REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO.624 OF 2016

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR

JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION.

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF PHYSICAL PLANNING ACT, CAP 286, LAWS OF KENYA

BETWEEN

REPUBLIC ……………………………………………………....APPLICANT

VERSUS

COUNTY GOVERNMENT OF NAIROBI……….......…………... RESPONDENT

PYRAMID BUILDERS LIMITED………….......…....…INTERESTED PARTY

EX-PARTE DR. ISFANDIAR SOHAILI

RULING ON LEAVE

1. By a chamber summons dated 9th December 2016 and filed on 13th December 2016, the applicant, Exparte **Dr Isfandiar Sohaili** seeks from this court orders:

a) Spent

b)

c) Leave be granted for the applicant to apply for an order of certiorari to bring into the High Court for purposes of being quashed the administrative action of the County Government of Nairobi of 5th April, 2016 approving the building plan for the construction of 5 Town Houses on LR3734/108 submitted by Pyramid Builders Limited;

c) Leave be granted for the applicant to apply for an order of prohibition directed at the County Government of Nairobi prohibiting it from approving any building plans on LR No. 3734/108 until the Urban Planning Committee is reconstituted.

d) The leave granted do operate as stay of the approval Ref CPD/DC/LR No.3734/108 pending hearing and determination of the notice of motion to be filed.

e) Costs be provided for.

2. The chamber summons, which is expressly brought under the provisions of the Physical Planning Act, Cap 286 Laws of Kenya; Order 53 Rules 1,2,& 4 of the Civil Procedure Rules, Articles 22 and 23 of the Constitution of Kenya, 2010, Sections 7(1) (a) and 9 of the Fair Administrative Action Act No. 4 of 2015 and all enabling powers and provisions of the law, is supported by the statutory statement and verifying affidavit of Dr. Isfandiar Sohaili, a resident of Kunde Road, Nairobi and a member of Kunde Welfare Association, sworn on 9th December 2016 and accompanied by several annexed exhibits.

3. The gist of the exparte applicant's application as contained in the grounds set out in the statutory statement and the depositions by Dr. Isfandiar Sohaili is that on 4th May 2016 the interested party herein Pyramid Builders Limited were granted an approval by the Nairobi City County to develop six town houses on LR No. 330/485 along Kunde Road in Nairobi.

4. That the residents of Kunde Road Nairobi were dissatisfied with the said approval and lodged an appeal under the provisions of the Physical Planning Act but that they have been informed that the Liaison Committee of the respondent has not been sitting and thus the Appeal cannot be heard.

5. That the issuance of the approval by the Nairobi City County was tainted with illegality and conflict of interest as both the projects architects and the contractor are members of the Urban Planning Technical Committee of the Nairobi City County and used their positions to influence the approval of the plans.

6. That the presence of the Contractor and the Architect in the meeting culminated in the approval of the development on LR No. 330/485 which is contrary to Chapter 6 of the Constitution and the County Government Act, 2012.

7. That it was after the issue of conflict of interest was brought to the attention of the respondent's Executive Committee meeting of 13th October 2016 that a directive was issued freezing the continued development by the interested party on LR No. 330/485, Kunde Road.

8. That the approval for the development of the property was done without due regard to procedural requirements of the Physical Planning Act; and that the Residents of Kunde Road were never consulted in the process leading to the issuance of the approval as envisaged in the Physical Planning Act.

9. That on 27th August 2015 the County Executive Committee of the respondent unanimously adopted the petition by the Kunde Road Welfare Association to maintain the status quo of houses at Kunde Road single dwelling units and issued a directive freezing the permission of multi dwelling units around Kunde Road and the development by the interested party on LR No. 330/485 Kunde Road.

10. That the purported approval by the 1st respondent of the development on LR NO. 330/485 is illegal and violates the rights of the residents of Kunde Road as the architect and contractor sat as judges in their own cause despite the fact that the exparte applicant had grave concerns about the approval of the development approval.

11. That the Kunde Road Welfare Association filed appeal No. 186/2016 against the interested party

and obtained a stop order restraining any development in the property.

12. That it is in the interest of justice that the reliefs sought are granted to protect the applicant's interests as a resident of Kunde Road and further, to uphold the principles and virtues espoused under Chapter Six of the Constitution.

13. The exparte applicant annexed to the affidavit annextures which include: Approval of development on LR 330/485 dated 4th May 2016 given to the interested party by the respondent; the plans thereto; change of user Form, PPA 8 dated 1st August 2016 being an appeal against development Planning decision on LR 330/485 by Kunde Residents Welfare Association; memo dated 13th October 2016 to CECM Lands & Urban Planning from Ag. County Secretary on the subject of CEC Resolutions on Kunde Road Residents Welfare Association, notifying of stop order against the developer; minutes of 27th August 2015; A guide of Nairobi City Development ordinances and zones NEMA Tribunal Appeal No. NET/186/2016 by Kunde Road Residents Welfare Association against the Director General NEMA's grant of License No.NEMA/EIA/PSL/3468 and an application Reference No. NEMA/EIA/PSR/6467 issued on 18th July 2016 on LR 330/485; stop order from NEMA dated 9th August 2016 to the interested parties stopping construction of residential town Houses on LR 330/485 along Kunde Road, Thompson Estate, Nairobi City County.

14. In opposition to the chamber summons, the respondent Nairobi City County filed grounds of opposition dated 18th January 2017 contending that:

> a. The application refers to a nonexistent Development permission(building approval)and is therefore fatally defective and incurable; and that there is a pending suit before the High Court constitutional and Human Rights Division Petition No. 316 of 2016 between the same parties herein and involving the same subject matter and as such the instant application is an abuse of the court process.

15. The interested party, Pyramid Builders Ltd did not file any response to the chamber summons but its counsel Senior Counsel Mr Ahmednasir Abdullahi submitted orally in opposition to the chamber summons, raising points of law.

16. The chamber summons was canvassed orally with Mr James Ochieng Oduol submitting on behalf of the exparte applicant, Mr Oonge for the respondent and Senior Counsel Ahmednasir for the interested party.

17. In his submissions, Mr Ochieng Oduol submitted, relying on the statutory statement, verifying affidavit and annextures, constitutional and statutory provisions.

18. According to Mr Ochieng Oduol, every person is guaranteed by the constitution expeditious and lawful administrative action and that this court has the jurisdiction to entertain the present application for leave to apply for Judicial Review orders of certiorari and prohibition.

19. Further, it was submitted on behalf of the applicant that the right to a clean and healthy environment under Article 42 of the Constitution and regulations of land use and planning under Article 46 of the Constitution are matters which the court must take cognizance of and that it is for that reason that Section 32 of the Physical Planning Act enjoins the respondent to approve building plans.

20. Mr Ochieng Oduol submitted that in this matter, there was no public participation; that there was no environment impact Assessment done under Section 36 of the NEMA Act; and that the purported approval was presided over by the Architect and project contractor who sat in their own cause hence the approval is invalid.

21. That the residents of Kunde Road having made representation to the County Government of Nairobi

and there being a resolution that status quo ought to be maintained, to the effect that the estate retains the single dwelling residential area, then the subsequent approval for town houses was contrary to the resolution of the County Government.

22. On the internal appeals mechanism, it was submitted that the County Government had not set up any appeals mechanisms hence the stay sought ought to preserve status quo, since it would fly in the face of the court if the court at the end of it all, would find that there was breach of statutory provisions.

23. Counsel for the applicant submitted that there was no involvement of the National Land Commission, yet its role in land use planning is critical.

24. Further, that there is a legitimate expectation as resolved by the County Government to maintain the status quo of the Kunde Road Estate hence the respondent could not have approved development plans contrary to its own earlier resolution for status quo to be maintained.

25. In addition, it was submitted on behalf of the applicant that the remedy under the Physical Planning Act relates to approval of building plans whereas proceedings before NEMA Tribunal are concerned with whether the applicant has complied with all the requirements under NEMA Act hence the remedies under the respective statutes are different.

26. Counsel for the applicant maintained that the applicant's application was not frivolous, vexatious or filed for collateral purposes. That the application discloses a cause of action in that the building plans were approved without complying with the Physical Planning Act; there was no public participation in the change of user process and that the contractor and the Architect sat in their own cause.

27. Mr Ochieng Oduol further maintained that the application was not statute barred as Section 9(3) of the Law Reform Act is clear that there must be a judgment, Order, decree or conviction or other proceeding sought to be quashed. Further, that Section 9(3) of the Law Reform Act does not override the right under Article 50 of the Constitution of Kenya, 2010 on the right to fair hearing and Article 25 which stipulates that the right to a fair hearing cannot be limited hence the Law Reform Act cannot limit the right to a fair hearing espoused in Article 50 of the Constitution.

28. According to Mr Ochieng Oduol, the applicant sought the intervention of the High Court because the Physical Planning Liaison Committee was not sitting hence the applicant should not be denied access to the High Court's Judicial Review remedy, which is a constitutional remedy under 2010 Constitution, Article 23.

29. Further, that there are exceptional circumstances to warrant grant of leave and stay and that there will be no prejudice against the respondent who must justify how the approvals were given, without public participation, and contrary to the provisions of the Physical Planning Act.

30. Mr Ochieng Oduol submitted that the applicant only came to court upon discovery that the Liaison Committee was not sitting and that in any case, he disclosed to this court the fact that there was an appeal pending before NEMA Tribunal.

31. In an intensive opposition to the applicant's application for leave and stay, Senior Counsel Mr Ahmednasir Abdullahi representing the interested party submitted that the leave sought is not available to the applicant because the decision which is impugned was made on 5th April 2016 which is over 6 months prior to the filing of the application for leave contrary to the provisions of Section 9(3) of the Law Reform Act and Order 53 of the Civil Procedure Rules which expressly prohibits the filing of an application for Judicial Review Order of certiorari unless leave is sought within 6 months from the date of the decision.

32. That in this case the decision was challenged in court on 9thDecember 2016 almost three months after the expiry period on 5th October 2016. Senior Counsel maintained that the court cannot confer upon the applicant a right which is denied by statute and that these proceedings are a nullity in that

the court cannot even grant leave for prohibition where certiorari is not available.

33. Senior Counsel further submitted that the court cannot grant the orders sought as Section 9(2)of the Fair Administrative Action Act, No. 4 of 2015 clearly bars the court from reviewing an administrative action or decision unless the mechanisms for review or appeal under any written law are exhausted.

34. Further, that there is a clear admission by the applicant at paragraph 6 of the verifying affidavit that upon learning of the approval of the development plans by the respondent, the residents of Kunde Road lodged an appeal against the said approval under the Physical Planning Act but that the Liaison Committee of the respondent has not been sitting and thus there is an alternative remedy available to the applicant which he has not exhausted as stipulated by Section 9(2) of the Fair Administrative Action Act and therefore this court has no jurisdiction to hear and determine these Judicial Review proceedings.

35. That there are no exceptional circumstances to warrant exemption from alternative remedies and that Section 9(4) of the Fair Administrative Action Act addresses those special circumstances and that only on an application would the court consider exemption from seeking those available remedies but that in this case, no such application has been filed and neither has the court exempted the applicant from seeking those alternative remedies.

36. Counsel relied on the case of **Republic vs The Principal Magistrate, Lamu Magistrate's Court** and **Abdul Wahidi Mohamed alias otherwise exparte Kenya Forest Service [2016] e KLR(Mombasa JR 54/2015.**

37. Senior Counsel further submitted that leave is not automatic and neither is it a matter of course that is why jurisdictions like England, an application for leave is considered inter parties at a substantive hearing.

38. That in this case, there is no prima facie arguable case from a superficial interrogation of the law since the court cannot do anything about statutory time limits under Section 9(3) of the Law Reform Act and Order 53 of the Civil Procedure Rules.

39. Senior Counsel submitted that there is no constitutional right which the Law Reform Act is limiting and that moreso, the application is not brought under the Bill of rights litigation hence Article 50 of the Constitution is not relevant to these proceedings as it recognizes disputes that can be resolved by application of the law which is the Law Reform Act and which law provides for limitation period of 6 months from the date of the decision being challenged hence there is no conflict between the Law Reform Act and the Constitution.

40. Further, that the court cannot quash as the approval being challenged is subsisting.

41. Senior Counsel further contended that parties before this court have litigated over the same matter vide Petition No. 316/2016 and that even as at the time of hearing of this application, the orders of Honourable Mureithi J are in force as made on 7th September 2016.

42. Senior Counsel further argued that in any event, the applicant's application had all along referred to LR 3734/108 yet the disputed property is LR 330/485 along Kunde Road which is a fundamental incurable error.

43. Further, that the applicant is circumventing the ruling of Mureithi J made on 7th September 2016 which is still in force in the sense that albeit it was suspended pending the determination of the appeal by the NEMA Tribunal, the NEMA Tribunal did dismiss the appeal and lifted the stop order.

44. Therefore, it was submitted that the applicant is abusing the court process as there is no successful challenge to that decision by Mureithi J and or to the decision by NEMA Tribunal dismissing the appeal.

45. Further, that the court should take note of the non disclosure of the said proceedings and decisions by Honourable Mureithi J and the NEMA Tribunal. Reliance was placed on the House of Lords decision in **Hunter V Chief Constable of West Midlands & Another [1981] 3ALL ER 727** to advance the argument on the circumstances in which abuse of process can arise.

46. It was argued that this court should dismiss this application as the issues have been considered and concluded by a court of competent jurisdiction hence it is a scandal to the administration of justice if the same question is cosmetically brought for determination by this court.

47. Senior Counsel urged the court to dismiss the applicant's application with costs.

48. In opposition to the applicant's application Mr Oonge counsel for the respondent associated himself with all the elaborate submissions by Senior Counsel Ahmednasir, while relying in the grounds of opposition filed on 18th January 2017, and urged this court to dismiss the application with costs.

49. In a rejoinder, Mr Ochieng Oduol counsel for the applicant conceded that there was a mix up in the LR Nos. 330/485 Kunde Road and LR 3734/108 as contained in paragraph 8 of the certificate of urgency in the statutory statement and the verifying affidavit. He urged the court to invoke the provisions of Article 159 of the Constitution to determine this matter on merits, as the subject disputed property is known and that the court can take cognizance of such error.

50. On the existence of Petition No.316/2016 Mr Oduol submitted that the same was filed by the interested party who sought to stop the residents of Kunde Road from allegedly interfering with its rights and that the resident has also appealed against Nema's grant of Environmental Impact Assessment (EIA) license on 18th July 2010 which matter has not been determined by the NEMA Tribunal.

51. It was further submitted that in any case, Honourable Mureithi J reviewed his orders after realizing that he had granted them in error as there was a statutory stay upon the matter being filed before NEMA Tribunal challenging EIA license issued to the interested party by NEMA.

52. Further that there is an appeal pending before the Physical Planning Liaison Committee which Committee is however not sitting and that neither are the issues before NEMA Tribunal concluded as the appeal was dismissed on a technicality and that there is a pending application to allow the appeal to be filed out of time hence there is no *Resjudicata* as far as Petition 316/2016 is concerned, as the second ruling of 3rd October 2016 stayed the order which does not negate the pending appeal.

53. Mr Oduol maintained that his client was not seeking to stay the decision of Mureithi J and that neither is there abuse of court process as both statutes provide for the appeal processes.

54. Further, that abuse of process is a question of fact yet there was no affidavit on record to show how court process was being abused.

55. Further, that in this case, there is a genuine grievance for the court to grant the prayers sought in the chamber summons as the residents of Kunde Road have not been heard. Counsel urged the court to grant leave as sought and that such leave do operate as stay.

<u>Determination</u>

56. I have carefully considered the applicant's application dated 13th December 2016. I have also considered the interested party's grounds of opposition dated 16th January 2017 and the respective parties' advocates' elaborate submissions and authorities cited for and against the chamber summons.

57. In my humble view, the issues that flow for determination are:

1. Whether the proceedings herein are statute barred.

2. Whether there was any other efficacious alternative remedy which the applicant ought to have pursued.

3. Whether the applicant has established a prima facie arguable case for consideration at a substantive motion stage.

4. Whether the applicant is entitled to leave and stay.

5. What orders should the court make.

6. Who should bear costs of the application?

58. On the question of whether these proceedings are statute barred and therefore a nullity, Senior Counsel Mr Ahmednasir for the interested party submitted that the application herein offends the clear statutory provisions of Section 9(3) of the Law Reform Act Cap 26 Laws of Kenya and Order 53 Rule (2) of the Civil Procedure Rules which clearly stipulate that no application for Judicial Review orders of certiorari shall be made unless leave is sought within 6 months from the date of the decision and that the decision which is impugned having been made on 4th May 2016, the application for leave ought to have been instituted by 5th November 2016.

59. Therefore, it was argued that as this application was made on 13th December 2016, the application is statute barred and so it ought to be struck out.

60. In addition, Senior Counsel argued that as the impugned decision exists, which is an approval for development on the contested parcel of land, where the court strikes out the request for certiorari; then the prayer for prohibition cannot issue.

61. On the other hand, the applicant avers that the impugned decision is not an order, judgment, decree or proceeding contemplated under Section 9(3) of the Law Reform Act and or Order 53(2) of the Civil Procedure Rules.

62. Further, that in any event, Section 9(3) of the Law Reform Act and Order 53(2) of the Civil Procedure Rules cannot override Article 159 of the Constitution which stipulates that the court in the exercise of judicial authority shall be guided by the principles that justice shall be administered without undue regard to procedural technicalities.

63. In the applicant's view, therefore, the application is in order and not statute barred as alleged.

64. Section 9(3) of the Law Reform Act Cap 26 Laws of Kenya stipulates that:

> ***9(3) In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law, and where that judgment, order, decree, conviction or other proceedings is subject to appeal, and a time is limited by law for the bringing of the appeal, the court of judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.***"

65. The above provisions are replicated in Order 53 Rule (2) of the Civil Procedure Rules.

66. It is not in dispute that the administrative decision which is being challenged by the applicant is the decision of the Director of Urban Planning made on 4th May 2016 approving the applicant's application of a building plan for construction of Domestic Building being Town Houses on LR 330/485 Kunde Road. Attached to the said approval are the building plans.

67. It is not also not in dispute that the approval was made more than six months prior to the filing of these proceedings on 13th December 2016.

68. It is further not in dispute that the applicant brought these proceedings pursuant to the provisions of Order 53 Rules 1,2, and 4 of the Civil Procedure Rules Articles 22 and 23 of the Constitution of Kenya, 2010, Sections 7(1) (a) and 9 of the Fair Administrative Action Act, 2015 and other enabling provisions of the law.

69. It is further not in dispute that the action being challenged was an administrative action of 5th April 2016 approving the building plans for the construction on LR 3734/108, albeit the parties are all in agreement that the subject disputed property is LR 330/485, which error I consider inadvertent on the part of the applicant's counsel and amenable for correction under the inherent jurisdiction of the court to read LR 330/485 and I so order for such correction.

70. Nevertheless, albeit the applicant claims that the administrative action complained of is not an order, decree or judgment or conviction, the words used in the Law Reform Act and the Civil Procedure Rules, in addition to the above words is or " other proceeding(s)"

71. Furthermore, in Judicial Review, the court is never concerned with the decision and its merits but the process of that decision making hence the court in this case would be concerned with the proceedings leading to the administrative action to grant approval of the building plans.

72. Further, the term 'decision' is defined under the Fair Administrative Action Act No. 4 of 2015 as "decision" means any administrative or quasi judicial decision made, proposed to be made, or required to be made, as the case may be.

73. Section 2 of the Act also defines ***administrative action to include*** ii) ***any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.***

74. It follows that the administrative action which is being challenged need not be an *order, decree or judgment or conviction, which words are used in the* Law Reform Act and the Civil Procedure Rules, as the scope of judicial review has been expanded by Article 47 of the Constitution and the Fair administrative e Action Act which is the implementing legislation.

75. The Fair Administrative Action Act recognizes not only the orders, decrees, judgments or other conviction or other proceedings but act or omissions or decisions made by an administrator as defined in section 2 of the Fair Administrative Action also defines administrative action to include the powers, functions and duties exercised by authorities or quasi –judicial tribunals, or any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.

76. The Act further defines an *administrator* to mean *a person who takes an administrative action or who makes an administrative decision*. It therefore follows that not only is leave required to challenge an order, judgment , decree, or conviction or other proceedings, but also an administrative action taken or failure to make an administrative decision that affects the legal rights or interests of any person to whom such action relates.

77. In my view, the Fair Administrative Action Act expands the scope of judicial review as traditionally known, although the Act does not oust the operation of Section 9(3) of the Law Reform Act in that under Section 12 of the Fair Administrative Action Act, it is clear that the Act "*is in addition to and not in*

derogation from the general principles of common law and the Rules of natural justice."

78. Under Section 13(1) the Cabinet Secretary may in consultation the Commission on Administrative Justice (CAJ) make regulations for the better carrying out of the provisions of the Act, which regulations must, before publication, be approved by Parliament.

79. In the instant case, no regulations have been promulgated for the better carrying out of the provisions of the Act. It follows that as stipulated in Section 12 of the Act, the general principles of common law and rules of natural justice are applicable in proceedings under the Act.

80. There is no provision under the Fair Administrative Action that requires that leave to apply for Judicial Review orders be sought and neither is there a provision that the statutory bar Under Section 9(3) of the Law Reform Act and Order 53 Rule (2) of the Civil Procedure Rules is inapplicable where the application or challenge is brought pursuant to the Fair Administrative Action Act.

81. It is for that reason that I find that an administrative decision or action is equivalent to that other proceeding referred to in Section 9(3) of the Law Reform Act and Order 53 Rule (2) of the Civil Procedure Rules.

82. Therefore, I find that failure to bring a challenge against an administrative action or decision, where such action or decision requires to be quashed by a Judicial Review order of certiorari within 6 months from the date of the action or decision is fatal to the current proceedings and more specifically with regard to prayer No (b) for leave to apply for Judicial Review order of certiorari.

83. In addition, where the prayer for leave to apply for Judicial Review order for certiorari is not available, thereby sustaining the decision of 4th May 2016, it follows that the prayer for leave to apply for Judicial Review order of prohibition to prohibit the respondent from approving any building plans on LR 330/485 until the Urban Planning Committee is reconstituted does not lie as the approval of the building plans was done on 4th May 2016.

84. Accordingly, the application herein is a non starter, and Article 159 of the Constitution cannot cure that which is statute barred as it goes to the jurisdiction of the court to hear and determine the application for leave the same having been filed outside the six months period and hence in contravention of Section 9(3) of the Law Reform Act and Order 53 Rule 2 of the Civil Procedure Rules.

85. The Court of Appeal in the cases including **Kimanzi Mboo v David Mulwa, CA 233/1996** and **Wilson OsoloVs John Ojiambo& Another[1996] e KLR** held that the period of six months within which leave to file substantive application for certiorari orders should be made from the date of the order or action complained of cannot be extended. The commencement words in the said provisions are clearly prohibitive. It says leave ***shall not be granted,*** which is clear and unambiguous and clearly declares the intention of the lawgiver.

86. Accordingly, I have no hesitation in finding that the point of law raised by Senior Counsel Ahmednasir for the interested party is valid and the same is upheld and therefore the application for leave must fail on that ground alone.

87. However, in the event that I am to be found to have erred in my above finding, I would go further to determine the 2nd issue of whether there was any other efficacious alternative remedy which the applicant ought to have pursued.

88. According to the interested party, the applicant had an alternative remedy of appealing to the Physical Planning Liaison Committee which the residents of Kunde Road of whom he is a member, did appeal to and which appeal is pending and that therefore they must exhaust that process before coming to the High Court to challenge the decision of the Physical Planning Liaison Committee.

89. On the other hand, the applicant avers that this court has jurisdiction to hear and determine the Judicial Review proceedings because the Physical Planning Liaison Committee is not sitting.

90. Article 47 of the Constitution as read with Article 165(6) donates to the High Court supervisory powers over decisions of the subordinate courts and inferior tribunals or bodies or authorities exercising judicial or quasi judicial jurisdiction.

91. In the implementation of Article 47 of the Constitution, Parliament recently enacted the Fair Administrative Action Act No. 4 of 2015. Sections 9(2) (3) and (4) of the said Act provides that:

> *" 9(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 the applicant shall first exhaust such remedy before instituting proceedings under Subsection* (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."*

92. The above provision is clear that an applicant for Judicial Review must first satisfy the court that they have first exhausted the alternative remedies available under the internal mechanisms or under any other written law before resorting to court. However, in exceptional circumstances, the court may exempt the applicant from resorting to alternative remedies.

93. In this case, the applicant claims in defence to the preliminary objection raised that there are exceptional circumstances warranting exemption from resorting to alternative remedies as the Physical Planning Liaison Committee is not sitting.

94. The interested party on the other hand maintains that if there were any exceptional circumstances, an application for exemption would have been made for the court's consideration.

95. In Republic V National Environment Management Authority, CA 84 of 2010 [2011] e KLR, the Court of Appeal stated:

> ***" Regarding the availability of an alternative remedy, such as an appeal, whereas there are occasions when the court will require exhaustion of other remedies of procedures such as execution procedures under the Civil Procedure Act Cap 21, Laws of Kenya and the Civil Procedure Rules made there under, the availability of such alternative remedy is not a bar to proceedings by way of Judicial Review. They have no concern with the merits of either of the applicant's or respondent's case. This court concerns itself with the review of the decision making process, not whether NEMA had authority to issue a stop order or notice, or whether there is an appeal mechanism."***

96. The court in the above case further stated:

> "***……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 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…..The learned judge, in our respectful view, considered these strictures and came to the conclusion that the appellant had failed to demonstrate to her what exceptional circumstances s existed in***

its case which would remove it from the appeal process set out in the statute with respect, we agree with the judge."

97. The above decision was made prior to the enactment of the Fair Administrative Action Act No. 4 of 2015. Nonetheless, the Court of Appeal recognized that except in exceptional circumstances, where there is an alternative remedy and especially where the Parliament has provided a statutory appeal procedure, the court should not allow the Judicial Review process to be invoked.

98. Emukule J (as he then was) in **Rental Healthcare [EPZ] Ltd &Another V Ministry of Health & 5 Others [2015]e KLR** citing with approval **Damian Belfonte V The Attorney General of Trinidad & Tobago CA 84/2004** persuasively stated:

" where there is a parallel remedy, constitutional relief should not be made unless the circumstances of which the complainant is made include some feature which made is 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 misuse, an abuse of the court process."

99. The same judge (Emukule J) in **Republic vs Principal Magistrate Lamu Magistrate's Court &Another exparte Kenya Forest Service** (supra) citing with approval the Court of Appeal decision in **Eliud Wafula Mailo V Minister of Agriculture &3 Others [2016] e KLR** was clear, as extracted from the **Halsbury's Laws of England, VOL 10, Paragraph 319**:

"The subject's rights to access the courts may be taken away or restricted by statute……"…….. "where a tribunal with exclusive has been specified by a specific statute to deal with claims arising under a statute, the county court's jurisdiction to deal with these claims is ousted, for where an Act creates an obligation to, and enforces the performance of it, it cannot be enforced in any other manner."

100. In this regard, the Physical Planning (Appeals to the Physical Planning Liaison Committee) Regulations, 1998 provides for the procedure of challenging decisions made under the Act. Rule 3 therefore stipulates:

" 3.All appeals shall be made on forms PPA 8 and PPA 9 set out in the schedule respectively and issued by the relevant Liaison Committee or Local Authority, and shall include such particulars as may be required by the directors printed on the forms."

101. The applicant's annexture at page 5 of this bundle is a Form PPA8 being an appeal against Development Planning decision, addressed to the secretary, the Nairobi Physical Planning Liaison Committee setting out the general and specific grounds to the objection to the change of user and the proposed development to LR 330/485.

102. The appeal at paragraph 4 challenges not only the approval of the structural building plans dated 4th May 2016 but the change of user from single dwelling unit to multi residential dwelling units (Town Houses) dated 18th August 2015. The appeal is dated 1st August 2016 and is filed by the Kunde Road Residents Welfare Association. The applicant herein is a member of the said appellant Kunde Road Residents Welfare Association.

103. The Physical Planning Liaison Committee is established under Section 7 of the Physical Planning Act, and the Committee's functions include:

"To hear appeals lodged by persons aggrieved by decisions made by the director or local authorities under the Act."

104. In **Mutanga Tea & Coffee Company Ltd V Shikara Ltd &another [2015] e KLR** the Court of

Appeal at Mombasa (Makhandia, Ouko and M'inoti JJA) determined the central issue of whether a party aggrieved by the decision of the Director of Physical Planning under the Physical Planning Act, Cap 286 Laws of Kenya and NEMA under EMCA Cap 387 may invoke the original jurisdiction of the High Court instead of the dispute resolution mechanisms prescribed by the two Acts.

105. The court, relying on several decisions including **Speaker of The National Assembly V Karume[2008] 1 KLR 425** where it was stated:

> ***"…….where there is a clear procedure for the redress of any particular grievances prescribed by the Constitution or the Act of Parliament, that procedure should be followed….;*** held as follows……
>
> ***"…….this court has in the past emphasized the need for aggrieved parties to strictly follow any procedures that are specifically prescribed for resolution of particular disputes (Speaker of the National Assembly V Karume (supra) was a 5(2) (b) applicant for stay of execution of an order of the High Court issued in Judicial Review proceedings rather than in a petition as required by the Constitution." In granting the order, the court made the often quoted statement : " where there is a clear procedure for the redress of any particular grievances prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. (See also Kones v Republic & Another exparte Kimani Wanyoike& 4 Others[2008] e KLR (ER) 296. It is readily apparent that in the above cited cases the court was speaking on issues of the correct procedure rather than of the correct forum for resolution of a dispute. However, we entertain no doubt in our minds that the reasoning of the court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by the Constitution or a statute, to resold to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court.***
>
> ***The basis for that view is first, that Article 159 (2) (e) of the Constitution has expressly recognized alternative forms of alternatives forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The use of the word "including" leaves no doubt that Article 159(2)(c) is not a closed catalogue. To the extent that the Constitution requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the High Court would not be promoting, but rather, undermining a clear constitutional objective. A holistic and purposive reaching of the Constitution would therefore entail construing the unlimited original jurisdiction conferred on the High Court by Article 165(3) (a) of the Constitution in a way that will accommodate the alternative dispute resolution mechanisms. Secondly, such alternative dispute resolution mechanisms normally have an advantage of ensuring that the issues in dispute are heard and determined by experts in the area; and that the dispute is resolved much more expeditiously and in a more cost effective manner…..***
>
> ***…..We are therefore satisfied that the learned judge did not err by striking out the appellant's suit and application which sought to invoke the original jurisdiction of the High Court in circumstances whereas the relevant statutes prescribed alternative dispute resolution mechanisms and afforded the appellant the right to access the High Court by way of an appeal, which mechanisms he had refused to invoke. To hold otherwise would, in the circumstances of this appeal, be to defeat the constitutional objective behind Article 159(2) (c) and the very raison d'etre of the mechanisms provided under the two Acts……"***

106. The Court of Appeal quite recently in **Samson Vuko V Nelson Kilimo & 2 Others (2016] e KLR** citing with approval its previous decisions including **Speaker of the National Assembly V Karume** (supra) maintained that:

> "***where there is a clear procedure (forum for the redress of any particular grievances prescribed by the Constitution or the Act of Parliament, that procedure or forum must be followed."***

107. The court in **Mutanga Tea & coffee Company** (supra) case was clear that:

> ***" The Physical Planning Act was enacted to provide for among other things, the preparation and implementation of development plans. As noted by the High Court, the Act has a fairly elaborate dispute resolution mechanism that affords affected parties, be they developers, adjacent property owners, or any other affected person, an opportunity to be heard in the first instance followed by a two tier appeal process, before a final appeal to the High Court.***
>
> ***Under Section 29 of the Act , local authorities are empowered to, among other things, prohibit or control the use and development of land and buildings in the interest of proper and orderly development; to control or prohibit subdivision of land; to approve all development applications; and to grant development permissions.***
>
> ***Under Section 30, no person may carry out development within the area of the local authority with a development permission by the local authority and it is a criminal offence to undertake such development without permission.***
>
> ***Any person aggrieved by a decision of a local authority to grant or deny an application for change of user of development may appeal to the relevant Physical Planning Liaison Committee established under Section 8 of the Physical Planning Act. A decision of a Physical Planning Liaison Committee is appealable to the National Physical Planning Liaison committee, a body made up of 19 members drawn from a cross section of sectors, professionals, and interest groups. Its mandates includes hearing and determination of appeals from a person or local authority aggrieved by a decision of any of the lower level liaison committees. The Committee has power to reverse, confirm or vary the decision appealed against.***
>
> ***Under Section 15(4) of the Act, any person aggrieved by a decision of the National Physical Planning Liaison committee has a further right to appeal to the High Court.***
>
> ***We have carefully considered the provisions of the Physical Planning Act and we do not see the basis of the argument that it contemplates the possibilities of some aggrieved parties side stepping the provided elaborate dispute resolution procedures and taking their grievances directly to the High Court.***
>
> ***Throughout the Physical Planning Act refers to " any person aggrieved by a decision." That aggrieved person, in our view includes the owner of an adjacent property like the present appellant. In our reading of Section 41(3) of the Physical Planning Act against the other provisions of the Act, a person who is supposed to be served with a copy of the application for change of user or for development, and is not so served is an aggrieved party within the meaning of the Act and is entitled to resort to the dispute resolution mechanism provided under the Act to agitate his grievances . He is not entitled to ignore the provisions of the Act and invoke the original jurisdiction of the High Court.***
>
> ***The EMCA takes a similar approach on matters of the Environment. Section 58 as read with the Second Schedule overrides all provisions of other laws including the Physical Planning Act and requires any person undertaking, among others, a project involving an activity out of character with its surrounding, or a structure of a scale not in keeping with the surroundings or entailing major changes in land use to first undertake an environment impact assessment.***
>
> ***Under the Environment Impact Assessment and Audit Regulations, 2003, in undertaking an environment impact assessment, all persons likely to be affected by the project must be consulted. In Section 31 the Act established the Public Complaints Committee whose functions, among other things, is to investigate any allegations or complaints against any person relating to the conditions of environment.***

> ***Like under the Physical Planning Act, any person aggrieved by a decision of the Director General, of NEMA or of any of its Committees has a right to appeal to the National Environment Tribunal under Section 129 (2) of EMCA, which may confirm, set aside, or vary the impugned decision and make such order as it may deem fit. A decision of the Tribunal is, under Section 130 appealable to the High court.***
>
> ***The real question then becomes whether an aggrieved party can ignore these elaborate provisions in both the Physical Planning Act and the EMCA and resort to the High Court, not in an appeal, as provided , but in the first instance."***

108. The Court of Appeal in the same decision above also cited with approval the High Court decision in **Rich Productions Ltd VsKenya Pipeline Company &Another Petition No. 173 of 2014** where the court explained why it must be slow to undermine prescribed alternative dispute resolution mechanisms thus:

> ***"The reason why the Constitution and law establish different institutions and mechanisms for dispute resolution in different sectors is to ensure that such disputes as may arise are resolved by those with technical competence and the jurisdiction to deal with them. While the court retains the inherent and wide jurisdiction under Article 165 of the Constitution to supervise bodies such as the 2nd respondent, such suspension is limited in various respects, which I need not, go into here.***
>
> ***Suffice to say that it (the court) cannot exercise such jurisdiction in circumstances where parties before court seek to avoid mechanisms and process provided by law, and convert the issues in dispute into constitutional issues when it is not."***

109. On the same reasoning above, the Court of Appeal in **Republic Vs National Environmental Management Authority, CA 84/2010** upheld a decision of the High Court, which declined to entertain a judicial review application by a party who had a remedy, which he had not utilized, under the National Environmental Tribunal. The Court of Appeal reiterated that where Parliament has provided an alternative remedy in the form of a statutory appeal procedure; it is only in exceptional circumstances that an order of judicial Review will be granted.

110. Similarly in **Vania Investments Pool Ltd Vs Capital Markets Authority & 8 Others, CA No. 92 of 2014** the Court of Appeal also upheld a decision of the High Court in which the court declined to entertain a Judicial Review application by an applicant who had failed to first refer its dispute to the Capital Markets Appeals Tribunal established under the Capital Markets Act.

111. From the above elaborate and authoritative decisions of the Court of Appeal and as I have no sound ground upon which to depart from or to distinguish them from the instant case and on its facts, I am satisfied that this court cannot invoke its inherent jurisdiction to hear and determine this matter where there a is an alternative resolution mechanism provided by law.

112. I am also satisfied that failure to follow the prescribed mechanism is not a mere technicality curable under **Article 159(2)(d)** of the **Constitution**, as it is the same Constitution under **Article 159(2) (c)** that expressly provide for principles under which the dispute resolution mechanisms provided (for by the Physical Planning Act) are underpinned hence, lack of compliance thereof is not a mere procedural technicality.

113. In the instant case, it is clear from **Sections 9 (2) (3)** and **(4)** of the Fair Administrative Action Act which implements **Article 47** of the **Constitution**, that the court is expressly barred from entertaining Judicial Review proceedings in a matter where there are internal mechanisms for appeal or review, and <u>all</u> remedies available under any other written law are first exhausted.

114. The Act, nonetheless, under **Subsection (4)** of section 9 gives to the court discretion, in exceptional circumstances, ***on application***, to exempt such person from the obligation to exhaust any remedy if the

court considers such exemption to be in the interest of justice.

115. The applicant acknowledges that there is an internal appeal mechanism which he and others invoked and which appeal is pending before the Physical Planning Liaison Committee of the respondent. He however claims that the Liaison Committee is not sitting.

116. There is no deposition as to who informed him that the Liaison Committee is not sitting and even if that were to be the case, nothing prevented the applicant from seeking for Judicial Review orders of Mandamus to compel the respondent to constitute such relevant Liaison Committee within a specified period for purposes of expeditions disposal of the appeal which was filed on 3/8/2016.

117. In addition, if the applicant believes that there are exceptional circumstances that warrant consideration of the judicial review proceedings, the provision of **Section 9 (4)** of the Fair Administrative Action are clear that an applicant *must apply* to seek exemption from the obligation to exhaust any alternative remedy and the court would then consider such application on its merits on whether the applicant deserves such exemption.

118. In this case, there is no such application seeking for exemption hence the court cannot on its own motion seek to consider that which is not before it and especially where the statute clearly stipulates that there must be such application, setting out those exceptional circumstances, for consideration.

119. This court had occasion to determine the issue of exhaustion of alternative remedies in **Judicial Review 581 of 2016 on 9/12/2016 in Republic Vs Patrick Njoroge Kimani& Others ex parte Kangemi Matatu Owners Sacco** where the respondent raised a preliminary objection as to the jurisdiction of the court to hear and determine judicial review proceedings between members of a Co-operative Society contrary to the provisions of **Section 76** and **67(3) of Cap 490 Laws of Kenya, t**he **Co-operative Societies Act** and **Cap 490B Laws of Kenya,** the **Sacco Societies Act** and I held thus:

> ***"With those clear provisions of Sections 76 and 67(3) of Cap490 and 490B of the Co-operative Societies Act and Sacco Societies Act respectively that disputes between the exparte applicants herein and the interested party should be resolved by the co-operatives Tribunal established under Section 77 of Cap490 Laws of Kenya, I have no doubt in my mind that the dispute squarely falls in and can be officiously by resolved through those established mechanisms under the statute and moreso, when the Fair Administrative Action Act No. 4 of 2015 which was expressly invoked by the ex parte applicants and which implements Article 47 of the Constitution thereby crystallizing the right to fair administrative action provides for exhaustion of alternative remedies before approaching this court."***

120. I am further fortified by the decision of Court of Appeal in **Narok County Council Vs. Trans Mara County Council & Another CA 25 of 2000** where the Court of Appeal stated:-

> ***"Although Section 60 of the Constitution gives the High Court unlimited jurisdiction, it cannot be understood to mean that it can be used to clothe the High Court with jurisdiction to deal with maters which a statute has directed should be done by a minister as part of his statutory duty; it is otherwise where the statute is silent on what is to e done in the event of a disagreement… where a statute provides that in case of a dispute the minister is to give direction, the jurisdiction of the court can be invoked only if the Minister refuses to give a direction or in purporting to do so, arrives at a decision which is grossly unfair or perverse. In the latter, his decision can be challenged by an application to the High Court for a writ of certiorari because under the relevant section of the decision is to be made on a fair basis. But if the Minister simply refuses to discharge his statutory duty; his refusal can also be challenged in the High Court by way of Mandamus to compel the Minister to perform his statutory but not by way of a suit…if the court acts without jurisdiction, the proceedings are a nullity…the extent of the jurisdiction of the High Court may not only, be that which is conferred or limited by the constitution but also, that which the constitution or any other law, may by express provisions or by necessary implication, so confer or limit.***

The jurisdiction of the High Court can be ousted by an Act of Parliament and in such cases all that the High Court can do is to enforce by judicial review proceedings, the implementation of the provisions of the Act; certainly, not to usurp the powers of the Minister.. Even though resort to the judicial review process, may in appropriate cases not be a bar to other proceedings such as a plaint, this may not apply in peculiar circumstances such as this one, so as to entitle the judge to do not only what he was not requested to so, but also, to do what he had no jurisdiction to embark upon. Where the law provides for procedure to be followed, the parties are bound to follow the procedure provided by the law before the parties can resort to a court of law as the court would have no jurisdiction to entertain the dispute."

121. The above decision applies in both issue 1 and 2 herein in that albeit the applicant contends that the Law Reform Act cannot oust the jurisdiction of the court, it is clear that a statute can oust jurisdiction of the High Court, just as the Constitution does, under **Article 165 (5) (b)** of the **Constitution**. Further, **Section 9** of the Fair Administrative Action ousts the jurisdiction of the High Court where there are in place officious alternative remedies and it is upon the applicant, on application, to satisfy the court that he deserves exemption from exhausting pursuing that other remedy through an alternative forum.

122. In this case, the fact that the applicant already approached the alternative forum by way of an appeal is a clear indication that he acknowledges the significance of exhaustion of alternative remedies and therefore he cannot be seen or heard to say that that alternative forum is not officious.

123. As already stated, if the Physical planning Liaison Committee does not perform its statutory duty of hearing the appeal as filed, the applicant would be entitled to seek for exemption or for judicial review of Mandamus to compel the respondent to perform a statutory duty, which the applicant has not attempted to do.

124. In the earlier case of **Damina Belfonte Vs The Attorney General of Trinidad & Tobago CA 2004** 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 cause. 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."

125. And in **international Centre for Policy and Conflict & 5 Others V the AG & 4 Others (293) eKLR** cited in **Diana Kethi Kilonzo & Another Vs IEBC& 10 Others [2013] eKLR it** was stated;-

"An important relief of the concept of the rule of law is that this court before exercising its jurisdiction under Article 165 of the Constitution in general must exercise restraint. <u>It must first give an opportunity to the relevant constitutional bodies or state organs to deal with the dispute under the relevant provision of the parte statute.</u> If the court were to act in haste it would be presuming bad faith or inability by that body to act. For instance, in the case of IEBC, the court would end up usurping IEBC's powers. This would be contrary to the institutional independence of IEBC granted by Article 249 of the Constitution." <u>Where there exists adequate mechanism 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."[emphasis Added]</u>

126. Hon Justice Makhandia (as he then was) in **Peter Ochara Anam & Others Vs. Constituencies Development Fund (CDF) Board and Others. Kisii HC Petition No. 3 of 2010 [2011]eKLR** put it in the following words:-

"The provision is couched in mandatory terms and leaves no exceptions and or provisos coming to court by way of a constitutional petition is not expected either as much as the constitution is

superior law to the statute aforesaid. In view of this provision and there being no allegations or evidence that the petitioners exhausted those remedies, in bringing this petition, the petitioners have deliberately avoided the procedure and remedy provided for under the Act. They have not preferred any explanation as to why they did not refer any of the complaints they have raised to the 1st respondent as required by law. It has been stated constantly that where there exists sufficient and Legal Avenue, a party ought not to trivialize the jurisdiction of the court pursuant to the constitution. Indeed, such a party ought to seek redress under the relevant statutory provisions; otherwise such available statutory provisions would be rendered otiose…"

127. The many decisions that I have cited speak one language; that resort to court is the last resort as was stated by Olao J in **Alice Mweru Ngai Vs. KPLC Ltd [2015] eKLR t**hat:

".....Government to herald specific grievances, the courts must respect and uphold the law. In view of the clear legal provisions cited above and which stipulate the forum that ought to deal with a dispute of this nature and which forum the plaintiff has not approached as a first point of call, it would be an unwarranted intrusion into the jurisdiction of another organ if this court were to purport to handle this dispute. It is in the interest of the proper orderly and efficient administration of justice that proper procedures provided for in the hierarchy of dispute resolution be followed and that the organs mandated to arbitrate over such disputes be respected and allowed to perform their statutory responsibilities. That is why those procedures were formulated and such organs established. It is clear from the above that the preliminary objection on the "where the law has granted jurisdiction to other organs, this court's lack jurisdiction to hear this dispute is well taken."

128. In the end, I find, without hesitation that there was an efficacious alternative remedy and forum which the applicant ought to have pursued to its logical conclusion without which this court's jurisdiction is effectively ousted by Section 9 (2) of the Fair Administrative Action Act No. 4 of 2015 and therefore I direct that the applicant shall first exhaust such remedy by way of an appeal to the PPLC and through to the National Physical Planning Liaison Committee before attempting to institute proceedings in the High Court by way of an appeal or by way of judicial review, if allowed by law, upon complying with the provisions of **Section (4)** of the Fair Administrative Action Act.

129. On the 3rd issue of whether the applicant has established a prima facie arguable case for consideration at a substantive motion stage to warrant grant of leave sought to apply for judicial review orders of Certiorari and Prohibition.; **Order 53 Rule 1(1)** of the **Civil Procedure Rules** is clear that no application for an order of Mandamus, Prohibition or Certiorari shall be made unless leave therefore has been granted in accordance with this rule.

130. It therefore follows that before any application for judicial review orders of Certiorari and Prohibition is made, leave must be obtained otherwise such an application shall be rendered incompetent.

131. The purpose for leave prior to institution of judicial review proceedings was aptly captured in the case of **Republic Vs County Council of Kwale & Another Exparte Kondo & 57 Others Mombasa HC Misc. App No. 2284 of 1996** that:-

"The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration.

The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainly in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceeding for judicial review of it were actually pending even though misconceived.

Leave may only be granted therefore id on the material available, the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigations at a full interpartes hearing of the substantive application for judicial review. It is the exercise of the court's discretions, but as always, it has to be exercised judicially."

132. The court of Appeal in **Mirugi Kariuki Vs Attorney General CA 70/1991 [1990-1994] EA 156; [1992] KLR** and stated:-

"The law relating to judicial review has now reached the stage where it can be said with confidence that, if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter on which the court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power…the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter. It is not the absoluteness of the discretion nor the authority of exercising it that matter but in its exercise, some of the person's legal rights or interests have been affected. This makes the exercise of such discretion justiciable and therefore subject to judicial review. In the instant appeal it is of no consequence that the Attorney General has absolute discretion under Section 11(1) of the Act in its interest the appellant's legal rights or interests were affected. The applicant's complaint in the High Court was that this was so and for that reason he sought leave of the court to have it investigated. It is wrong in law for the court to attempt an assessment of the sufficiency of the applicant's interests without regard to the matter of his complainant. If he fails to show, when he applies for leave, a prima facie case, on reasonable grounds, for behaving that these has been a failure of public duty, the court would be in error if it granted leave. The counsels represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse if the legal process. It enables the court to prevent abuse by busy bodies, cranks and other mischief-makes…. In this appeal, the issue is whether the appellant in his application for leave too apply for orders of Certiorari and Mandamus demonstrated to the High Court a Prima facie case for the grant of those orders, clearly once breach of the rules if natural justice was alleged, the exercise of discretion by the Attorney General under Section 11(1) of the Act was brought into question. Without a rebuttal to the allegations, the appellant certainly disclosed a prima facie case. For that, he should have been granted leave to apply for the orders sought."

133. In the instant case, I have already found that the prayer for Certiorari would out rightly not be available to the applicant since the application for leave was made outside the 6 months statutory period limited by **Section 9 (3)** of the **Law Reform Act Cap 26 Laws of Kenya.** And that where certiorari is not available, it means that the decision regarding approval of development plans is not quashed hence prohibition would not be an efficacious remedy.

134. Besides the above position which I reiterate, i have found that that there is an established elaborate procedure for challenging decisions of the respondent and as there was no application under Section 9(4) of the Fair Administrative Action Act for exemption, this court's jurisdiction to proceed and hear and determine judicial review proceedings on this subject is ousted.

135. In addition, and most importantly, is that from annexture at page 11 of the applicant's bundle, is a memo dated 12/10/2016 issued before these proceedings were instituted by the Acting County Secretary to CECM Lands and Urban Planning. The subject is **"<u>CEC *RESOLUTION on Kunde Road Residents Welfare Association."*</u>** It reads:-

"Reference is made to the CEC Resolution of its meeting held on Wednesday 12/10/2016 and other various deliberations concerning the above subject as listed below:-

1. During the CEC meeting held on Thursday 27/8/2015 under Min 180/CEC/AUGUST/2015

(extract of minutes attached) <u>it was resolved that the request for the Kunde Road</u> status quo to remain, be approved and the County Attorney to do a letter for the CS's signature acknowledging receipt and responding to the petition by communicating the County's decision on the same.

<u>Kindly let this office have the implementation status of this resolution which ratified and approved</u>….

i. Change of user and

ii. Building plans and the Development applications.

2. You are hereby requested to write to the developer informing him of:

i. <u>The stop order for construction of residential town</u> houses on LR 330/485 along Kunde Road, Thompson Estate Nairobi City County NEMA (Copy of stop order attached dated 9/8/16 which reached the county before the communication of the court ruling by Pyramid Builder Limited dated 22/9/2016.

i. The CEC meeting =s resolutions of Thursday 27/8/2015 and Wednesday 12/10/2016 respectively.

3. The Urban Planning Technical Committee to be reinstituted with immediate effect since the information there is stipulates that both the Architect and the Contractor both sit in this committee which s clear beyond any reasonable doubt that they have vested interests in the deliberations of this committee.

Kindly expedite with what needs to go to the developer and to this office.

Signed

Dr. Robert Ayisi, MBS

<u>Acting County Secretary</u>.

cc. H.E. The Governor

H.E. The Deputy Governor

Economic Planning, Finance and

Strategy Advisor"

136. The letter attached minutes of Thursday 27/8/2015 held at 7.00 hrs which are also referred to in the above reproduced memo, and which meeting was chaired by H.E. the Governor Dr Evans Kidero.

137. Minute No. 180/CEC/August 2015 is Petition of the Kunde Road Resident Welfare Association and proceeds to be minuted as follows:

"The committee was informed that a petition had been received from Kunde Road Resident Welfare Association requesting of the Kunde Road Status Residents Welfare Association requesting for the Kunde Road status quo to remain.

The Committee considered the matter and it was recommended that the request by the said Welfare Association be approved. It was also recommended that the current status of Tende Drive and Mzima Springs to remain.

The County Attorney was requested to do a letter for the County Secretary's Signature, responding to the Kunde Road Residents Welfare Association and communicate County decision on the petition.

Resolution:

> ***i. That the request for the Kunde Road status quo to remain be approved. Tende Drive and Mzima Springs Road status also to remain.***
>
> ***ii. Do a letter for County Secretary's signature acknowledging request and responding to the person and communicate county decision on the same.***

Confirmed as true record of proceedings.

Secretary - signed

Date: 13/10/2016"

138. From the above memo of 13/10/2016 and minutes and resolution of 27/8/2015 presided over by the Governor Nairobi City County Dr. Evans Kidero and attended by 9 CECM's and other 10 top officials of the County including County Attorney, I have no difficulty in finding that the County Government of Nairobi did on 27/8/2015 stay the implementation of the earlier approvals for development on the subject land and the resolution that was passed was communicated to the County CECM Lands and Urban Planning on 13/10/2016 for implementation, together with the NEMA Tribunal stop order dated 9/8/2016 found at page 25 of the applicant's bundle.

139. Bearing in mind the fact that the stop resolution was signed on 13/10/2016 after the impugned decision of approval was made on 4/5/2016, and that the stop order from NEMA Tribunal came on 9/8/2016, in my humble view, there would be no administrative action made by the respondent with regard to LR 330/485 capable of implementation by the respondents and for which the respondent would be prohibited from enforcing, as at the time this chamber summons was filed on 13th December, 2016.

140. Accordingly, this court would be engaging in a wild goose chase if it granted leave even assuming that the challenge vide Certiorari was validly made within 6 months from 4/5/2016, as there would be nothing to be quashed.

141. In other words, I am not persuaded that the applicant has established that he has a prima facie arguable case to warrant judicial review orders.

142. There are also serious conflicting facts on record which can only be resolved by way of an appeal process and not by judicial review remedy. Such facts include the interpretation of item No. 3 on the memo of 13/10/2016 as to whether or not the Architect and contractor who were members of the Urban Planning Technical Committee actually sat in the approval committee subject of these proceedings, since no minutes of that approval committee were annexed to the replying affidavit.

143. Another conflict and or contradiction which can only be resolved by way of evidence is whether the decision of 4/5/2016 was suspended by the memo of 13/10/2016 referred to above communicating the decision (resolution) of the respondent reached on 27/8/2015.

1144. Further, as the ruling of 15/12/2016 in NET/186/2016 by the NEMA Tribunal dismissed the applicants Association's appeal challenging the issuance to the interested party herein an EIA licence No. NEMA/EIA/PSL/3468 authorizing the construction of the six town houses on LR 330/485 along Kunde Road, it would serve no useful purpose for this court to grant leave and stay, when there is no evidence that that NEMA Tribunal decision is under challenge before any other authority or court.

145. Parties counsels also argued broadly on the issue of these proceedings being ***res judicata*** Petition

316/2016.

146. However, I am unable to determine that issue conclusively as there are many conflicting issues involved. Furthermore, in the Petition 316 of 2016 the two rulings by Hon Justice Mureithi concerned the EIA licence and not the approval for Development plans by the respondent which latter are the subject of these proceedings.

147. In the end, I find that the applicant has not demonstrated to this court that he deserves the orders sought for leave to apply for judicial review orders of Certiorari and Prohibition. I also find that the prayer for stay is not merited. The two substantive prayers in the chamber summons dated 13/12/2016 are hereby dismissed. Each party shall bear their own costs of the Chamber Summons.

Dated, signed and delivered in open court at Nairobi this 31st day of January, 2017.

R.E. ABURILI

JUDGE

In the presence of:

Mr Ochieng Oduol for the exparte applicant

Mr Cohen h/b for Senior Counsel Ahmednasir for the Interested Party

N/A for the Respondent