REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION 266 OF 2017

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION BY THE TRUSTEES OF THE ARCHDIOCESE OF NAIROBI KENYA REGISTERED TRUESTEES (ST. JOSEPH MUKASA CATHOLIC CHURCH KAHAWA WEST)

AND

IN THE MATTER OF ARTICLES 47, 50(1), 60 & 67 OF THE CONSTITUTION OF KENYA, 2010 IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT 2015

AND

IN THE MATTER OF THE NATIONAL LAND COMMISSION ACT NO.5 OF 2012

AND

IN THE MATTER OF THE NATIONAL LAND COMMISSION'S DECISION ON LAND PORTION NO. KAHAWA WEST X31 AND X36 MADE ON 22/05/2017

BETWEEN

REPUBLIC……..…….....APPLICANT

VERSUS

THE NATIONAL LAND COMMISSION…….....…RESPONDENT

AND

COUNTY GOVERNMENT OF NAIROBI.....1ST INTERESTED PARTY

A.N. MWAURA ACTING AS THE CHAIRMAN KAHAWA

WEST WELFARE ASSOCIATION….……2ND INTERESTED PARTY

EX PARTE:

ARCHDIOCESE OF NAIROBI KENYA REGISTERED TRUSTEES

(ST. JOSEPH MUKASA CATHOLIC CHURCH KAHAWA WEST)

JUDGEMENT

Introduction

1. This judgement is the subject of a Notice of Motion dated 31st May, 2017 by which the ex parte applicant herein, **Archdiocese of Nairobi Kenya Registered Trustees (St. Joseph Mukasa Catholic Church Kahawa West)**, seeks the following orders:

> **a. That an order of certiorari to remove into the High Court for purposes of quashing the decision of the Respondent communicated in the letter dated 22nd May 2017 terminating the re-planning and exchange of plot numbers x31 and x36 and withdrawal of development approvals issued to the Applicant by the Interested party be issued.**
>
> **b. That *a*n *o*rder of prohibition directed at the 1st Interested Party, their employees, servants or agents from implementing the directive given by the Respondent to reverse the re planning and exchange and withdrawing any development approval issued to the Applicant be issued.**
>
> **c. That costs of this application be provided for.**

The Applicant's Case

2. According to the Applicant, on 1st October 2014, the applicant submitted a prepared re-planning proposal to the Nairobi County Director of Planning which request was granted by the 1st Interested Party vide a letter dated 10th December 2014.

3. However, on 5th March 2015, the applicant received a letter of complaint from the 2nd Interested Party alleging that he is a member of Kahawa West Welfare Association which letter was copied to Nairobi City County, Director of City Planning and the Respondent. By a letter dated 8th May 2015, the 1st Interested Party wrote to the 2nd Interested Party and assured him that the process of the exchange of the subject plots was above board as no public land was being alienated. Despite that on 26th May 2015, the 2nd Interested Party wrote a further objection letter insisting that he was still opposed to the re-planning but did not give reasons for his opposition. This letter was responded to by the 1st Interested Party's letter of 30th June 2015, by which the 1st Interested Party informed the 2nd Interested Party that his objection did not have any merit. He was further requested to tender a registration certificate of Kahawa West Residents Welfare Association and was further informed that the 1st Interested Party did not have any objection to the Applicant's proposed development.

4. It was averred that in September 2015, the Director of Urban Planning visited the site and confirmed that the Applicant's proposal was quite genuine but still directed the Applicant to pay for an advert to be placed in one of the newspaper. This newspaper advert was meant to inform the public about the Applicant's proposal so that any member of the public who had any objection to the proposal would raise it. It was disclosed that the Applicant caused an advert to be placed on the *Taifa Leo* Newspaper of 15th October 2015.

5. According to the applicant, no objections were received pursuant to the advert and as such on 14th January 2016, the 1st Interested Party issued the approval for the proposed re-planning subject to the conditions therein. Having received the approval aforementioned, the Applicant proceeded to comply with the conditions as particularized in the letter dated 14th January, 2016 and to date, all the necessary approvals have been granted and fees paid out to various consultants providing professional services. Upon the approval of the re-planning, the Applicant prepared and submitted architectural drawings to the 1st Interested Party for approval and the same was approved and further applied for NEMA approval

which was granted on 16th December 2016.

6. According to the applicant, one of the conditions for the proposed re-planning was that the Applicant was to improve the new public parking area to such functionality as to satisfy the Nairobi City County Engineer. To that end, the Applicant undertook rehabilitation of the storm water drainage and the car park at a cost of Kshs 2,500,000.00. Further and in compliance with the approval condition requiring the Applicant to submit drawings showing the existing infrastructure services passing through the plot as well as storm water drainage serving the area, the Applicant redesigned the car park and storm water drainage to the satisfaction of the 1st Interested Party.

7. It was averred that after the approvals by the 1st interested party, the Applicant invited tenders from qualified professionals to offer consultancy services during the construction which tender was won by Space Line Design Limited and was engaged as Architect on or about 14th April 2016. On or around 14th April 2016, the said Architects sought for services of other professionals and appointed to offer services for Structural- civil engineering and which services were procured from Ms Kimpa Associates. On or around 14th April 2016, the services for Quantity surveyors were then procured from Ms Tegra Cost Consultants while on or around 14th April 2016, the services for Mechanical – Electrical engineering were procured from Ms GAD consulting Limited.

8. It was however contended that on or around 27th February 2017, at the behest of the 2nd Interested Party, another public meeting was convened and despite the fact that the 2nd interested party and other officials of Kahawa West Welfare Association attended the meeting, they failed to disclose what their concerns were or how it they would be offended by the project.

9. As a result of the decision made by the Respondent, the Applicant has been compelled to stop the construction works so as to resolve this dispute first. The applicant however lamented that the stoppage of works is causing the Applicant unnecessary costs as the contractor's equipment are on site and as such the Applicant is liable for penalties under the existing contractual obligations.

10. The applicant revealed that by a letter dated 2nd May, 2017 the Respondent informed the Applicant that it had received a complaint from the 2nd Interested Party alleging grabbing of a public utility plot allocated for children playground/car-park. The Respondent further directed the Applicant to stop any form or manner of interference, development or possession of the children playground/car park plot arising from the disputed re-planning and exchange of plots X31 and X36 pending investigations. However, the Applicant was neither invited nor given a chance to be heard before, during or after the investigations by the Respondent. The Respondent nevertheless unilaterally made a decision communicated vide a letter dated 22nd May, 2017:

a. Terminating the proposed re-planning and exchange with immediate effect.

b. Directing the Applicant to restore the disputed land to its original state.

c. Instructing the 1st Interested Party to reverse the re-planning and exchange and withdraw any development approval issued to the Applicant.

d. Requesting the Deputy County Commissioner, Kasarani Sub-County to assist in implementation of the Respondent's decision.

11. In a further affidavit, the ex parte applicant averred that it is evident that the 2nd Interested Party was registered long after this matter was filed in Court hence the deponent has at all given times prior to the 29th June 2017 been acting for a non-existent entity. It was therefore contended that the 2nd Interested Party had no *locus* in challenging the decision of the 1st Interested Party.

12. It was however averred that it cannot be true that the 1st Interested Party allocated members of the phantom 2nd Interested Party the said land as it was non-existent. The ex parte applicant also denied that it was issued with an allotment letter for the said land save for the plots in exchange of which the it applied for re-planning from the 1st Interested Party. It proceeded to deny that it colluded with the 1st Interested Party in conducting the re-planning as the same was done in accordance with the law and in strict adherence to the terms and conditions set out by the 1st Interested Party.

13. In the ex parte applicant's view, the question as to whether the 2nd Interested Party was aware of the re-planning is irrelevant to this particular case as the proceedings herein have been brought to challenge the decision of the Respondent and not that of the 1st Interested Party.

14. The ex parte applicant averred that the children and the general public have tremendously benefited with a better park and playground the *ex parte* Applicant having rehabilitated the same as a condition precedent to the re-planning and exchange as required by the 1st Interested Party.

15. The ex parte applicant however insisted that it was not given a chance to be heard by the Respondent before it arrived at the decision contained in the letter dated 22nd May 2017 and that the continued construction is in accordance with the law as there has been no lawful order stopping the said development.

16. Based on the foregoing it was the ex parte applicant's view that in the interest of justice it is only fair that the said Notice of Motion dated 31st May 2017 be granted as prayed. To it, it is evident and clear that the deponent of the affidavit in support of the 2nd interested party's case has been pushing his own personal agenda in the pretext that he is representing the 2nd Interested Party and its members, yet 2nd Interested Party was a phantom organization.

1st Interested Party's Case

17. The application was supported by the 1st interested party, the County Government of Nairobi.

18. According to the County, on 1st October 2014, the *ex parte* applicant submitted to the County a re-planning proposal for its church situated in Kahawa West and upon due diligence the County granted the Ex-parte applicant's request vide a letter dated 10th December 2014 subject to the following conditions;-

a. The actual survey of the two pieces of land being done

b. Actual survey of the public parking being done

c. The public parking being accessible to the public

d. Existing 9m access road to be maintained

19. It was averred that on 5th March 2015, the County received a letter of complaint from the 2nd Interested Party alleging that he is a member of Kahawa West Welfare Association which letter was addressed to the *ex parte* Applicant and copied to the County. By a letter dated 8thMay 2015, The County wrote to the 2nd Interested Party and in response to his letter dated 5th March 2015 in which the County clarified the following issues;

a. that the County appreciated the concerns raised by the second Interested Party on the need to have the public car park accessible to the estate's children as a play ground

b. Further, the County noted that the proposed re-planning of the Ex-parte Applicant's neighbourhood would not compromise the public car park which also serves as children play

ground but would instead enhance the *ex parte* Applicant's compound and the existing public car park.

c. Most importantly, the County noted that the parcel of exchange/relocation is exactly equal in size to the area of the 2 Ex-parte Applicant's plots added together.

d. The only change proposed by the *ex parte* Applicant is only addressing location and not size and as such the public would not lose any land at all.

20. It was averred that on 26th May 2015, the 2nd Interested Party wrote a second letter to the County indicating that he still had objections to the re-planning and on 30th June, 2015, the County respondent thereto raising the following issues;

a. It requested the 2nd Interested Party to give material issues of concern for objecting to the proposed development as required by the ***Physical Planning Act***, Cap 286 as the letter failed to give any reasons for the objection to the proposed re-planning.

b. Further, the County requested to be provided with the minutes of the meetings held by the 2nd Interested Party on 22nd and 24th May 2015, certificate of registration of the 2nd Interested Party and its list of members.

c. The County clarified that unless the 2nd Interested Party supplied it with material issues of concern, the re-planning would proceed as the County was not opposed to it.

21. According to the County, in September 2015, its Director of Urban Planning visited the site and confirmed that the *ex parte* Applicant's proposal was merited and legitimate but still directed the *ex parte* Applicant to pay for an advert to be placed in one of the daily newspapers and which was published in the *Taifa Leo* issue of 15th October 2015 which newspaper advert was meant to inform the public about the Ex-parte Applicant's proposal so that any member of the public (such as the 2nd Interested Party) who had any objection to the proposal would raise it. According to the County, the Ex-parte Applicant caused an advert to be placed on the *Taifa Leo* Newspaper of 15thOctober 2015 (supra) but as no objections were received, the County issued the approval for the proposed re-planning subject to the conditions therein and thereafter the Applicant proceeded to comply with the conditions as particularized in the letter dated 14th January, 2016 to the satisfaction of the County.

22. It was averred that further and in compliance with the approval condition requiring the Applicant to submit drawings showing the existing infrastructure services passing through the plot as well as storm water drainage serving the area, the *ex parte* Applicant redesigned the car park and storm water drainage to the satisfaction of the County and upon the approval of the re-planning, the *ex parte* Applicant prepared and submitted architectural drawings to the County for approval and the same was approved.

23. It was disclosed that on or around 27th February 2017, at the behest of the 2nd Interested Party, another public meeting was convened but despite the fact that the 2nd interested party and other officials of Kahawa West Welfare Association attended the meeting, they failed to disclose what their concerns were or how it they would be offended by the project.

24. It was the County's case that the re-planning was conducted in accordance with the laid down procedures and specifically the ***Physical Planning Act***.

25. It was contended based on legal advice that the Respondent had a mandatory duty to give the *ex parte* Applicant and the County a hearing before making its decision communicated to the *ex parte* Applicant vide its letter dated 22nd May 2017. However, the County was neither invited by the Respondent to give an expert opinion nor to make any representations before it so as to guide the Respondent in making an informed decision.

Respondent's Case

26. The application was however opposed by the Respondent (hereinafter referred to as "the Commission").

27. According to the Respondent, it is a constitutional commission established under Article 67 of the Constitution and whose mandate is to *inter alia* mange and administer public land on behalf of the National and County Governments. It is also charged with the responsibilities of monitoring and exercising oversight over land use planning throughout the Country.

28. The Respondent averred that on or about the 25th of April 2017 it received a complaint from the 2nd interested party touching on a public utility that was being utilized as a car park and children ply ground in the Kahawa West area of Nairobi County. Immediately it commenced investigations to unveil the nature of the dispute and a possible recourse to matter and upon preliminary investigations it became clear that the dispute arose from a disputed re-planning and exchange of plots X31 and X36 originally belonging to St. Joseph Mukasa Catholic Church.

29. It was averred that on the 2nd of May the Commission wrote to the Father-in-charge St. Joseph Mukasa Catholic Church informing him of the nature of the complaint and further requiring the church to stop any form of manner of interference or possession of the said children playground/car park lot which is a public utility pending investigations. That letter was copied to the Director Urban and Physical Planning Nairobi County and the 1st interested party herein who received it on 5th of May 2017.

30. It was the Commission's case that despite issuance of the above said directive, the applicant ignored, neglected or refused to comply with the requirement to stop the developments on the land pending investigations and proceeded with the same.

31. It was disclosed that on or about the 12th of May 2017 the Commission visited the ground with a view gathering more information and receiving the already availed information pertaining to the matter in order to advise the respondent's Land Administration Committee. The site visit revealed the Catholic Church has taken possession of the disputed car park plot which is adjacent to plot X31 and X36 and had erected a fence on the same. Further investigations revealed that the Development Committee of St. Joseph had in October 2014 applied to Nairobi City County for re-planning and exchange of the plots. The said application was submitted to the Director of Urban Planning Nairobi City County who granted "administrative approval for 3 years" in December 2014. However, the application to exchange a public utility plot never brought to the attention of the respondent as the manager and administrator of public land. It was the Commission's position that under Article 62(2), the 1st interested party is mandated to hold public land in trust for the people resident in the County but it is the mandate of the respondent to manage and administer the same. Its case was therefore that the failure to involve it in the process of the exchange and re-planning of a public utility plot was in itself unconstitutional, unlawful and in bad faith on part of the County and the applicant herein.

32. It was further contended that according to the residents association the process was done without their knowledge up until they raised an objection on the 5th of March 2015 and thereafter their grievances were never fully addressed.

33. The Commission took the view that it is under a public duty to promote public participation and monitor land use which are core principles envisioned in the Constitution and that under section 6(3) of the ***National Land Commission Act***, it has powers to conduct an inquiry in any manner it may consider necessary and may receive written and oral submissions. In its view, it was in exercise of the above said powers that it retreated to make the determination and the same was communicated to all the parties herein.

34. The Commission's position was that the County cannot validly claim that they were not involved in the respondent's investigative process whereas they were informed of the same in writing and despite

having invited them to co-operate and assist in settling the matter, they never made any submissions to the respondent pertaining to the matters. On its part, the applicant tendered very detailed submissions pertaining to the matter on the 10th May 2017, which were given due consideration by the respondent in arriving at the decision to the effect that the applicant did not submit sufficient grounds to warrant the said exchange. It was therefore the Commission's case that the applicant was given a fair hearing and that the Respondent's decision was not unilateral as alleged.

35. The Respondent Commission insisted that the said exchange of a public utility plot was an illegality *ab initio* and the applicant cannot therefore seek enforcement of the unlawful approval by the County.

36. Based on legal advice the Respondent took the position that this application is brought in bad faith and is therefore an abuse of the court process.

2nd Interested Party's Case

37. Similarly, the 2nd interested party opposed the application.

38. According to the 2nd interested party, between 1992 and 1995, the Nairobi City Council as it was then, allocated members of the 2nd Interested Party with land that was to be used as a public car park and children's playground, making the same public land. It was averred that the County issued the petitioners with an allotment letter of the said land which they handed over to St. Joseph Mukasa Catholic church for safe keeping. Upon being issued with the allotment letter the members of the 2nd interested party took over the suit land and to this day the same has been used as a public and children's playground.

39. According to the 2nd interested party, the County allocated the applicant with plot No. X31 and X36 and the same was used by the applicant for church purposes.

40. It was averred that the applicant and the 2nd interested party utilized their respective portions of lands peacefully until 2014 when it came to the knowledge of the 2nd interested party that the applicant in collusion with the County had started re-planning proceedings with the intention of exchanging the public car park and children's playground with plot No. X31 and X36. According to the 2nd interested party, the objective of re-planning and exchanging the said portion, which was done without the knowledge and/or consent of the members of the 2nd interested party or public participation, was in order for the applicant to construct a residential house for priests on the public car park and children's playground.

41. It was averred that once the 2nd interested party became aware of the same, they wrote to the Cardinal of the Catholic Church of Nairobi, **His Eminence John Njue**, letters dated 5th March 2015, 15th July 2015 and 24th November 2016, where they informed him that they were opposed to the re planning and requested him to intervene in the matter.

42. It was the 2nd interested party's case that they were opposed to the said re-planning because:-

i. There is a public road on the proposed new park making it not only dangerous but impossible for the children to play thereon.

ii. The residents would have nowhere to park their cars.

iii. There was no public participation during the re-planning proceedings.

iv. The Applicant and the 1st Interested Party neglected and/or ignored the objections lodged by the 2nd Interested Party.

v. That the advertisement placed by the applicant on *Taifa Leo* Newspaper on 15th October 2015

was not sufficient notice as required by ***Physical Planning Act*** Cap. 286.

vi. That since the same constitutes public land, then it fell under Article 62(2) of the Constitution and therefore its conversion into private use by the applicant and the 1st Interested Party contravene the provisions of the constitution.

43. According to the 2nd Interested Party, it further lodged an objection with the County indicating that they were against the re-planning and also wrote letters dated 8th May 2015 and 26th May 2015 to the County further objecting to the same. Accordingly, a meeting was held on 13th December 2016 at the offices of the Cardinal of the Catholic Church of Nairobi, **His Eminence John Njue**, between members of the 2nd Interested Party and the applicant where the members of the 2nd Interested Party reiterated their opposition to the Re-planning. Further to that, a meeting was held on 2nd February 2017 at the offices of the Cardinal of the Catholic Church of Nairobi, **His Eminence John Njue**, between members of the 2nd Interested Party and the applicant where the members of the 2nd Interested Party reiterated their opposition to the Re-planning.

44. It was however averred that the applicant forcefully and illegally took possession of the public car park and children's playground, for they fenced off the land and began rehabilitating the drainage system which actions, in the 2nd Respondents' view, amount to grabbing. The 2nd interested parties lamented that the children now have nowhere to play from and the adults are forced to park their cars along the illegally erected fence.

45. It was disclosed that once the 2nd interested party realized that the applicant had every intention of taking over the public car park and children's playground, they lodged a complaint with the respondent who upon receiving the complaint, informed the applicant of the complaint and required them to stop interfering the developing the public car park and children's playground. Further the respondent through a letter dated 22nd May 2017 addressed to the applicant terminated the proposed re-planning and ordered for the withdrawal of the development approval issued by the County. However, despite being issued with the said letter, the applicant to this day continues to illegally construct on the public land.

46. The Court was urged not to allow the applicant to forcefully and illegally acquire ownership of public land knowing fully well that their possession of the same is against the provisions of the Constitution and the ***Physical Planning Act*** Cap 286. It was asserted that since the respondent which is vested with the powers to manage public land on behalf of the National and County Governments by Article 67 of the Constitution of Kenya 2010, has terminated the re-planning, making the actions of the applicant and the 1st interested party null and void, the orders sought by the applicant cannot be issued.

47. It was the 2nd Respondent's case that the applicant through the orders sought herein, seeks to legitimize their illegal acquisition of the public car park and children's playground and that it would be unfair and unjust to issue the same since it goes against the public interest. The Court was urged to instead issue injunctive orders against the applicant in order for them to be stopped from continuing to develop public land.

Determinations

48. I have considered the issues raised herein.

49. It is clear that the only issue that falls for determination is whether the applicant was afforded an opportunity of being heard before the impugned decision was made.

50. Article 47(1) and (2) 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.

51. Apart from that provision section 4(1), (2) and (3) of the ***Fair Administrative Action Act*** provides as follows:

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

(2) Every person has the right to be given written reasons for any administrative action that is taken against him.

(3) 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-

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

52. What the Constitution requires in my view is the notification of the intention to take an action against a person likely to be adversely affected thereby and the reasons for the intended action. The said reasons, it is my view must depend on the peculiar circumstances of each case and it is those peculiar circumstances which ought to be considered which consideration must under Article 47 of the Constitution entail an opportunity to the applicant to be heard on the circumstances alleged to constitute satisfactory reasons for the taking of the adverse action.

53. In this case, there was a constitutional and statutory obligation placed on the Respondent Commission to give the applicant prior and adequate notice of the nature and reasons for the proposed administrative action and an opportunity to be heard and to make representations in that regard. In this case the Respondent contended that on the 2nd of May the Commission wrote to the Father-in-charge St. Joseph Mukasa Catholic Church informing him of the nature of the complaint and further requiring the church to stop any form of manner of interference or possession of the said children playground/car park lot which is a public utility pending investigations. It was the Commission's case that despite issuance of the above said directive, the applicant ignored, neglected or refused to comply with the requirement to stop the developments on the land pending investigations and proceeded with the same. It was therefore the Commission's case that the applicant was given a fair hearing and that the Respondent's decision was not unilateral as alleged.

54. In the matter before me, vide its letter dated 2nd May, 2017, the Respondent informed the applicant that it had received complaint from the 2nd interested party regarding the "Grabbing of Public Utility Plot Allocated for Children Playground/Car Park". The Respondent therefore required the Applicant to stop any form of interference, development or possession of the same pending investigations. There were however no particulars of the said complaint save for that bare statement.

55. In my view the notice contemplated *under Article 47 of the Constitution as read with s*ection 4(3) of the ***Fair Administrative Action Act*** must not only be *prior to the decision but must also be adequate and must disclose the nature and reasons for the proposed administrative action*. This was the position in **Geothermal Development Company Limited vs. Attorney General & 3 Others [2013] eKLR** where it was held that:

> **"20. Article 47 enshrines the right of every person to fair administrative action. Article 232 enunciates various values and principles of public service including *"(c) responsive, prompt, effective, impartial and equitable provision of services"* and *"(f) transparency and provision to the public of timely, accurate information."***
>
> **...**
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> **28.** ***As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it. Elementary justice and the law demands that a person be given full information on the case against him and given reasonable opportunity to present a response*. This right is not limited only in cases of a hearing as in the case of a court or before a tribunal, but when taking administrative actions as well. (See *Donoghue v South Eastern Health Board* [2005] 4 IR 217). Hilary Delany in his book, *Judicial Review of Administrative Action, Thomson Reuters 2nd edition, at page 272,* notes that, *"Even where no actual hearing is to held in relation to the making of an administrative or quasi-judicial decision, an individual may be entitled to be informed that a decision which will have adverse consequences for him may be taken and to notification of the possible consequences of the decision."***
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> **30. In many jurisdictions around the world, it has long been established that notice is a matter of procedural fairness and an important component of natural justice. As such, *information provided in relation to administrative proceedings must be sufficiently precise to put the individual on notice of exactly what the focus of any forthcoming inquiry or action will be*. (*See Charkaoui v Canada* [2007] SCC 9, *Alberta Workers' Compensation Board v Alberta Appeals Commission (*2005) 258 DLR (4th), 29, 55 and *Sinkovich v Strathroy Commissioners of Police (1988) 51 DLR (4th) 750)."** *[Emphasis provided].*

56. Similarly in **Gathigia vs. Kenyatta University Nairobi HCMA No. 1029 of 2007 [2008] KLR 587** the Court held:

> **"I would at this stage adopt the observations made in the *Hypolito Cassiani De Souza vs. Chairman Members of Tanga Town Council 1961 EA 77* where the court set down the general principles which should guide statutory domestic or administrative tribunals sitting in a quasi-judicial capacity. P 386 – the court said; "1.if a statute prescribes, or statutory rules and regulations binding on the domestic tribunal prescribe, the procedure to be followed, that procedure must be observed; 2. if no procedure is laid down, there may be an obvious implication that some form of inquiry must be made such as will enable the tribunal fairly to determine the question at issue; 3.In such a case the tribunal, which should be properly constituted, must do its best to act justly and reach just ends by just means. It must act in good faith and fairly listen to both sides. It is not bound, however, to treat the question as a trial. It need not examine witnesses; and it can obtain information in any way it thinks best…; 4.*The person accused must know the nature of the accusation made*; 5.*A fair opportunity must be given to those who are parties to the controversy to correct or contradict any statement prejudicial to their view and to make any statement they may decide to bring forward*; 6.The tribunal should see to it that matter which has come into existence for the purpose of the *quasi–lis* is made available to both sides and once the *quasi-lis* has started, if the tribunal receives a communication from one party or from a third party, it should give the other party an opportunity of commenting on it."** [Emphasis added].

57. It is my view that fair hearing must be meaningful for it to meet the constitutional threshold. On this aspect, ***Halsbury's Laws of England***, 5th Edn. Vol. 61 page 545 at para 640 states:

> **"The *audi alteram partem* rule requires that those who are likely to be directly affected by the outcome should be given prior notification of the action proposed to be taken, of the time and place of any hearing that is to be conducted, and of the charge or case they will be called upon to meet. Similar notice ought to be given of a change in the original date and time, or of an adjourned hearing…*The particulars set out in the notice should be sufficiently explicit to enable the interested parties to understand the case they have to meet and to prepare their answer and their own cases.*"** [Underlining mine].

58. In my view, for a notice to be worthy of its purpose, it must not be vague and must not leave room for speculation. If possible the notice should draw the addressee's attention to the legal provision, if any, under which it is being issued and even spell out the consequences that would follow non-compliance. It is these particulars that will distinguish a notification of intent from the decision itself. Where therefore the decision is expressed in a manner suggesting that a decision has already been made, such a notice would fail to meet the purpose for which the notice is prescribed. Similarly a notice that vaguely refers to the complaint without particularising the same and which does not expressly call upon the person to be adversely affected to respondent thereto cannot in my view amount to an adequate notice.

59. Whereas the *authority concerned* may well have proper reasons to act in the manner it intends to act, where its decision is tainted by procedural impropriety the same cannot stand. It was therefore held in **Onyango Oloo vs. Attorney General [1986-1989] EA 456**:

> **"A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...Denial of the right to be heard renders any decision made null and void ab initio."**

60. This was a restatement of Lord Wright's decision in **General Medical Council vs. Spackman [1943] 2 All ER 337** cited with approval in **R vs. Vice Chancellor JKUAT Misc. Appl. No. 30 of 2007** that:

> **"If the principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared as no decision."**

61. In **Ridge vs. Baldwin [1963] 2 All ER 66** at 81, **Lord Reid** expressed himself as follows:

> **"Time and again in the cases I have cited it has been stated that a decision given without the principles of natural justice is void."**

62. To my mind the factors which the Respondent intended to take into consideration in determining the complaint ought to have been presented to the applicant with as much particularity as the circumstances required and the Applicant's version on the same heard and considered before the decision which clearly was adverse to the Applicant's interests was taken. It is in this respect that I associate myself with the position in **Board of Education vs. Rice; [1911] AC 179** in which **Lord Loreburn LC** stated that:

> **"a decision-making body should not see relevant material without giving those affected a chance to comment on it and, if they wish, to controvert it, is fundamental to the principle of law (which governs public administration as much as it does adjudication) that to act in good faith and listen fairly to both sides is 'a duty lying upon everyone who decides anything."**

63. In **Msagha vs. Chief Justice & 7 Others Nairobi HCMCA no. 1062 of 2004 (Lessit, Wendo & Emukule, JJ on 3/11/06) (HCK) [2006] 2 KLR 553** it was held:

> **"The Court observes firstly that the rules of natural justice "*audi alteram partem*" hear the other party, and no man/woman may be condemned unheard are deeply rooted in the English common law and have been transplanted by reason of colonialisation of the globe during the hey-days we of the British Empire. An essential requirement for the performance of any judicial or quasi-judicial function is that the decision makers observe the principles of natural justice. A decision is unfair if the decision-maker deprives himself of the views of the person who will be affected by the decision. If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision…It is paramount at this juncture that this court establishes the ingredients and/or components of natural justice. The principles of natural justice concern procedural fairness and ensure a fair decision is reached by an objective decision maker. Maintaining procedural fairness protects the rights of individuals and enhances public confidence in the process. The ingredients of fairness or natural justice that must guide all administrative decisions are, firstly, that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision-maker; secondly, that no one ought to be judge in his or her case and this is the requirement that the deciding authority must be unbiased when according the hearing or making the decision; and thirdly, that an administrative decision must be based upon logical proof or evidence material.**

64. A recent articulation of the elements of procedural fairness in the administrative law context was provided by the Supreme Court in **Baker vs. Canada (Minister of Citizenship & Immigration) 2 S.C.R. 817 6** where it was held:

> "**The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions."**

65. In **Selvarajan vs. Race Relations Board [1976] 1 All ER 12** at page 19 of the judgement **Lord Denning** MR observed that:

> **"In all these cases it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigation and the consequences which it may have on the persons affected by it. The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it. The investigating body is, however, the master of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow**

lawyers. It need not put every detail of the case against a man. Suffice if the broad grounds are given. It need not name its informants. It can give the substance only. Moreover it need not do everything itself. It can employ secretaries and assistants to do all the preliminary work and leave much to them. But, in the end, the investigating body itself must come to its own decision and make its own report."

66. In **Egal Mohamed Osman vs. Inspector General of Police & 3 Others [2015] eKLR** at page 7 the Court at the time referred to **The Management of Committee of Makondo Primary School and Another v Uganda National Examination Board, HC Civil Misc Application No.18 of 2010**, the Ugandan Supreme Court stated as follows regarding the rules of natural justice:

"It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God hence the rules enjoy superiority over all laws made by humankind and that any law that contravenes or offends against any of the rules of natural justice, is null and void and of no effect. The rule as captured in the Latin Phrase 'audi alteram partem' literally translates into 'hear the parties in turn', and has been appropriately paraphrased as 'do not condemn anyone unheard'. This means a person against whom there is a complaint must be given a just and fair hearing."

67. In my finding, a process by which an administrative body makes findings and proceeds to make recommendations before affording persons affected thereby cannot by any stretch of imagination be termed as fair in order to meet the provisions of Article 50 of the Constitution. For a hearing to be said to be fair not only should the case that the respondent is called upon to be meet be sufficiently brought home to him and adequate or reasonable notice to enable him deal with it given, but also the authority concerned ought to approach the issue with an unbiased disposition. In other words the authority ought not to be seen to be seeking representations from the respondent simply for the purposes of meeting the legal criteria. The fair hearing must be meaningful for it to meet the constitutional threshold.

68. It is therefore clear that even if it is true that the *ex parte* applicant submitted a response to the Respondent's letter of 2nd May, 2017, there is no evidence that the *ex parte* applicant was responding to the allegations in the complaint which allegations were not furnished to the ex parte applicant.

69. The Supreme Court of Uganda in **The Management Committee of Makondo Primary School and Another vs. Uganda National Examination Board, HC Civil Misc Application No.18 of 2010**, which was followed with approval by **Justice Lenaola** in **Mandeep Chauhan v Kenyatta National Hospital & 2 others [2013] eKLR** to the effect that:

"It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God hence the rules enjoy superiority over all laws made by humankind and that any law that contravenes or offends against any of the rules of natural justice, is null and void and of no effect. The rule as captured in the Latin Phrase *'audi alteram partem'* literally translates into 'hear the parties in turn', and has been appropriately paraphrased as 'do not condemn anyone unheard'. This means a person against whom there is a complaint must be given a just and fair hearing."

70. The applicants also relied on **Breen vs. Amalgamated Engineering Union [1971] All E.R. 1148**, where Lord Denning held as follows:

"It is now settled that a statutory body which is entrusted by Statute with discretion must act fairly. It does not matter whether its functions are described as judicial or quasi-judicial on the one hand or as administrative on the other or what you will, still it must act fairly. It must in a proper case give chance to be heard."

71. In **Judicial Service Commission vs. Gladys Boss Shollei & Another [2014] eKLR***:*

"Apart from the need for independence and impartiality, the right to a fair hearing under Article 50(1) of the Constitution encompasses several aspects. These include, the individual being informed of the case against her/him; the individual being given an opportunity to present her/his side of the story or challenge the case against her/him; and the individual having the benefit of a public hearing before a court or other independent and impartial body."

72. I agree with **Chief Constable Pietermaritzburg vs. shim 1908 29 NLR 338 341** where the court held that:

"it is a principle of common law that no man shall be condemned unheard, and it would require very clear words in the statute to deprive a man of that right. To the applicant, this court's decision shows that the *audi alteram partem* rule would only be excluded if parliament intended its exclusion, irrespective of whether or not the rights of individuals are affected. The *audi alteram partem* rule ensures a free and impartial administrative process, within which decisions and cognizance of facts and circumstances, occur altogether openly."

73. Having considered the issues raised herein, it is my view and I find that the letter dated 2nd May, 2017 did not meet the requirements of notification under section 4(3) of the ***Fair Administrative Action Act*** since it did not afford the applicant whose rights and interests stood to be adversely affected by the Respondent's administrative action a prior and adequate notice of the nature and reasons for the proposed administrative action. The said letter did not indicate in details the nature of the complaint lodged against the applicant. It did not require the applicant to correct, contradict or comment on the allegations in the said complaint. To the contrary the letter simply informed the applicant of the fact of the receipt of the complaint without more and proceeded to transmit the Respondent's decision that the applicant should cease further activities on the said property.

74. In my opinion, the Respondent's action did not meet the tenets of a fair administrative action. This is not to say that the Applicant's action was lawful or valid. That is not a matter for determination by this Court. However the process of arriving at the Respondent's decision was flawed right from inception.

75. In the premises the Motion dated 31st May, 2017 is merited and succeeds.

Order

76. Accordingly:

a. An order of certiorari is hereby issued removing into this Court for purposes of quashing the decision of the Respondent communicated in the letter dated 22nd May 2017 terminating the re-planning and exchange of plot numbers x31 and x36 and withdrawal of development approvals issued to the Applicant by the Interested party, which decision is hereby quashed.

b. An order of prohibition is hereby issued directed at the 1st Interested Party, their employees, servants or agents from implementing the directive given by the Respondent to reverse the re planning and exchange and withdrawing any development approval issued to the Applicant unless and until a valid decision is made.

c. As the merits of the decision has not been determined, each party will bear own costs of these proceedings

77. It is so ordered.

Dated at Nairobi this 14th day of February, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Maina for the 1st Interested Party and holds brief for Miss Njuguna for the Respondent

Mr Ndungu for Mr Mathi for the applicant

CA Ooko