Waqooy Merchants Limited v Nairobi City County & another (Judicial Review Application E002 of 2023) [2023] KEHC 26846 (KLR) (Constitutional and Judicial Review) (20 December 2023) (Ruling)

Neutral citation: [2023] KEHC 26846 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND JUDICIAL REVIEW

JUDICIAL REVIEW APPLICATION E002 OF 2023

JM CHIGITI, J

DECEMBER 20, 2023

BETWEEN

WAQOOY MERCHANTS LIMITED ..... APPLICANT

AND

NAIROBI CITY COUNTY ..... 1ST RESPONDENT

THE DIRECTOR, LANDS, HOUSING & URBAN PLANNING & DEVELOPMENT NAIROBI CITY COUNTY ..... 2ND RESPONDENT

RULING

1. The Application seeks orders:

    1. Spent

    2. This Honourable Court be pleased and do hereby grant Judicial Review Order of Mandamus do issue against the Respondents compelling the Respondents to issue the Applicant with the stamped and approved architectural and structural plans for the construction on LR No. 209/11953 pending the hearing and determination of this application.

    3. That this Honourable Court be pleased and do hereby grant Judicial Review Order of Mandamus do issue against the Respondents compelling the Respondents to issue the Applicant with the stamped and approved architectural and structural plans for the construction on LR No. 209/11953 pending the hearing and determination of this suit.

The Applicants case:

2. It has a lease of business space within Green Park terminus on LR No. 209/11953 off Haile Selassie Avenue and it has paid the Respondent the required annual rent for the lease.

3. The Applicant submitted the required architectural plan to the Respondents for their approval and paid for the approval of the architectural and structural plans on 4th October, 2022.

4. The Applicant moved the court after the Respondents refused to issue it with the stamped architectural plans and the structural plans to enable the Applicant to start constructing on the said parcel of land and this is causing the Applicant irreparable harm in terms of money and time as it would have already started constructing and developing on the piece of land.

5. It is the Applicant's contention that the provisions of the Physical Planning and Land Use Act that were cited by the Respondent to challenge the jurisdiction of this court is only applicable in cases where a decision has been made by the county executive committee member and further where one was aggrieved by the said decision and hence filed an appeal.

6. Section 61(3) of the *Physical and Land Use Planning Act*, 2019 provides that;

> An applicant or an interested party that is aggrieved by the decision of a county executive committee member regarding an application for development permission may appeal against that decision to the County Physical and Land Use Planning Liaison Committee within fourteen days of the decision by the county executive committee member and that Committee shall hear and determine the appeal within fourteen days of the appeal being filed.
>
> 61(4) An applicant or an interested party who files an appeal under sub-section (3) and who is aggrieved by the decision of the committee may appeal against that decision to the Environment and Land Court.

7. According to the Applicant the afore stated sections apply ONLY when an Applicant is aggrieved by the decision of a county executive committee member which needs to be referred to the County Physical and Land Use Planning Liaison Committee.

8. The Applicants are not challenging any decision made by the County Physical and Land Use Planning Liaison Committee; but rather the manner in which the Respondents are acting in bad faith in refusing to release the said development plan to the Applicant.

9. The Applicants further submit that the application herein for judicial review is rightly before this Honorable court, as there exists exceptional circumstances as herein above demonstrated to justify the departure from the appellate procedure prescribed for under Sections 61(4) of the *Physical and Land Use Planning Act*, 2019. Reliance was placed on the case of *Republic v Commissioner of Customs Services Ex parte Imperial Bank Limited* [2015] eKLR where the Court cited with approval the decision in *Pastoli v Kabale District Local Government Council and Others* [2008] 2 EA 300 Where it was stated as follows

> "In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances

of illegality.... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

10. In the foregoing it is submitted that there was no any alternative remedy available to the applicant herein, to fortify this position, *Republic v Nairobi City County, Director of Planning Nairobi City County & Engineeer of Roads Nairobi City County Ex -parte: Suad Salim Abubakar t/a Saab Royale Hotel* for the holding that: -

> " 33. In my view, whereas the availability of an alternative remedy is a factor to be taken into consideration, the Court ought not, in its decision to sanitise a patently illegal action on the basis that there is a right of appeal provided by the statute where such a right is practically non-existent. In this case the circumstances of the dispute render such an option a mirage. In my view, if there is no dispute resolution mechanism covering the circumstances of the case, to send the applicant away on a wild goose chase of a non-existent remedy would be absurd. Where the purported alternative remedy leaves an aggrieved party with no effective remedy, such remedy is no remedy at all. I reiterate that where a remedy provided under the Act is made illusory with the result that it is practically a mirage, the Court will not shirk from its Constitutional mandate to ensure that the provisions of Article 50(1) are attained with respect to ensuring that a person's right to have any dispute that can be resolved by the application of law is decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body, is achieved.
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> 34. In the foregoing premises the inescapable conclusion I come to is that the Respondents' decision was tainted with procedural impropriety and further that there is no more convenient, beneficial and effectual remedy available to the applicant."

11. Further in the case of *Charles Migichi Mungai & 7 others v County Government of Kiambu* [2019] eKLR the Honourable Judge Gacheru stated that:

> " The Plaintiffs have come to court seeking remedies and enforcements of their right to own property and such remedies can only be awarded by the Environment & Land Court and not the Physical Planning Liaison Committee. Further, the Court finds no decision of the Director or the Defendant that needs to be referred to the Liaison Committee but the issues raised herein falls squarely under the jurisdiction of this Court. The upshot of the foregoing is that the Preliminary Objection raised by the Defendant is not merited and the same is dismissed entirely with costs to the Plaintiffs".

Respondents' Case

12. It is the Respondents case that the Applicant has moved the court prematurely, and the applicant is abusing the court process as it has failed to meet and exhaust all possible mechanism for dispute resolution as stipulated by section 61(3) of the *Physical and Land Use Planning Act*, 2019. Reliance is placed in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696. At page 700 Law JA stated;

> " A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

13. At page 701 Sir Charles Newbold, P added:

> " A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

14. The *Physical and Land Use Planning Act*, 2019 provides for a means of redress to a person aggrieved by the decision of the County Executive Committee Member regarding an application for development permission. Section 61 (3) of the said act states that;

> " An applicant or an interested party that is aggrieved by the decision of a county executive committee member regarding an application for development permission may appeal against that decision to the County Physical and Land Use Planning Liaison Committee within fourteen days of the decision by the county executive committee member and that committee shall hear and determine the appeal within fourteen days of the appeal being filed"

15. Section 61(4) of the above mentioned Act states that,

> " An applicant or an interested party who files an appeal under sub-section (3) and who is aggrieved by the decision of the committee may appeal against that decision to the Environment and Land Court"

16. The application is an abuse of the court process. Article 159(2) provides that courts should be guided by alternative forms of dispute resolutions in the exercise of its duties. Reliance is placed in the case of S*peaker of the National Assembly vs Njenga Karume* (2008) 1 KLR 425 where the court held as follows:

> " In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the *constitution* or an act of parliament, that procedure should be strictly followed".

17. The applicant has not adduced any evidence to show that they exhausted all possible redress provided in the act before moving to this honorable court.

18. This Honourable court should down its tools for lack of jurisdiction as was stated in the case of *Owners of the Motor Vessel "Lilian s" v Caltex oil (Kenya) ltd* (1989) where the court pronounced itself as below:

> "Jurisdiction is everything. Without It a court has no power to make one more step. Wthe here a court has no jurisdictionre would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."

19. According to the Respondent costs follow the event as was in Petition No. 4 of 2012 *Jasbir Singh Rai & 3 others Tarlochan Singh Rai & 4 others*; [2014] eKLR where the Supreme Court stated:

> "It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation."
>
> Although there is eminent good sense in the basic rule of costs, that costs follow the event, it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings — a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the applicant."

Issue for Determination

20. Following are the issues for determination are as follows:

    a. Whether this court has jurisdiction to hear and determine this suit.

Analysis and Determination

Whether this court has jurisdiction to hear and determine this suit

21. Section 61(3) of the *Physical and Land Use Planning Act*, 2019 provides that;

> "An applicant or an interested party that is aggrieved by the decision of a county executive committee member regarding an application for development permission may appeal against that decision to the County Physical and Land Use Planning Liaison Committee within fourteen days of the decision by the county executive committee member and that committee shall hear and determine the appeal within fourteen days of the appeal being filed.
>
> 61(4) An applicant or an interested party who files an appeal under sub-section (3) and who is aggrieved by the decision of the committee may appeal against that decision to the Environment and Land Court."

22. The Final Report of the Committee of Experts (CoE) that prepared the draft that ultimately became the *Constitution* of Kenya 2010, leaves no doubt that the ELRC and its twin sibling, the ELC, were intended to be "specialized courts" with certain, specific and precise jurisdiction, in contradistinction to the High Court which enjoys unlimited original jurisdiction in criminal and civil matters; and the jurisdiction to interpret and apply the *Constitution*, including enforcement of fundamental rights and freedoms. The report expressly refers to the two courts as "specialized" courts and further explains that the CoE rejected a proposal to remove the two courts from the *Constitution* and leave it to Parliament to establish "other courts" with such jurisdiction as it may determine. The CoE reasoned that to do so would give Parliament an opportunity to establish courts with broad jurisdiction capable of supplanting that of the other superior courts established by the *Constitution*, which "would not signal establishment of specialized courts" on employment and labour and land/environment, and might lead to competing jurisdiction with the High Court.

23. The Supreme Court emphasized this background in *Republic v Karisa Chango & Another* [2017] eKLR, when it stated as follows:

> "the *Constitution* of Kenya, 2010 has pronounced itself clearly on the jurisdictional competencies of various courts of law in Kenya. The drafters of the *Constitution*, it appears, had the intention of clearly demarcating the jurisdictions of the said courts so as to pre-empt lacunae and conflicts. Besides the *onstitution*, there are several statutes which demarcate the jurisdictions of various Courts and tribunals..." [Emphasis added]

24. Later on in the same judgment, the Supreme Court concluded as follows:

> "Although the High Court and the specialized Courts are of the same status, as stated, they are different Courts. It also follows that the Judges appointed to those Courts exercise varying jurisdictions, depending upon the particular Courts to which they were appointed. From a reading of the statutes regulating the specialized Courts, it is a logical inference, in our view, that their jurisdictions are limited to the matters provided for in those statutes. Such an inference is reinforced by and flows from Article 165(5) of the *Constitution*, which prohibits the High Court from exercising jurisdiction in respect of matters "reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or (b) falling within the jurisdiction of the Courts contemplated in Article 162(2).

25. In the cases of *Beatrice Wambui Kiarie & 2 others vs Tabitha Wanjiku Ng'ang'a & 9 others* (2018) eKLR and *Isaac Kinyua & 3 Others v Hellen Kaigongi* [2018] eKLR, *Wilson Mthui Mutungu v Beatrice Gathoni & Another* (2016) eKLR, n*Gerick Kenya Limited v National Environment Management Authority* [2015] eKLR and *Republic v Chief Land Registrar & Another*, JR ELC No. 11 of 2010 [2019] eKLR, the court held as follows on the issue of distinctiveness of jurisdiction of the High Court and courts of equal status as follows: -

> "Even with that clear-cut jurisdictional demarcation on paper, sometimes matters camouflaged in what may on the surface appear to be a serious constitutional issues or Judicial Review applications or other matters falling in other High Court divisions may, on a closer scrutiny reveal otherwise- that the germane of the application is actually a labour dispute or land issue falling squarely in the forbidden sphere of the specialized courts! ...The drafters of the *Constitution* were very clear on the limits of this court's jurisdiction and the jurisdiction of the courts of equal status."

26. The jurisdiction of this court is well settled in the case of *Pastoli v Kabale District Local Government Council and Others* [2008] 2 EA 300 it was held:

> "In order to succeed in an application for judicial review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.....Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

27. I am satisfied that the Applicants are challenging the failure to act procedurally on the part the Respondents in refusing to release the said development plan to the Applicant which is within the purview of the *Fair Administrative Action Act*.

28. The issue raised in the Application fall within the principles laid out in the *Pastoli v Kabale District Local Government Council and Others* [2008] 2 EA 300 wherein it was held that:

> "In order to succeed in an application for judicial review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety."

29. I need not delve into the merits of the case at this juncture lest I compromise the parties' respective cases.

30. On its part, the Environment and Land Court is vested with such facilities that the Environment and Land Court also has powers to issue judicial review orders.

31. It is this court's finding that the issues raised in the suit go beyond judicial review ambit. They are not simply issues of illegality, irregularities or procedural improprieties.

32. Section 13 (7) (b) the *Environment and Land Court Act* provides that:

> "In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including prerogative."

33. From the above analysis, as guided by the pleadings, it is quite obvious this suit is related to environment, use and occupation/use of land and; I so hold.

34. In the case of *Dickson Ngigi Ngugi v Commissioner of Lands* S.C Petition No. 9 of 2019 [2019] eKLR, [36] the Supreme Court made binding finding that Jurisdiction goes to the root of any cause or dispute before a court of law. A court must exercise restraint to avoid overstepping its constitutional role in

order to maintain its legitimacy. If a court has no jurisdiction, a judgment rendered therein does not adjudicate the dispute. It does not bind the parties, nor can it be made the foundation of any right. It is a nullity without life or authority. In short, it is coramnon judice and amounts to a nullity because, as Nyarangi, JA famously said in the locus classicus, *Owners of the Motor Vessel "Lillian S" v Caltex Oil, (Kenya) Ltd* [1989] KLR 1, "jurisdiction is everything. Without it, a court has no power to make one more step".

Disposition:

35. I lack the jurisdiction to deal with the other issues before this court.

Order:

36. Orders:-

    1. The Preliminary Objection is upheld.

    2. Costs to the Respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DECEMBER, 2023.

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J. CHIGITI (SC)

JUDGE