REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

JUDICIAL REVIEW DIVISION

JR MISC CIVIL APPLICATION NO. 103 OF 2017

BETWEEN

REPUBLIC…….APPLICANT

VERSUS

NAIROBI CITY COUNTY…….....……1ST RESPONDENT

DIRECTOR OF PLANNING NAIROBI CITY COUNTY….2ND RESPONDENT

ENGINEEER OF ROADS NAIROBI CITY COUNTY…..…3RD RESPONDENT

EX PARTE: SUAD SALIM ABUBAKAR T/A SAAB ROYALE HOTEL

JUDGEMENT

Introduction

1. By a Notice of Motion dated 14th March, 2017, the ex parte applicant herein, **Suad Salim Abubakar**, seeks an order of certiorari to quash the decision of the Respondents requiring the ex parte applicant to remove the perimeter wall on property LR No. 209/5127 (hereinafter referred to as "the suit property"). He also seeks an order of mandamus directed at the Respondents to afford the Applicant adequate prior notice before taking any administrative decisions affecting her rights over the suit property. Further, the applicant seeks an order of prohibition prohibiting the Respondents from demolishing, excavating or in any way dealing with the suit property.

2. This Motion was filed pursuant to the Chamber Summons dated 6th March, 2017 in which leave was sought for substantive orders in the nature of certiorari to remove to the Court for purposes of being quashed, and to quash the 1st and 2nd Respondents' decision to issue the Enforcement Notice dated 3rd March, 2017; an order of *mandamus* compelling the Respondents to issue the applicant with prior and adequate notice before undertaking any administrative actions in reference to the suit property; and an order of *mandamus* compelling the Respondents to give the applicant an opportunity to be heard and to make representations in relating to the said administrative action.

Ex Parte Applicants' Case

3. According to the Applicants, they are the proprietors of **SAAB Royale Hotel** (hereinafter referred to as "the Hotel") a business registered under the ***Registration of Business Names Act***.

4. It was averred that having constructed the same, they applied to the Nairobi City County and were issued with a Hoarding/Scaffolding Licence for the adjacent way-leave and public land to enable them to rehabilitate the land, secure and beautify the area as well as extend their parking lot. Upon the expiry of the said licence they applied for is renewal, paid the requisite statutory fees to the 1st Respondent which renewed the same. It was further averred that they also applied to the County Government for an authority to improve the frontage of their premises with cabro (concrete blocks) which application was approved.

5. Pursuant to the foregoing the applicants undertook the improvements thereon and have maintained the same till the cause of action herein arose.

6. It was averred that on 3rd March, 2017, the applicants were served with an Enforcement Notice of the same date purporting that their perimeter wall was on the road reserve and were required to remove the same within 3 days of the said notice. It was averred that on 4th March, 2017, a group of men with their tools went to the suit property and adjacent premises and marked the ground and started excavating the cabro laid thereon. To the applicants, the premise of the said notice was wrong as they had constructed their perimeter wall within the beacons and boundaries as delineated by the Director of Surveys as attached to the lease issued by the National Land Commission.

7. It was the applicants'' case that whereas the County claimed that they had constructed their perimeter wall on a road reserve they had not been issued with any notices from the Kenya Urban Roads Authority or the Director of Surveys.

8. The applicants' case was that in any event the said notice was too short as it did not afford them adequate time to respond thereto and take any remedial actions if any. To aggravate the shortness of the notice, the Respondents commenced the enforcement thereof barely 12 hours after issuing it and before the expiry of the 3 days period stated with the sole intention of denying the applicants their rights to the enjoyment of the property and the remedial measures provided under the law. In the applicants' view, prior to the enforcement notice it is necessary to ascertain the proper boundaries to their property which can only be done by or on the instructions of the Director of Surveys and the National Land Commission.

9. It was submitted on behalf of the applicants that the Respondents had no mandate to the issue the Enforcement Notice in question since such powers are conferred under section 27 of the ***Kenya Roads Act, 2007***.

10. Furthermore it was submitted that the Physical Planning Act does not vest any powers on the Respondents to effect such notice since section 24 thereof does not contemplate issues dealing with road reserves. To the applicants, the enforcement notice under section 38 of the ***Physical Planning Act*** can only issue in reference to the mandate of the Respondents pursuant to section 24 of the said Act. Therefore, it was submitted the Notice was illegal. In support of this position the applicants relied on **Republic vs. Kenya National Examinations Council ex parte Gathenji and 9 Others Civil Appeal No. 266 of 1996**.

11. It was further contended that even if the Respondents had the power to issue the said Notice, the same was not properly and procedurally issued. It was submitted that the Respondents not only breached the Applicant's Constitutional rights under Article 47 but also flouted the statutory provisions necessary for an administrative action to be construed as proper and procedurally fair as the notice was too short. In this respect the applicant relied on **Republic vs. Kenya School of Law ex parte Thomas Otieno Oriwa Nairobi JR Misc. Appl. No. 260 of 2015**.

12. It was submitted that the short period thwarted the applicants' legitimate expectations that they would continue using the licensed areas without interruption from the Respondent and that if any interruptions were to be occasioned, the applicant would be given adequate prior notice.

13. Based on section 11 of the ***Fair Administrative Action Act***, the applicants prayed that the orders sought herein be granted.

Respondents' Case

14. In their response the Respondents averred that the 1st Respondent has the mandate to enforce the provisions of the ***Physical Planning Act*** (Cap 286) Laws of Kenya, which Act, alongside By-Laws enacted by the 1st Respondent make provisions for the procedure and conditions to be adhered to for any developments or construction within the County.

15. According to the said Respondents, they conducted investigations and determined that the subject development by the ex parte applicants, being boundary wall encroached into a road reserve and that the same did not have the approval of the 1st Respondent and was therefore illegal.

16. According to the said Respondents, this was the basis of the Enforcement Notice dated 6th March, 2017 which the ex parte applicant failed and/or refused to comply with.

17. On behalf of the Respondents it was submitted that pursuant to section 29 of the ***Physical Planning Act***, No. 6 of 1996, a local authority has the mandate and power to control developments in its area and to issue permits for such developments. It was submitted that the assertion by the Applicants that it is only the Urban Road Authority that has the mandate to issue notices such as that which was issued to her is unfounded and not supported by the provision quoted.

18. It was the Respondents' position that the functions of the Urban Road Authority are set out in section 10(1) of the ***Kenya Roads Act, 2007*** and that from that section it is clear that the Authority has no mandate to issue notices over illegal structures, or to remove such structures since their mandate is simply maintenance of roads in urban areas. Therefore where any development is commenced or undertaken without authority of the Respondents, the Respondents have the power and duty to take the appropriate action which action is commenced by the issuance of an enforcement notice to the person concerned to remove the structure and where they fail to comply the Respondent moves to remove such structure.

19. It was submitted that the Scaffolding Licence attached to the applicant's supporting affidavit had conditions which the applicants failed to adhere to such as condition 2 which mandated the Applicant to either renew or remove the hoarding upon the expiry of six months from 22nd October, 2013 yet there is no evidence showing that the Applicant renewed the same. It was further submitted that the authority to improve the frontage of the property granted to the applicant on 12th November, 2015 also contained conditions that the Applicant was required to adhere to failure to which there would be consequences. The Applicant however failed to adhere to the conditions set out therein and as such the authority was null and void.

20. It was therefore the Respondents' case that it was apparent that the Enforcement Notice issued was proper and in accordance with the relevant laws hence the application ought to be dismissed with costs.

Determinations

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

22. In my view the substantial grounds upon which the application is based are whether the Respondents had the mandate to issue the enforcement notice in the circumstances of this case and if so whether its action in this case was tainted with procedural impropriety.

23. It is now clear that judicial review remedies can be granted on grounds of *ultra vires*, jurisdictional error, misdirection in law, errors of precedent fact such as fundamental factual errors or findings devoid of evidence, abdication of or fettering discretion, insufficient inquiry or failure to consider material or relevant facts, considering irrelevant facts, bad faith or improper motive, frustration of the legislative purpose, substantive or procedural fairness, inconsistency in decision making, unreasonableness, lack of proportionality, bias and failure to give reasons for the decision. See ***Judicial Review Handbook*** 6th

Edition by **Michael Fordham**.

24. In **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300,** the Court while citing **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478** at **479** held:

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

25. An Enforcement Notice is issued pursuant to section 38 of the ***Physical Planning Act*** which 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.**

26.26. In this case the Enforcement Notice was issued pursuant to section 30(1) of the ***Physical Planning Act***. Section 30 aforesaid provides as follows:

> **(1) No person shall carry out development within the area of a local authority without a development permission granted by the local authority under section 33.**
>
> **(2) Any person who contravenes subsection (1) shall be guilty of an offence and shall be liable to a fine not exceeding one hundred thousand shillings or to an imprisonment not exceeding five years or to both.**

27. It is therefore clear that where a development is carried out without development permission the Local Authority may issue an Enforcement Notice and in addition institute criminal proceedings against the offender. In this case the Notice was grounded on the fact that there was an illegal development i.e. the construction of boundary wall on road reserve. The Applicants were then required to remove the said illegal development "forthwith". The Notice also stated that the same was to be removed within 3 days.

28. In my view if the Applicants had constructed a wall on a road reserve or anywhere else within the area of a local authority without a development permission granted by the local authority under section 33, the Respondents were within their powers to issue an Enforcement Notice. Accordingly, the issue of lack of jurisdiction or mandate on the part of the Respondents does not arise. As to whether the Applicants had the necessary authorization is a matter that goes to the merits of the case rather than the process.

29. 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 "forthwith within 3 days", 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 <u>adequate notice</u> of the nature and reasons for the proposed administrative action.** [Emphasis added].

30. Section 38(4) in my view also implicitly imports that a reasonable notice be given so as to enable a person appeal to the liaison committee if he chooses to. A notice which is worded on such ambiguous terms as "forthwith within 3 days" is unreasonable and cannot therefore be said to be in compliance with the spirit of section 38(4) of the said Act. It is therefore not surprising that barely 24 hours after the issuance of the notice, the same notice was being implemented without even waiting for the expiry thereof.

31. In this case, it was contended which contention was not denied that the Liaison Committee to whom an appeal lies pursuant to section 38(4) was not in existence as at the time the Notice was issued. In my view, the applicants cannot be driven from the seat of justice on the basis of the existence of such alternative remedy, as was held **<u>Republic vs. National Environment Management Authority [2011] eKLR</u>**, where the Court of Appeal had this to say at page 15 and 16 of its judgment:

> **" …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."**

32. Similarly, this Court in **<u>Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE</u>** Judicial Review Case No. 441 of 2013:

> **"…Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute."**

33. In my view, whereas the availability of an alternative remedy is a factor to be taken into

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

34. In the foregoing premises the inescapable conclusion I come to is that the Respondents' decision was tainted with procedural impropriety and further that there is no more convenient, beneficial and effectual remedy available to the applicant.

35. It follows that this application is merited in so far as the orders of judicial review are concerned.

Order

36. In the result the orders which commend themselves to me which I hereby grant are an order of certiorari removing into this Court for the purposes of being quashed and quashing the decision of the Respondents requiring the ex parte applicant to remove the perimeter wall on property LR No. 209/5127 as well as an order of *mandamus* directed at the Respondents to afford the Applicant adequate prior notice before taking any administrative decisions affecting his rights over the suit property. Further, I grant an order of prohibition prohibiting the Respondents from demolishing, excavating or in any way dealing with the suit property unless the due process of the law is adhered to.

37. The applicant will also have the costs of these proceedings to be borne by the Respondents.

38. It is so ordered.

Dated at Nairobi this 9th day of February, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ogutu for Mr Oonge for the 1st, 2nd and 3rd Respondents

CA Ooko