Republic v Nairobi City County; Mwangi (Exparte) (Application E132 of 2023) [2024] KEHC 10141 (KLR) (Civ) (14 August 2024) (Judgment)

Neutral citation: [2024] KEHC 10141 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

APPLICATION E132 OF 2023

J NGAAH, J

AUGUST 14, 2024

BETWEEN

REPUBLIC .... APPLICANT

AND

NAIROBI CITY COUNTY .... RESPONDENT

AND

FRANCIS NJOROGE MWANGI .... EXPARTE

JUDGMENT

1. The application before court is the applicant's motion dated 13 September 2023 expressed to be brought under Order 8 Rule 3 and Order 53 rule 3 of the *Civil Procedure Rules*. The applicant seeks the following orders:

   a. That the orders for certiorari to bring to the high court for quashing the enforcement notice issued by the respondent dated 16th August 2023 served on 23rd August 2023 referenced 2056 developer/owner/occupier Masai Road.

   b. That orders of prohibition be issued against the Respondent and its agents, prohibiting them from undertaking further damage, encroaching on the applicant's land parcel LR 1160/1149, LR 1160/1150 and LR, 1160/1151 and/or undertaking any activities thereon contrary to the applicant's interest in the land.

   c That orders be issued by this Honorable court against the Respondent compelling it compensate the Applicant of KES 1,382,000 which monies are as a result of the damages caused by the Respondent's malicious actions.

d. That the costs of this application be provided for."

2. The application is based on a statutory statement dated 6 September 2023 and an affidavit verifying the facts relied upon sworn on even date by Francis Njoroge Mwangi. The applicant has sworn that he is the registered proprietor of parcels of land in Nairobi identified as LR. LR. 1160/1149, LR. 1160/1150, LR. 1160/1151.

3. On 16 August 2023 he was served with an enforcement notice by the respondent; the notice was referenced as no. 2056. The applicant contends that the purported notice is defective in several respects. For instance, it does not describe the land it refers to and it does not show the officer who signed it. The notice does not also give any reasons why the applicant's perimeter wall is being demolished or any steps to be taken, apparently by the applicant. The applicant also claims that he had obtained permission to construct the perimeter wall that has been demolished.

4. The applicant has also sworn that issues to do with construction on his parcels of land are a subject of litigation in the Environment and Land Court No. E184 of 2023 and, therefore, sub judice.

5. Further, the applicant has sworn that he was unable to file an appeal to the Nairobi City County Physical Planning and Land Use Planning Liaison Committee under section 75 of the *Physical Planning and Land Use Act*, 2019 because the term of the committee has expired. It is for this reason that he has directly approached the court.

6. The respondent opposed the motion and filed a replying affidavit sworn by W.S. Ogola who has described himself as "the county solicitor" of the respondent. Mr. Ogola is in agreement with the applicant that the subject matter in this suit is the same subject matter in the Environment and Land Court case No. E148 of 2023. As a matter of fact, there are interim orders that have been issued in that case pending its hearing and determination.

7. Mr. Ogola has also sworn that the applicant sought for and obtained approval for sub-division of his land parcel no. 1160/1116. The approval was granted subjected to certain conditions, including provision of access road to the resultant parcels which, according to the respondents, were eight in number. One of these owners of these parcels complained to the respondent that the applicant had not provided access road contrary to the conditions under which the approval for sub-division was granted. The respondent, therefore, issued an enforcement notice to compel the applicant to comply with the conditions under which the approval had been granted.

8. I have considered the submissions by the learned counsel for the respective parties. By the applicant's own admission, the issues relating to ownership or use of the suit property no.1160/1116 or sub-divisions thereof are directly in issue or substantially in issue in the Environment and Land Court case No. E148 of 2023. In the affidavit sworn by the applicant in support of the motion, the applicant has sworn, inter alia as follows:

> " 5(f) 4 That the notice is instituted by malice and bad faith and instigated by Darius Omai Obegi against whom there is litigation in case no ELC E184 of 2023.
>
> (g) That the issues of any construction in LR 1160/1145, 1146, 1149,1150 and 1151 is sub judice in view of the case in existence.
>
> 13. That I have not enjoyed peaceful possession of the land since I filed ELC Case number E184 of 2023 and now with the demolition and laying the water pipes.
>
> 17. That I believe the notification was issued at the instance of Darius Obegi with whom we have a case number ELC 184 of 2023.

18. That by initiating action from the City County Government the said Darius Obegi is attempting to steal a match from me yet the court matter is due for ruling on 12th October 2023."

9. Indeed, in a ruling delivered in ELC No. 184 of 2023 on 12 October 2023, it is evident that the question of ownership or use of the property or properties in issue in this suit are subject to the court's determination in ELC No. 184 of 2023. In that case in which the applicant is the plaintiff and the one Darius Obegi is named as the defendant, the court issued interim orders in the following terms:

> " i. An order of status quo is hereby issued restraining all parties from furthering interfering in any manner with respect to all that parcels of land known as LR /1160/7147, LR /1160/1148, LR 1116/149, LR 1116/1150, and LR1116/1151 pending the hearing and determination of this suit."

10. If all parties were restrained from interfering with the property in any manner, then the applicant was as much subject to this order as the defendant. He could not purport to construct perimeter walls when the issue of ownership of the suit property or its use was still pending for determination.

11. But that is beside the point. For purposes of determination of this application, it is sufficient, as both parties agree, that this matter is sub judice. That being the case, section 6 of the *Civil procedure Act* bars this court from proceeding with a suit in which the matter in issue is directly and substantially in issue in a previously instituted suit between the same parties or parties under whom they claim. That section reads as follows:

    6. Stay of suit

    No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

12. I am minded that the County Government of Nairobi is not party to suit no. 184 of 2023 in the Environment and Land Court; however, I note that the applicant has sworn that the actions of the County Government of Nairobi have been instigated by the defendant in the suit. If that is the case, the applicant's concerns in this suit can properly be addressed in the previously instituted suit to which the defendant is a party.

13. But even if the issue of sub judice was out of the picture in this application, the applicant's application would still be unstainable because, under the law, a party aggrieved by the decision of the county physical and land use planning liaison committee can only file an appeal against the decision and not a judicial review application. This is under Part V of the *Physical Land Use and Planning Act* and in particular, section 72 thereof that makes provision for inter alia, the circumstances under which an enforcement notice may be issued, the form the notice takes and how it may be challenged. This section reads as follows:

    72. Enforcement notice

    (1) A county executive committee member shall serve the owner, occupier, agent or developer of property or land with an enforcement notice if it comes to the notice of that county executive committee member that—

(a) a developer commences development on any land after the commencement of this Act without the required development permission having been obtained; or

(b) any condition of a development permission granted under this Act has not been complied with.

(2) An enforcement notice shall—

(a) specify the development alleged to have been carried out without development permission or the conditions of the development permission alleged to have been contravened;

(b) specify measures the developer shall take, the date on which the notice shall take effect, the period within which the measures shall be complied; and

(c) require within a specified period the demolition or alteration of any building or works or the discontinuance of any use of land or the construction of any building or the carrying out of any other activities.

(3) Where a person on whom an enforcement notice has been served is aggrieved by that notice, that person may appeal to the relevant County Physical and Land Use Planning Liaison Committee within fourteen days of being served with the notice and the committee shall hear and determine the appeal within thirty days of the appeal being filed.

(4) Any party aggrieved with the determination of the county physical and land use planning liaison committee may appeal to the court only on a matter of law and the court shall hear and determine the appeal within thirty days.

(5) A person who has been served with an enforcement notice and who refuses to comply with the provisions of that notice commits an offence and is liable on conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding two months or to both. (Emphasis added).

Section 72(4) is clear that a party aggrieved by the determination for the County physical and land use planning liaison committee may appeal to the court.

An appeal is not synonymous with judicial review. The distinction between the two jurisdictions has been discussed by David Foulkes in his book *Foulkes Administrative Law*, 7th Edition. Citing the case of *Customs and Excise Commissioners versus J.H. Corbitt (Numismatists) Ltd* (1981) AC 22, (1980) 2 2ALL ER 72, the learned author noted as follows:

> " It is to be noted that an appeal lies from, whether to an appellate tribunal or to a court of law, only when and to the extent that statute so provides, and the powers of the appeal body to review, reconsider etc. the decision of the tribunal likewise depend on the statute.
>
> To be contrasted with appeal is judicial review. The decision of tribunals, as bodies exercising judicial functions, have always been subject to review by the courts (that is, to judicial review) by means of the order of certiorari. This enables the court to quash a decision on certain grounds. Whereas appeal lies only when and to the extent that statute provides, the court's common law power of judicial review exists unless it is take away or limited by statute.

> Thus where no appeal to the court is provided by statute the only possible challenge in the courts is by way of judicial review..." (at p.150-151). (Emphasis added).

And no doubt this was the principle applied by Lord Wright in *General Medical Council versus Spackman* (1943) AC627, at 640 where he stated as follows:

> "I have observed that Parliament has not provided for any appeal from the decisions of the council. The only control of the court to which the council is subject (apart from proceedings by way of mandamus) is the power which the court may exercise by way of certiorari. Certiorari is not an appellate power."

14. These decision are, more or less, self-explanatory. They are clear that judicial review and appeal are separate and distinct jurisdictions. Appeals against decisions of courts, tribunals and such other bodies exercising quasi-judicial functions only lie where the statute expressly provides for the appeals. Where no such provision is expressly made, it does not necessarily follow that a party aggrieved by the decisions of these bodies is left without a remedy. In that case, judicial review kicks in to check abuse of power by these bodies.

15. In the instant case, the statute is clear that the recourse available to the applicant is an appeal and not judicial review. It does not matter that the applicant has sidestepped the county physical and land use planning liaison committee, for whatever reason. That being the case, I need not belabour the point that, to the extent that the applicant has filed an application for judicial review rather than an appeal, his application is incompetent, misconceived and an abuse of the due process of this Honourable Court. It is hereby struck out with costs. It is so ordered.

SIGNED DATED AND POSTED ON THE CTS ON 14 AUGUST 2024

NGAAH JAIRUS

JUDGE