant to remove the stone fence and developments on the suit property yet it is the same entity which granted planning approval. He submitted that this was irrational and that the remedy of judicial review would be available in such instance. He relied on the case of ***Pastoli vs Kabale District Local Government Council & Others (2008) 2 EA 300***. He submitted that the respondent has been accepting rates without objection and it would be unfair and in excess of its powers to seek removal of the applicant when all these years the applicant has worked hard to develop the same. He submitted that the applicant will suffer loss without any compensation. He relied further on the case of ***Republic vs Kombo & 3 Others ex-parte Waweru (2008) 3 KLR (EP) 478***.

6. For the respondent, Mr. Musembi Ndolo, learned counsel, submitted inter alia that the issue herein being judicial review should be restricted to the decision making process. He relied on the case of ***Municipal Council of Mombasa vs Umoja Consultants Ltd, Civil Appeal No. 185 of 2001***. He submitted that the ex-parte applicant has not tabled any evidence or adduce facts in support of the allegations of illegality, procedural impropriety, unreasonableness, irrelevancy and excessiveness of the respondent's powers and the motion herein should fail. He submitted that there is evidence that the ex-parte applicant was granted opportunity to be heard. He submitted that revoking the allocation of the Plot was within the statutory powers donated by Section 144(5) of the Local Government Act, Cap 265 (now repealed) and did not exceed the powers of the respondent. He pointed out that the allocation of the Plot to the applicant was illegal and there was no justification in repossessing the plot and allocating it to the applicant.

7. On behalf of the interested party, Mr. Rubua Nguire, learned counsel, inter alia submitted that the repossession was done by mistake as there had been no default of any payment of rates. He pointed out that the ex-parte applicant was invited to submit copies of ownership documents and later a decision was reached to cancel the allocation of the plot to the ex-parte applicant. He submitted that the ex-parte applicant was given opportunity to be heard and there was no breach of the rules of natural justice. He

submitted that an allotment letter can be cancelled if it is established that it was acquired through mistake. He relied on the case of ***Republic vs City Council of Nairobi*** which quoted a dictum in the case of ***Rukaya Ali Mohamed vs David Gikonyo Nambacha*** relied upon by Mr. Otieno.

8. I have considered the matter. The complaint of the ex-parte applicant is that the respondent was wrong in cancelling its allotment letter to the suit property. It is her view that this decision ought to be quashed for being :-

- i. *illegal, irrational and tainted with procedural impropriety.*
- ii. *Contrary to the spirit and provisions of Article 40 of the Constitution of Kenya, 2010.*
- iii. *In excess of the respondent's powers.*
- iv. *Otherwise unreasonable, and founded on irrelevant considerations.*

9. The facts do not really appear to be in dispute. On 1 September 2009, the predecessor of the respondent, the County Council of Nakuru did issue a Notice of Repossession of Plots to all those who had not cleared their rent arrears. The subject plot was one of the repossessed plots and was thereafter allocated to Francis Njihia. It now turns out that the plot was wrongly repossessed as the previous allottee had not defaulted in the payment of rents. It is for this reason that the respondent made the decision to have the Plot revert back to the previous owner.

10. I on my part cannot see how it can be argued that the respondent had no jurisdiction to make a decision on the allocation of the plot. The respondent is the allotting authority and I believe it can make decisions on the allotment and revocation of plots which are within its mandate. The Plot in issue is not one with a title but appears to still be under the County Government. If it had a title, the issues of course would be different.

11. I do not see the illegality of the decision. In fact, no law was cited by Mr. Otieno to demonstrate that the respondent's decision was illegal. I do not also see how the decision can be argued to be contrary to the spirit of Article 40 of the Constitution. It has emerged that the Plot was allocated to the ex-parte applicant by mistake and I cannot fault the respondent for wishing to correct its error. If the error is not corrected then the interested party will have been wrongfully deprived of her property. Neither do I see the unreasonableness or irrationality of the decision. There is nothing unreasonable or irrational in wishing to correct one's mistakes. On the question of being heard, I think the ex-parte applicant was given an opportunity to be heard. In essence I see no reason to fault the decision to have the mistake which deprived the interested party of her property corrected.

12. The only issue that I feel the respondent did not adequately address is the question of compensation. I cannot fault the late Francis Njihia for applying for and receiving the plot. He believed that it was properly repossessed. His plans to develop the property were approved. He indeed proceeded to develop the property. His estate considered the property as their own. The whole fault was with the predecessor of the respondent and/or the respondent, and the respondent ought to compensate the applicant for the fair value of what the ex-parte applicant has lost.

13. However, this is not a suit for compensation or damages. If no compensation is forthcoming, the ex-parte applicant is free to file suit for the same. This is a suit to quash the decision to revert the plot back to the estate of the interested party. I am unable to fault that decision. I therefore dismiss this motion. However, given the circumstances, I make no orders as to costs.

14. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 5th day of May, 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of : -

Mr Rubua Ngure for Interested Party and holding brief for Mr Ndolo for respondent.

N/A on part of M/s Geoffrey Otieno & Co for ex-parte applicant .

CA: Janet

MUNYAO SILA

JUDGE

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