



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC. MISC. CIVIL APPLICATION NO. 103 OF 2012

REPUBLIC.....APPLICANT

-VERSUS-

THE TOWN CLERK MUNICIPAL COUNCIL OF MOMBASA.....RESPONDENT

RULING

1. This ruling is in respect to the application dated 26.2.13 filed by the interested party hereinafter referred to as the applicant. The application is anchored under the provisions of article 35 of the Constitution, section 3 & 3A of the Civil Procedure Act and Order 51 of the Civil Procedure Rules. The main prayer is an order to be issued directing the Mombasa Municipal Council to supply the applicant with the information contained in the schedule provided before the application dated 11.1.2013 is heard. He also prayed for the costs of the application.
2. The schedule of the items required to be provided is annexed to the application. The application is premised on the grounds on the face of it and the affidavit deposited by Mr Mohamud Amin Ali. In the affidavit, it is deposed that the applicant is the registered owner of L.R No MN/1/5141 the subject land over which the decision is challenged. The applicant deposed further that the Physical Planning Act requires that development permission shall be given only to persons with legal title and that the ex – parte applicants have not shown any recognised title in law. Further that the illegality of the permission given to the exparte applicant cannot be unravelled unless the documents sought are provided. The applicant continued that they wrote to the respondents to supply them with these documents vide their letter of 4.2.2012 but which request was not honoured. It urged Court to grant orders sought.
3. The exparte applicants in opposing the prayers sought have stated through their written submissions filed that they rely on the verifying affidavit of Branson Hare Chogo of 28.12.2012 and the affidavit of Mr. C. M Mwadime sworn on 1.7.2013. In the affidavit of 28.12.12, which was made in support of the Substantive motion, Mr Chogo deposed that the exparte applicants are the owners of the respective portions of plots which form part of plot No 5141/1/MN situated at Utange Mombasa. They annexed copies of approvals of their developments. Further that the respondent served them notices alleging the houses were constructed without authority. In this 7 paragraph affidavit, other than copies of approvals, none of the documents the interested party has listed has been annexed. In the affidavit of C. M Mwadime of 1.7.2013, there is no document annexed to it. Besides, the two affidavits do not directly oppose the orders sought.
4. The parties filed their rival submissions through their respective advocates. The interested party/applicant gave a chronology of facts of this case and why they made the present application

of worth noting is the two affidavits sworn by C. M Mwadime in which his affidavit of 20.6.13 Mwadime denied the respondents denied issuing any approvals. Later on 1.7.13 he deposes that the expert applicants obtained the requisite approvals. The applicant submitted further that before granting the approvals, the law required the respondent to be provided with certain documents and which documents the applicant prays to be supplied. In support of their submissions, they relied on the following submissions :-

i) Physical Planning Act

ii) ABN Amro Bank vs Kenya Pipeline Corporation (2014) eKLR

iii) Njuguna Ndungu vs EACC & 3 Others (2014) eKLR

vi) South African decisions enclosed

5. The exparte applicants also filed their written submissions which stated that this application is intended to delay the hearing of their Substantive Motion. Secondly that the application ought to have been filed separately from the Judicial review proceedings. It is their submission that the interested party cannot and should not hold brief for the respondent who has not opposed the application for Judicial review. They urged the Court to find this application has no place in proceedings of Judicial review, is misplaced and ought to be dismissed with costs.
6. The pleadings filed by the exparte applicants shows they are asking this Court to cancel the notice of demolition. The notice is said that it was issued because the structures set to be demolished were built without approval a fact denied by the exparte applicants. Secondly the respondent's representative Mr Mwadime swore two affidavits one denying that approvals were ever issued and another admitting there were approvals. The interested party avers that for the Court to reach a just determination of the matter, it is important that the documents presented by the exparte applicants seeking approvals need to be exhibited. This Court is alive to the principle of law that in dealing with the application for Judicial review, the merits of the case is not to be considered but the procedure used in arriving at that decision. Would the documents required by the applicant be necessary for the determination of issues before Court or not ?
7. The applicant want the respondent to provide/supply the following documents presented to it by each of the exparte applicants
 - a) Notifying the Council in writing 48 hours prior to commencement of construction.**
 - b) To start the construction within 12 months and completingsuch in 24 months otherwise the approval lapses.**
 - c) To execute the proposal in strict conformity with the architectural and structural plans approved by the Director of Planning and Municipal Engineer respectively.**
 - d) That the Council will not accept any responsibility for stabilityor any work or other shortcoming in the building. (LegalNotice No. 135 Regulation 38 of 1998).**
 - e) Building works to commence on site after the structural drawing have been approved by the Municipal Engineer.**
 - f) Not constituting part of disputed public/private land or public utility land.**
 - g) A board indicating plan No. the names of consulting Planner, Architect, Engineers, minute No. of the approved plan MUST be placed at the site before any construction start.**

h) Satisfying any other legal requirement is of your application.

All the documents required to be supplied ought to be submitted in accordance with section 31 of the Physical Planning Act. These documents particularly item (d) would determine whether the approval was given or not. Probably this application would have been misplaced had the respondent not sworn two conflicting affidavits. Since affidavit is treated as evidence on oath, it would be useful to Court for the documents to be provided for this Court to know the true position of the respondent.

8. As said earlier, there is no direct evidence filed to oppose the orders sought herein. And taking into account the provisions of law on what circumstances information would be denied as was stated in the case of **Professor Njuguna Ndungu vs EACC & 3 Others** that the information must have been requested for, the information is held by the respondent and the disclosure does not go against public interest. In this instant, the information was requested for and has not been supplied. The documents ought to be in possession of the respondent as the body concerned it is required to keep copies. Lastly no mention is made that if the documents are supplied, it shall violate the public interest. I find the applicant has met their conditions as set under article 35 of the constitution. Consequently I do find merit in the motion dated 26.2.13. The respondent is ordered to supply the said documents within 60 days of the date of delivery of this ruling. In default of compliance, this Court will proceed with this case on the premise that no such documents exists. Costs of the application ordered in the cause.

Ruling dated and delivered in Mombasa this 8th day of October, 2015

A. OMOLLO

JUDGE