



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI JUDICIAL REVIEW DIVISION

JR MISCELLANEOUS CIVIL APPLICATION NO. 573 OF 2016

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY GLOBE DEVELOPERS LIMITED

IN THE MATTER OF ENFORCEMENT NOTICE DATED 7TH NOVEMBER 2016 UNDER PHYSICAL PLANNING ACT LAWS OF KENYA IN RESPECT OF CONSTRUCTION ON PLOT L.R. NO. NAIROBI/BLOCK 91/159 GIGIRI

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

BETWEEN

GLOBE DEVELOPERS LIMITEDAPPLICANT

VERSUS

NAIROBI CITY COUNTY..... RESPONDENT

RULING

Introduction

1. By a Notice of Motion dated 23rd November, 2016, the ex parte applicant herein, **Globe Developers Limited**, seeks the following orders:

1. An order of Certiorari do issue to remove into this honourable court and quash the decision of the Nairobi City County in an enforcement notice dated 7th November 2016 requiring the applicant to cease from using the garage, vacate the premises and remove its structures on plot Nairobi/Block 91/159 Gigiri.
2. An order of Prohibition do issue against the Director of County Planning Department of Nairobi County prohibiting him from removing the structures erected on plot Nairobi/Block 91/159 Gigiri.
3. Leave to operate as stay.
4. The costs of this application.

Ex Parte Applicant’s Case

2. According to the Applicants, they are the owner of Plot Nairobi/Block 91/159 Gigiri (hereinafter referred to as “the suit property”).
3. According to them were served with an enforcement notice dated 7th November 2016 by the respondent herein requiring them to stop using the garage, to vacate the premises and to remove the structures erected on Plot Nairobi/Block 91/159 Gigiri within 14 days of the notice.
4. It was averred that the applicants had applied for and were given permission to construct the boundary wall by the respondent which authorization was granted on 10th May, 2016 after the applicant paid the requisite fees.
5. It was revealed that the respondent continued to serve the applicants with an enforcement notice despite this order. Despite availing to the Respondent the approvals, the Respondent insisted that the applicants had not obtained any approval.
6. The applicants insisted that they applied for and were given permission to construct the boundary was by the respondent which authorization was granted on 10th May 2016 after the applicant paid the requisite fees. However, the authorization was cancelled and it is on this basis that the applicant filed JR No. 352 of 2016 which was then pending before this Court.
7. According to the applicants, the notice was brought in bad faith and malice as the respondent was hell bent on removing the applicant from the property erected on plot Nairobi/Block 91/150 Gigiri. It would therefore be in the interests of justice if the decision of the respondent contained in the enforcement notice dated 7th November 2016 is quashed.

Respondent's Case

8. The application was opposed by the Respondent.
9. According to the Respondent, the current application is an outright abuse of court process as the applicant has already filed HCC JR 271 of 2016 and HCC JR No. 352 of 2016 both relating the Plot/Nairobi Block 91/159 Gigiri in this honourable court. In both applications the parties have filed and served their written submissions and were awaiting the court's judgment on the matter.
10. It was further contended that the said application was premature, misconceived and bad in law as the applicant had not complied with section 13(1) of the **Physical Planning Act** Cap 286 Laws of Kenya which requires that any person aggrieved by a decision of the Director concerning any physical development plan or matters connected therewith may within sixty days of receipt by him of notice of such decision appeal to the respective liaison committee in writing against the decision in such manner as may be prescribed.
11. It was further the Respondent's view that this court has no jurisdiction to grant the orders herein as this is a Land and Environments matter which ought to be tried in the Environment and Land Court since the subject matter relates to a development which lacks approvals from the respondent as required by the law.
12. According to the Respondent, immediately after the wall collapsed on plot Nairobi Block 91/159 Gigiri the respondent visited the sight and found that the said development lacked proper approvals from the respondents as required by law. Further, the respondent's findings were that the applicant had illegally converted the use of the suit parcel from residential use to a garage without approval from the respondent. The respondent further found that the developments therein, a garage, posed danger to a resident s of the surrounding neighbourhood and consequently issued an enforcement notice.
13. It was the Respondent's case that the enforcement notice issued by the respondent related to the applicant's illegal conversion of land use and construction of a garage on the suit parcel without the

requisite approvals from the respondent. To the Respondent, this Court's order of stay issued on the 8th August, 2016 were strictly confined to stop the construction and or demolition of the wall erected on Nairobi Block 91/159 Gigiri and yet the respondent's enforcement notice relates to illegal use and the illegally constructed garage therefore the current application lacks merit and is an abuse of court process and precious judicial time.

14. It was the Respondent's case that it is authorized by sections 29 of the **Physical Planning Act** to regulate use and development of land and buildings within its jurisdiction hence its actions are within the confines of the law.

15. To the Respondent, since section 30(3) of the **Physical Planning Act** makes any development without the respondent approval illegal and any dealings regarding the development is null and void, the applicants cannot found a cause of action when they are in clear breach of the law. It was therefore the Respondent's case that grant of orders sought in the said applicant would greatly prejudice the respondent who is mandated by law to regulate any physical planning and developments within its jurisdiction pursuant to section 29 of the **Physical Planning Act**.

16. The Respondent asserted that its approval is a mandatory requirement before any development is done within the jurisdiction of the respondent. Consequently the said garage was constructed in absence of the approval of the respondent hence the decision to issue the Enforcement Notice. The essence of an approval is a wider public interest an orderly development in the society. It was contended that for change of use of land an individual is required to follow a prescribed procedure and get approval from the respondent for the purposes of orderly development. The Respondent therefore insisted that the applicants were not above the law and ought to follow the prescribed legal processes before effecting change of use of land and development to land within the jurisdiction of the respondent.

17. The Court was therefore urged not to exercise its discretion to grant the orders sought in the application as the applicant has not adduced any or any cogent evidence to demonstrate to this honourable court that the construction of the garage on plot Nairobi Block 91/159 Gigiri has been approved and that the change of use from residential to commercial was approved. Further, the applicant has not demonstrated that substantial difficulties would be uncounted if the said Enforcement Notice is enforced.

18. In the Respondent's view, the grounds relied upon in the application are not for judicial review but a civil claim.

19. The Respondent insisted that the applicant is not entitled to any of the reliefs prayed in the application or at all as applications similar to the current are still pending hearing and determination under HCC JR. No. 271 of 2016 and HCC JR 352 of 2016.

Determinations

20. I have considered the application, the affidavits filed in support of and in opposition to the application as well as the submissions made.

21. The real issue for determination before this Court is whether the action of the Respondent was procedural.

22. It is true that by its order issued in Miscellaneous Application No. 352 of 2016, this Court *inter alia* directed that the grant of leave therein would operate as a stay of the decision of the Nairobi City County to stop the construction and or demolition of the wall erected on Plot Nairobi/Block 91/159 Gigiri pending the hearing and determination of the motion and further orders of the court in that matter.

23. It is therefore clear that the stay was in respect of the decision which was the subject of challenge in that cause. In my view the stay did not operate to bar the Respondent from properly commencing the process afresh as long as it was not purporting to implement the decision the subject of the stay. This must be so because judicial review proceedings only deal with the process as opposed to the merits of the

decision and where a respondent is of the view that its first action was a mis-step, nothing bars it from properly acting notwithstanding the stay. In other words, the mere fact that the Respondent's decision has been stayed or even quashed does not bar it from abandoning its earlier action and taking the proper action.

24. Therefore for this Court to find that the actions of the Respondents subsequent to the grant of stay were meant to evade the effect of the said order, the Court must necessarily find that the conditions prevailing as at the time of the subsequent action were the same as the conditions prevailing at the time of the grant of the order for stay. If the conditions were the same, the mere fact that the Respondent's action constituted a new cause of action would not absolve the decision from being subjected judicial review remedies since, in my view, a person who takes an action either during the pendency of legal proceedings or thereafter with a view to craftily avoiding or dodging the legal consequences of such proceedings cannot escape the Court's censure.

25. However as a general rule, there is no bar to an authority who, upon realising that its actions are unlawful correcting the same during the pendency of the legal proceedings.

26. In the earlier case, the applicant's complaint was that the enforcement notice was not served while in the present case, it is admitted that the notice was actually served. In this case, the applicant's case is based on the fact that the said notice was issued notwithstanding the fact that the Respondent had approved its development.

27. Section 38 of the **Physical Planning Act**, Cap 286 Laws of Kenya provides 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.

28. It is therefore clear the applicant ought to have challenged the notice before the Liaison Committee.

29. In **Republic vs. National Environment Management Authority [2011] eKLR**, it was held that where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted. The Court of Appeal had this to say at page 15 and 16 of its judgment:

“ The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal process, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining

whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it. – see for example **R v BIRMINGHAM CITY COUNCIL, ex parte FERRERO LTD** case. The Learned judge, in our respectful view, considered these strictures and come to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute with respect we agree with the judge.”

30. There is now a chain of authorities from the High Court as well as the Court of Appeal that where a statute has provided a remedy to a party, this Court must exercise restraint and first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided in the relevant statute. This principle was well articulated by the Court of Appeal in **Speaker of the National Assembly vs. Karume [1990-1994] EA 549** which held that:

“Irrespective of the practical difficulties enumerated...these should not in our view be used as a justification for circumventing the statutory procedure....In our view, there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that Order 53 of the Civil Procedure Rules cannot oust clear constitutional provisions and statutory provisions.”

31. The position was restated by the Court of Appeal sitting in Kisumu in **Eliud Wafula Maelo vs. Ministry of Agriculture and 3 Others [2016] KLR** where it was held that:

“The jurisdiction of the High Court in particular matters or instances can be ousted or restricted by statute...The subject’s right of access to the courts may be taken away or restricted by statute...Where a tribunal with exclusive jurisdiction has been specified by a statute to deal with claims arising under the statute, the County Court’s jurisdiction to deal with those claims is ousted, for where an Act creates an obligation to and enforces the performance of it in a specified manner only, the general rule is that performance cannot be enforced in any other manner.”

32. It was accordingly held in **Thuku Kirori & 4 Others vs. County Government of Murang’a [2014] eKLR** that:

“Moreover, where a statute or constitution, for that matter, has expressly delegated specific functions, duties or responsibilities to a particular organs, state or otherwise , this court will be hesitant to intervene and curtail these organs’ efforts to execute their statutory or constitutional mandates”

33. In **Re Preston [1985] AC 835 at 825D** Lord Scarman was of the view that a remedy by judicial review should not be made available where an alternative remedy existed and should only be made as a last resort. The position was also expressed in **Republic vs. Chief Magistrate Nanyuki Law Courts Ex Parte Purity Gathoni Macheru [2016] eKLR** where the court held that:

“The Learned authors Beatson, Mathews and Elliot in the book Administrative Law on availability of alternative remedy had this to say.’ It is generally accepted that, at least in principle, judicial review is a remedy of last resort, to be invoked only when other avenues , such as rights of appeal...have been explored; if not then permission may be defined.”

34. I therefore associate myself with the position adopted by Emukule, J in **Revital Healthcare (Epz) Limited & Another vs. Ministry of Health & 5 Others [2015] eKLR** at paragraph 10 where he cited with approval the case of **Damian Belfonte vs. The Attorney General of Trinidad and Tobago C.A 84 of 2004** in which it was held that:-

“...where there is a parallel remedy, Constitutional relief should not be sought unless the circumstances of which the complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature, which, at least arguably indicates that the means of least redress otherwise available would not be adequate. To seek constitutional relief in the absence of such feature would be a misuse, an abuse of the Court’s process.”

35. This position has now acquired statutory underpinning by the enactment of the *Fair Administrative Action Act*, No. 4 of 2015 which is an Act of Parliament enacted pursuant to Article 47 of the Constitution. Section 9(2), (3) and (4) thereof provides:

(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

36. It is however my view that the onus is upon the applicant to satisfy the Court that he ought to be exempted from resorting to the available remedies.

37. In **International Centre for Policy and Conflict and 5 others-vs. The Hon. Attorney-General & 4 Others [2013] eKLR** the Court recognized the need to let relevant statutory bodies deal with matter within their mandate fully before interfering in manner sought in these proceedings by holding that a Court of law:

“...must first give an opportunity to the relevant constitutional bodies or State organs to deal with the dispute under the relevant provision of the parent statute. If the court were to act in haste, it would be presuming bad faith or inability by that body to act...Where there exists sufficient and adequate mechanisms to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted...”

38. Similarly in **Diana Kethi Kilonzo & Another vs. Independent Electoral & Boundaries Commission & 10 Others [2013] eKLR** the court held as follows:

‘We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities...Where there exists sufficient and adequate mechanisms to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted...’

39. In this case the applicants have not shown why the Court ought to exempt them from the remedy provided under the *Physical Planning Act*.

40. It has not been shown to me that the alternative statutory remedy provided by Parliament for the resolution of the grievances the applicant has brought before this Court is less convenient, beneficial and effectual. The applicants therefore ought to pursue the said remedy and only approach this Court after the same are exhausted or if the Court is satisfied that the existing alternative remedies are inappropriate in the circumstances of this case. However the fear that such a remedy is unlikely to succeed, it has been recognised, does not constitute exceptional circumstances to warrant the Court in exempting a party from resorting thereto. This was the position adopted by **Mohammed Ibrahim, JSC** in **Yusuf Gitau Abdallah vs. Building Centre (K) Ltd & 4 others [2014] eKLR** where he held that:

“A party cannot be heard to move a Court in glaring contradiction of the judicial hierarchical system of the land on the pretext that an injustice will be perpetrated by the lower court. Courts of justice have the jurisdiction to do justice and not injustice. However, the law acknowledges that judges are human and are fallible hence the judicial remedies of appeal and review. A party cannot in total disregard of these fundamental legal redress frameworks move the apex Court”.

41. In the premises I will not deal with the substance of the other issues raised in this application in order not to prejudice proceedings which may be instituted after the alternative remedies are exhausted.

Order

42. In the result these proceedings are incompetent and misconceived and the order which commends itself to me and which I hereby grant is that these proceedings be and are hereby struck out but with no order as to costs. It is so ordered.

Dated at Nairobi this 23rd day of January, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Kamau for the ex parte applicant

CA Ooko