



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION
JUDICIAL REVIEW APPLICATION NO. 412 OF 2017

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS IN THE
NATURE CERTIORARI AND PROHIBITION**

AND

**IN THE MATTER OF ENFORCEMENT NOTICE ISSUED BY THE NAIROBI CITY COUNTY
GOVERNMENT FOR EVICTION UNDER THE PHYSICAL PLANNING ACT CAP 286 OF
THE LAWS OF KENYA**

AND

**IN THE MATTER OF ARTICLE 40 OF THE CONSTITUTION OF KENYA RELATING TO
PROTECTION OF RIGHT TO PROPERTY AND ARTICLE 43 RELATING TO ECONOMIC
AND SOCIAL RIGHTS AND ARTICLE 47 RELATING TO FAIR ADMINISTRATIVE ACTION
OF THE CONSTITUTION OF KENYA**

KISCOBA ASSOCIATION.....APPLICANT

Acting through JOHN MAINA - Chairman

JAMES NDIBA - Organizing Secretary

VERSUS

NAIROBI CITY COUNTY GOVERNMENT.....RESPONDENT

JUDGEMENT

Introduction

1. By a Notice of Motion dated 27th July, 2017, the *ex parte* applicants herein, **KISCOBA Association**, seeks the following orders:

1. That this honourable court do please to issue an order of Certiorari to bring up to the court in order to be quashed the Enforcement Notice issued by the Nairobi City County Government on 6th July 2017 to M/s Owner/Occupier- Illegal Occupiers on Commonwealth Cemetery Land Ref LR No. 209/6738 (part) under Section 38 of the Physical Planning Act Cap 286 of the Laws of Kenya.

2. This honourable court do pleased to grant an order of Prohibition to prohibit the respondent from evicting the applicants Jua Kali members who occupy various plots at the land surrounding common wealth Cemetery Kariokor Land Ref LR. No. 209/6738.

3. Costs of this application be provided for.

Ex Parte Applicant's Case

2. According to the Applicant, it has over 1000 members who are all *Jua Kali* Artisans carrying on various businesses such as food Kiosks, motor vehicle garages, spare parts shops, timber yards, machinery repairs and other occupations at Kinyanjui Road, Commonwealth Cemetery, L.R. No. 209/6738. They also use the premises for the residences of their families and have constructed churches thereon and schools. The applicants therefore averred that the applicant's members conduct in the suit constitute their entire livelihood for themselves and their families.

3. It was averred that on 6th July 2017 officials or agents of the respondent entered the applicants premises where their members operate and gave out several copies of eviction notices reading as follows:-

Illegal construction and occupation of a temporary structures on Commonwealth Cemetery Kariokor Land Ref L.R. No. 209/6738) (part)

You are hereby required to

1. Remove said illegal structures immediately

2. Reinstate said portion to its original state

3. Vacate said portion immediately within a period of immediately – 72 hours

4. According to the applicant the County Government Officials did not give any reasons for requiring the applicant's members to vacate the premises they occupy and where they have invested over Kshs. 200,000,000/= for the last 30 years, and have never been called by the respondent Nairobi City County for a meeting or discussion involving their occupation of the land.

5. The applicant averred that its members have been issued with letters of allotment going as far as 25th February 1999 for a lease term of 99 years and have paid stand premiums, annual rents, survey fees, architectural and approval fees and have continued making payments every year as required.

6. As a result of the foregoing the applicant immediately wrote to the then County Governor, **Evans Kidero**, complaining about the Enforcement Notice which gave them 72 hours only to move out their businesses and structures from the plot.

7. In the applicant's case that the eviction notice dated 6th July 2017 was therefore extremely illegal and constituted a violation of the right to own property as protected by Article 40 of the Constitution of Kenya which states as follows. The applicant's members were apprehensive that the intention of the respondent was to evict them forcibly from their respective plots where they do business and demolish their structures and ruin their businesses which action was likely to cause them and third parties immense financial loss as their customers have left various items for repair in the premises such as motor vehicles, home appliances, machineries and products for storage such as timber.

8. They suspected that the Nairobi City County was working on behalf of others to evict them and give their plots to other people as they had had a running dispute with the Ministry of Sports Culture and Arts over a gazette Notice No. 375 of 23rd January 2015 which purported to declare Nairobi/Kariokor) Cemetery a National Museum property. While not opposed to the gazette of the site, the applicants contended that the measurements in the gazette notice exceeded the cemetery and affected their plots.

They therefore urged the Court to ensure that due process be followed by the respondent or any other authority in the disputed land.

9. The applicants feared that the respondent actions will affect their economic and social rights as provided under Articles 43 of the Constitution of Kenya.

10. They disclosed that currently there are various motor vehicles left in the premises by customers and other items that could be lost or damaged if forcible evictions were to be conducted.

11. It was the applicant's case that the respondent's action was not only an unconstitutional infringement of their rights but was also ultra vires the powers of the local authority under Article 38 of the *Physical Planning Act* as the Enforcement Notice does not provide for eviction of occupiers.

Respondent's Case.

12. In response to the application, the respondent filed the following grounds of opposition:

1. That the Respondent contends on preliminary point of law that this Application is incompetent and fatally defective and an abuse of due process of law and consequently discloses no known cause of action against it as:-

a. There is no substantive relief sought for judicial review capable of being granted rendering the entire application a nullity.

b. The Applicant lacks the requisite legal capacity ("Locus standi") to commence these proceedings against the Respondent.

c. The application is vexatious, scandalous and frivolous in form and substance.

2. That the statutory statement is fatally defective in so far as it has not established any substantive reliefs to be granted provided under the law for invoking order 53 of the Civil Procedure Rules and/or judicial review proceedings herein.

3. That the Applicant has failed to demonstrate that it has the authority from the 1000 allegedly affected applicants to plead and act on their behalves rendering this application incompetent.

4. That the Applicant has either failed to disclose or describe the said 1000 land parcels under reference upon which the enforcement notice was allegedly issued nor the legal allottees.

5. That the allotment letter purportedly issued by it has no relationship with the disputed land parcel L.R. NO. 209/6738 (PART) against which the enforcement notice was issued.

6. That the enforcement notice issued against the property known as L.R. 209/6738 was issued in accordance with the Physical Planning Act, Cap. 296, Laws of Kenya. Besides the applicant has not demonstrated that it obtained any development approvals prior to making developments or improvement on the suit parcels of land, the developments were contrary to city planning guidelines.

7. That the applicant has wilfully concealed from this honourable court substantial facts and matters which are materials and relevant for a fair adjudication of the issues raised in the said application. And the application is consequently accentuated by malice, spite and has been brought in bad faith.

8. That in the premises, the said application is misconceived, vexatious and amounts to abuse

of the process of the Court.

13. It was submitted on behalf of the Respondent that applicants have not sought for any substantive relief to be granted but instead only sought for leave to be granted to them to institute judicial review proceedings against the respondent. In the Respondent's view, the reliefs sought by the applicants in the statutory statements are clearly at variance with the reliefs sought in the substantive motion rendering the motion null and void. This, according to the Respondent was due to the fact that the reliefs sought in the statutory statements are for grant of leave to commence judicial review in the nature of certiorari and prohibition, whereas in the substantive motion the applicant sought for an order of certiorari and prohibition making the Notice of Motion application dated 27th July 2017 incompetent and hopelessly defective.

14. It was submitted that for an application of this nature to succeed the applicant must have sought for the substantive reliefs in the statutory statement filed together with the ex-parte chamber summons, supported by a verifying affidavit. The technicality goes to the very root of this application and cannot be cured by article 159(2) of the Kenyan constitution. In this respect the Respondent relied on High Court judicial review No. 810 of 2013 - **Republic vs. Social Security Fund Board of Trustees & Another ex-parte Town Council of Kikuyu (2014) eKLR** where this Court expressed itself as hereunder:

“Since the reliefs indicated in the statement are different from those sought in the Notice of Motion, that renders the entire Motion defective. It is correct that under order 53 rule 4(1) of the Civil Procedure Rules, the ex parte Applicant is only entitled to the reliefs which were expressed in the statement. However, this does not mean that the applicant cannot seek only some of the reliefs which were indicated in the statement. In other words, whereas the Applicant is only entitled to be granted the reliefs indicated in the statement, there is nothing wrong in the Applicant abandoning some of the reliefs expressed in the statement in his Notice of Motion.”

15. It was further submitted that the applicant's Notice of Motion application is defective in that the applicant in the Notice of motion is indicated as the applicant rather than the Republic hence the application is wrongly instituted since in the Judicial review applications, the applicant is always the Republic rather the person aggrieved by the decision sought to be impugned. In this respect the Respondent relied on **Farmers Bus Service & Others vs. Transport Licensing Appeals Tribunal (1959) EA 779**.

16. It was submitted that the applicant failed to establish whether they obtained the requisite development permission in accordance with the ***Physical Planning Act*** Cap 296 from the Respondent before putting up the alleged structures on the suit property. Besides the applicant has failed to tender evidence of allotment of all the respective plots occupied by them.

17. The Respondent submitted that L.R. No. 209/6738 is preserved for cemetery at Kariokor and the applicants have denied being the occupation of the said cemetery land but aver that they occupy plots Nos. M, C, R14 and R9. It is therefore, not in dispute that no enforcement notices has been issued against the plots Nos. M, C, R14 and R9 under reference and the applicant cannot claim that the enforcement notice issued herein is unlawful and hence constitutes a violation of their right to own property as protected by Article 40 of the Constitution of Kenya. To the Respondent, it issued the enforcement notice in exercise of its constitutional mandate set out under Article 174 of the Constitution of Kenya 2010.

18. The Respondent's position was that the orders sought herein if granted would obviously defeat the very purpose and intents of section 36 of the ***Urban Areas and Cities Act*** No. 13 of 2011.

19. The respondent submitted that the enforcement notice issued herein on the 6th July 2017 to M/s Owner/Occupier – illegal occupiers on commonwealth cemetery land Parcel L.R. No. 209/6738 (part) was issued in good faith and in implementation of its lawful mandate conferred to it by the law.

20. It was reiterated that Part 2 of Schedule Four of the Kenyan Constitution 2010 confers to the

respondent the function and power over cemeteries, funeral parlours and crematoria and hence it's within the respondent power to preserve and protect the commonwealth cemetery – Kariokor from encroachment or any form of invasion and also taking into account that protecting the subject cemetery by the respondent is a matter of public interest, which outweighs the applicant's private interest.

21. Besides in event the relief sought herein by the applicants are allowed by this Honourable Court, the respondents would be deprived of its constitutional right or mandate to own and manage the demise cemetery and the residents of Nairobi City would consequently be highly prejudiced since they would have been dispossessed of the land preserved for interring the dead.

22. In any case, this matter transcends the interest of the parties to the litigation which impact on the society and/or have consequences that bear on public interest. In the Respondent's view, the applicants have pleaded and/or quantified the value of the dispute as being over **Kshs.200,000,000/=** but failed to demonstrate that the said investments was made on the cemetery Kariokor land L.R. No. 209/6738 which is a public property or on private individual plots.

23. It was its view that the questions to be determined by this Court as set out in the application are:

(i) Whether the applicants are the lawful owners of the commonwealth cemetery Kariokor L.R. NO. 209/6738.

(ii) Whether the applicants are entitled to occupy commonwealth cemetery Kariokor L.R. No. 209/6738.

(iii) Whether the enforcement notice issued on the 6th July, 2017 was unlawful.

(iv) Whether the enforcement notice issued on the 6th July 2017 violated the applicants' rights to ownership of the private property contrary to article 40 of the constitution.

(v) Whether the applicants' have sought for any substantive relief in this suit capable of being granted by this honourable, in accordance with law.

24. The Court was urged to remember that the land parcel L.R. No. 209/6738 commonwealth Kariokor cemetery was acquired for cemetery services. Therefore reasserting the applicants' title or any right over the suit land is unconstitutional and infringes on the right to property under article 40 of the Constitution as the land belongs to the County Government. All the investments and improvements or decisions made by the County on the suit land are constitutional as it is the holder of the title to the land.

25. It was submitted that the enforcement notice issued herein on the 6th July 2017 against any developments on the suit land therefore adhere to the constitutional mandates on the protection of the bill of rights and in the circumstances the orders sought for herein ought to be declined and the suit/application be dismissed with costs to the respondents.

Determinations

26. I have considered the issues raised by the parties to this application.

27. Before proceeding to determine the merits of the case, it was contended that the application was incompetent for the failure by the applicants to indicate the substantive reliefs they intended to seek in the statement of facts. Order 53 rule 1(2) of the **Civil Procedure Rules** provides that:

An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.

28. It is true that the statement filed with the application for leave indicated the reliefs sought as being “leave” as opposed to the substantive reliefs. I agree with the applicant that it was improper for the applicant to have indicated the reliefs in that manner. The statement ought to state the substantive reliefs which the applicant intends to seek in the Motion once leave is granted. However, to disallow the application based on the said ground, in my view would amount to elevating procedural rules to a fetish. As was held in **Republic Ex Parte Chudasama vs. The Chief Magistrate’s Court, Nairobi and Another Nairobi HCCC No. 473 of 2006 [2008] 2 EA 311**, in which the Court cited with approval *The Judicial Review Handbook* (3rd Edn) by Michael Fordham at 361, **Republic vs. Kensington and Chelsea Royal LBC [1989] All ER 1202 at 1215**, *Role of a Judge* by J Cardozo 52 Harvard LR 361 at 363; **Seaford Court Estates Ltd vs. Asher [1994] 2 All ER 155 at 164**:

“The Court is always faced with variety of facts and circumstances and to place it into a straight jacket of a procedure, specially in the field of very important, sensitive and special jurisdiction touching on liberties and rights of subjects shall be a blot on independence and many faceted jurisdiction and discretionary powers of the High Court... It is well settled that ‘rule of procedure cannot be allowed to become mistress of justice; it is the handmaid of justice. Rules of procedure are not themselves an end but the means to achieve the ends of justice. Rules of procedure are tools targeted to achieve justice and are not hurdles to obstruct the pathway of justice...A judge must think of himself as an artist who, although he must know the handbooks, should never trust them for his guidelines; in the end he must rely upon his almost instinctive senses of where the line lay between the word and the purpose which lay behind it. A Judge must not alter the material of which the Act is known but he can and should iron out the creases... Simply put, the initial stage of obtaining leave is similar to getting an entry into judicial arena so that the applicant can vindicate his rights or claims. Till that stage no serious inroads can be expected to be made in the rights of the opposite side.”

29. This is not a case in which the reliefs indicated in the application are substantially different from the reliefs in the Motion. The only misnomer is that the statement indicated the same grounds but inadvertently stated that what was sought was leave to apply for the same. I am not prepared to dismiss the application on that ground.

30. It was further submitted that the Motion is incompetent for failure to indicate the applicant as the Republic. In judicial review applications, the applicant is always the Republic rather than the person aggrieved by the decision sought to be impugned. See **Farmers Bus Service & Others vs. Transport Licensing Appeal Tribunal [1959] EA 779**. The rationale for this was given in **Mohamed Ahmed vs. R [1957] EA 523** where it was held:

“This recital reveals a series of muddles and errors which is not unique in Uganda and is attributable to laxity in practitioners’ offices and in some registries of the High Court. The appellant’s advocate appears to have failed entirely to realise that prerogative orders, like the old prerogative writs, are issued in the name of the crown at the instance of the applicant and are directed to the person or persons who are to comply therewith. Applications for such orders must be intituled and served accordingly. The Crown cannot be both applicant and respondent in the same matter”.

31. However in **Republic Ex Parte the Minister for Finance & The Commissioner of Insurance as Licensing and Regulating Officers vs. Charles Lutta Kasamani T/A Kasamani & Co. Advocate & Another Civil Appeal (Application) No. Nai. 281 of 2005** the Court of Appeal stated:

“Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment...Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court”.

32. I however must state that the failure by a party to properly intitle the proceedings may lead to denial of costs in the event that the party in default succeeds in the application or even being penalised in costs.

33. Having disposed of the preliminary issues I now turn to the substance of the application. The applicants' case, in summary is that though its members are lawfully in occupation of the suit land, the Respondent issued the enforcement notice without recourse to them. The Respondents however did not file a replying affidavit. It follows that the factual averments made by the applicants are not controverted.

34. Although the Respondent in its submissions raised issues touching on the merits of the factual averments by the applicant, as no replying affidavit was filed, those issues cannot be the basis upon which this Court can determine this application. In any case, this Court is not concerned with the merits of the Respondent's decision but the process with which it was arrived at.

35. It is important to remember that judicial review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the judge disagrees with what the public body has done, but whether there is some recognisable public law wrong that has been committed. Whereas private law proceedings involve the claimant asserting rights, judicial review represents the claimant invoking supervisory jurisdiction of the Court through proceedings brought nominally by the Republic. See **R vs. Traffic Commissioner for North Western Traffic Area ex parte Brake [1996] COD 248.**

36. The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilised governance, by holding the public authority to the limit defined by the law. Judicial review is therefore an important control, ventilating a host of varied types of problems. The focus of cases may range from matters of grave public concern to those of acute personal interest; from general policy to individualised discretion; from social controversy to commercial self-interest; and anything in between. As a result, judicial review has significantly improved the quality of decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint it is a sufficient tool in causing the body in question to remain accountable.

37. Judicial review is therefore a constitutional supervision of public authorities involving a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through the taking into account of an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See **Reid vs. Secretary of State for Scotland [1999] 2 AC 512.**

38. Article 47 of the Constitution provides as follows:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

39. That the Respondent's action was an administrative one is not in dispute. The Respondent was therefore under a duty to ensure that its action was expeditious, efficient, lawful, reasonable and procedurally fair.

40. Article 47 of the Constitution in my view does not only deal with decision but also encompasses processes of arriving at decisions. As was stated by Nyamu, J (as he then was) in **Republic vs. The Commissioner of Lands Ex parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998:**

“Availability of other remedies is no bar to the granting of the judicial review relief but can however be an important factor in exercising the discretion whether or not to grant the relief...The High Court has the same power as the High Court in England up to 1977 and much more because it has the exceptional heritage of a written Constitution and the doctrines of the common law and equity in so far as they are applicable and the Courts must resist the temptation to try and contain judicial review in a straight jacket...Although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been extended using the principle of proportionality...The court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectations...Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them...Judicial review is a tool of justice, which can be made to serve the needs of a growing society on a case-to-case basis...The court envisions a future growth of judicial review in the human rights arena where it is becoming crystal clear that human rights will evolve and grow with the society.”

41. With respect to procedural fairness, it was held in **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300** that procedural impropriety is one of the grounds upon which a Court would be entitled to grant judicial review orders and according to the court:

“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.”

42. Therefore the respondent is under an obligation to afford a person who stands to be adversely affected by its decision an opportunity of being heard before such a decision is arrived at. In this case, the applicant has exhibited letters of allotments in favour of its members. The validity of the same is not challenged since no replying affidavit has been filed. Similarly the issue whether the allotted plots are not the same as those against which the enforcement notices were issued cannot be determined without a replying affidavit. It follows that the applicant's averments must be taken on their face value.

43. The subject enforcement notice was addressed to owner/occupier – illegal occupiers on Commonwealth Cemetery land. The applicants averred that it was addressed to them and there is no evidence to the contrary. According to the said notice the applicants were required to remove the structures thereon immediately, reinstate the said portion to its original state and to vacate the said portion immediately. Although there was a mention of 72 hours, the word “immediately” renders the said 72 hours superfluous.

44. Section 38 of the ***Physical Planning Act***, Cap 286 Laws of Kenya provided as follows:

(1) When it comes to the notice of a local authority that the development of land has been or is

being carried out after the commencement of this Act without the required development permission having been obtained, or that any of the conditions of a development permission granted under this Act has not been complied with, the local authority may serve an enforcement notice on the owner, occupier or developer of the land.

(2) An enforcement notice shall specify the development alleged to have been carried out without development permission, or the conditions of the development permission alleged to have been contravened and such measures as may be required to be taken within the period specified in the notice to restore the land to its original condition before the development took place, or for securing compliance with those conditions, as the case may be, and in particular such enforcement notice may require 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) Unless an appeal has been lodged under subsection (4) an enforcement notice shall take effect after the expiration of such period as may be specified in the notice.

(4) If a person on whom an enforcement notice has been served under subsection (1) is aggrieved by the notice the may within the period specified in the notice appeal to the relevant liaison committee under section 13.

45. Before the Respondent can determine whether a person has encroached onto another person's property and hence needs to remove the same, it is my view and I so hold that the Respondent ought first to afford the person concerned an opportunity of addressing the issue before issuing an enforcement notice. There is no such evidence on record.

46. In my view for a notice to be deemed to be valid for the purposes of section 38 of the aforesaid Act, it must comply with certain requirements. The notice is required to specify the development alleged to have been carried out without development permission, or the conditions of the development permission alleged to have been contravened; such measures as may be required to be taken within the period specified in the notice to restore the land to its original condition before the development took place, or for securing compliance with those conditions, as the case may be; and may also require 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. It must also give the applicant reasonable time to comply therewith. A notice which is served to take effect immediately, as was the case here cannot amount to a valid notice. In this respect section 4(3)(a) of the ***Fair Administrative Action Act***, 2015 provides:

Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision prior and adequate notice of the nature and reasons for the proposed administrative action.

47. In the foregoing premises the inescapable conclusion I come to is that the Respondent's decision was tainted with procedural impropriety.

48. It follows that this application is merited.

Order

49. In the result an order of Certiorari is hereby issued removing into this Court for the purposes of being quashed the Enforcement Notice issued by the Nairobi City County Government on 6th July 2017 to M/s Owner/Occupier- Illegal Occupiers on Commonwealth Cemetery Land Ref LR No. 209/6738 (part) under section 38 of the ***Physical Planning Act*** Cap 286 of the Laws of Kenya which notice is hereby quashed. I also issue an order of prohibition prohibiting the respondent from unlawfully evicting the applicants *Jua Kali* members who occupy various plots at the land surrounding common wealth Cemetery Kariokor Land Ref LR. No. 209/6738.

50. As the application was improperly intituled each party will bear own costs of these proceedings.

51. It is so ordered

Dated at Nairobi this 29th day of January, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mboya for the Respondent

Mr Gachichio for Mr Njiru for the Applicants

CA Ooko