



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION**

**MISCELLANEOUS CIVIL APPLICATION NO. 561 OF 2016**

**IN THE MATTER OF: AN APPLICATION BY SERENITY SPA LIMITED FOR JUDICIAL  
REVIEW ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS**

**AND**

**IN THE MATTER OF: THE PHYSICAL PLANNING ACT CHAPTER 286 OF THE LAWS OF  
KENYA**

**AND**

**IN THE MATTER OF: THE PHYSICAL PLANNING (BUILDING AND DEVELOPMENT)  
(CONTROL) RULES, 1998; PHYSICAL PLANNING (ENFORCEMENT NOTICES)  
REGULATIONS, 1998**

**IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT, 2015.**

**AND**

**IN THE MATTER OF: NAIROBI CITY COUNTY ENFORCEMENT NOTICE NO. 1563**

**THE REPUBLIC .....APPLICANT**

**VERSUS**

**COUNTY GOVERNMENT OF NAIROBI.....RESPONDENT**

**AND**

**AMIP RAJENDRA PATEL.....INTERESTED PARTY**

**Ex-parte SERENITY SPA LIMITED**

**JUDGEMENT**

**Introduction**

1. By a Notice of Motion dated 23<sup>rd</sup> November, 2016, the ex parte applicant herein, **Serenity Spa Limited**, seeks the following orders:

1) AN ORDER OF PROHIBITION to prohibit the Respondent or its officers and/or agents from taking any adverse action and interfering with the *ex parte* Applicant's business pursuant to the Enforcement Notice No. 1563.

2) AN ORDER OF CERTIORARI removing to this Honourable Court for the purpose of the same being quashed, the Respondent's Enforcement Notice No. 1563 dated 9<sup>th</sup> November 2016 requiring the *ex parte* Applicant to stop operating and vacate the premises being Nairobi/Block 91/412 situated at UN Crescent Gigiri Estate in Nairobi County.

3) Costs to be awarded to the *ex parte* Applicant.

### Ex Parte Applicant's Case

2. According to the applicant, it is a lessee of the property known as Nairobi/Block 91/412 yet it was served with Enforcement Notice No. 1563 dated 9<sup>th</sup> November 2016 requiring it to stop the use of the premises and vacate within a period of seven (7) days from the date of the said notice.

3. In the said notice, it was alleged that the Applicant had illegally converted the use of the premises from office use to commercial use without approval from Nairobi County Government and that the occupier is in illegal occupation of the premises which allegations according to the applicant are unlawful, unreasonable and without basis for the following reasons:

(i) The Respondent being the author and issuer of the said Enforcement Notice, has issued Applicant with trading licenses since the year 2013 and in fact issued single Business Permit dated 16<sup>th</sup> December, 2015 to engage in the business of beauty salon, Fire Prevention Department Clearance Certificate dated 17<sup>th</sup> December, 2015 which clear states that the Nairobi County Government had inspected the premises and Outdoor Advertisement License for direction signs.

(ii) The Respondent has not denied issuing the above licenses or questioned their authenticity.

(iii) When issuing the above licenses, the Respondent allowed the Applicant to conduct its licensed business within the said premises without any unlawful interference with the business.

(iv) When issuing the above licenses, the Respondent was well aware of Section 30 (5) of the Physical Planning Act Chapter 286 which provides that "***no licensing authority shall grant, under any written law, a license for commercial or industrial use or occupation of any building, or in respect of any premises or land, for which no development permission had been granted by the respective local authority.***"

(v) In pursuant of the said trading licenses, the Applicant has invested millions of shillings in the premises and business.

(vi) It is therefore unreasonable and irrational for the Respondent and/or its agents to declare the Appellant's business activities illegal as the various licenses issued by the Nairobi County Government are confirmation that development permission was granted in respect of the premises for such commercial activities.

(vii) It would be unreasonable and irrational for the Respondent and/or its agents to deny that a change of user from residential to office has the effect of converting the premises in question from residential to commercial.

(viii) Section 30(6)(a) of the *Physical Planning Act* Chapter 286 in no uncertain terms provides that "***commercial use includes shops, offices, hotels, restaurants, bars, kiosks, markets and similar business enterprises and trade but does not include petroleum filling stations***".

(ix) The **Physical Planning (Building And Development) (Control) Rules**, define “**commercial premises**” to mean “**a building or part of a building used or designed for use as an office or for the conduct in such building or any business but does not include a petroleum filling station or an industrial building.**”

(x) The newspaper advert on the change of user on 8<sup>th</sup> May, 2013 clearly shows that the intended user was from residential to commercial which according to the relevant Act and Regulations includes office.

4. It was therefore the applicant’s case that the Enforcement Notice served on the Appellant herein was defective, illegal and unreasonable to the extent that it was based on the allegation of “*illegal conversion of use from office use to commercial use without approval from NCC and illegal occupation*” yet the same institution had granted the Applicant licenses to operate commercial activities on the premises. The Applicant averred that its use of the premises for commercial purposes is within the user for which it is licensed for which is contemplated by the **Physical Planning Act** Chapter 286 (hereinafter referred to as “the Act”) and the various licenses issued by the Nairobi County Government.

5. It was contended by the Applicant that pursuant to section 38(3) of the Act, the Enforcement Notice is suspended upon filing of an appeal with the relevant Liaison Committee within the period provided for in the Notice. It was however disclosed that despite the Applicant having lodged the appeal with the Nairobi Physical Planning Liaison Committee within the seven (7) days provided for in the Enforcement Notice, the said Liaison Committee does not sit as the composition of the same under section 8(2) of the Act does not take into the account the current constitutional dispensation and some of the administrative offices which compose members of the committee have been abolished including the Chairman of the said Committee.

6. It was further contended that the Enforcement Notice served on the Appellant is given in breach of rules of natural justice as the Applicant was not heard and cannot be heard in absence of the Nairobi Physical Planning Liaison Committee hence it is therefore in the interest of justice that this Court grants the orders prayed for herein.

7. In support of its case the applicant also relied on an affidavit sworn by one **Amip Rajendra Patel**, (hereinafter referred to as “the interested party) according to whom it was averred was the registered proprietor of the suit property herein Nairobi/Block 91/412 which he leased to the *Ex-parte* Applicant herein. It was his case that the allegations of forgery contained in the said replying affidavit are baseless and intended to hoodwink this Court in the face of clear un-rebutted evidence of a lawfully acquired Change of Use which allegations contradict the Enforcement Notice No. 1569 dated 9<sup>th</sup> November, 2016 wherein the Respondent clearly stated that the alleged illegality is “**Illegal Conversion of Use from Office use to commercial use**”. This, according to him, confirms that according to the records in possession of the Respondent, there is already in place a valid change of use to office use hence the Respondent is estopped from denying this.

8. It was averred that on or about 8<sup>th</sup> May, 2013 the interested party submitted to the Respondent applications for change of use for his two properties being Nairobi/Block 91/412 and Nairobi/Block 91/413 and paid to the Respondent a total sum of Kshs. 120,000.00, being the requisite fees demanded for the same, by way of banker’s cheque for the two properties. Upon receiving the application for Change of User and confirmation of payment, the Respondent placed two advertisements in the **Daily Newspapers** on 8<sup>th</sup> May, 2013 informing the general public of the proposed Change of Use and invited the public to forward any objection/comments to the proposal within 14 days of the advertisement. Thereafter, the Respondent issued to him the Notification of Approval of Development being P.P.A.2 dated 29<sup>th</sup> August, 2013 for Nairobi/Block 91/412 in which one of the conditions of Approval of Change of Use was that the rates payable to the Respondent would be revised and that indeed, the Respondent revised the rates in accordance with the Approval.

9. The interested referred to the purported Draft Agenda Item for Town Planning Meeting of 15<sup>th</sup> August,

2016 produced by the Respondent as and the letters dated 22<sup>nd</sup> November, 2016 and 30<sup>th</sup> November, 2016 exhibited by the Respondent and responded as follows:

- a. The purported agenda item is marked as draft and is not the final agenda item for the Town Planning Meeting of 15<sup>th</sup> August, 2016 and urged the Court to treat the same with the contempt it deserves.
  - b. The purported agenda item marked as draft is not the complete draft of all the agenda items of the Town Planning Meeting of 15<sup>th</sup> August, 2016.
  - c. The Respondent has failed to produce the actual minutes of the Town Planning Meeting of 15<sup>th</sup> August, 2016 showing deliberations of the Planning Committee on that particular day which document is within the exclusive possession of the Respondent.
  - d. One D. Mutegi, the author of the Respondent's letter dated 22<sup>nd</sup> November, 2016 is the same person who signed the P.P.A.2 Serial No. 006184 dated 29<sup>th</sup> August, 2013 which he now alleges to be forgery but has not sworn an affidavit on the validity of the document.
  - e. Only a qualified document examiner can determine whether P.P.A.2 Serial No. 006184 and the signature thereto is a forgery.
  - f. If P.P.A.2 Serial No. 006184 dated 29<sup>th</sup> August, 2013 is a forgery as alleged by the Respondent, then the Respondent should have produced the genuine P.P.A.2 with Serial No. 006184 as evidence that the Approval held by the interested party is not genuine.
  - g. The interested party confirmed that he had in his possession the original P.P.A.2 with Serial No. 006184 issued to him by the Respondent.
10. The interested party reiterated that he made an application for change of use, paid for the same to the Respondent, the Respondent issued computer generated receipts, proceeded to advertise the same in the daily newspaper and subsequent to the Approval, the Respondent revised the rates is not consistent with a fraudulent process but is evidence of a transparent process as required by the law.
11. The interested party averred that contrary to the Respondent's allegations, there has not been any alteration to the premises. The only alteration done was on the parking area and painting works in which case the necessary approval was sought and granted by the Respondent as evident in the letter dated 11<sup>th</sup> June, 2013.
12. In the interested party's view, the actions of the Respondent are malicious and intended to achieve the Respondent's ulterior motives for the following reasons:
- a. The application Change of Use of the subject matter being Nairobi/Block 91/412 was done simultaneously with the Change of Use for the other property Nairobi/Block 91/413.
  - b. The Notification of Approval of Development Permission granting Change of Use for my other property Nairobi/Block 91/413 was issued on 29<sup>th</sup> August, 2013 after Town Planning Committee Meeting of 15<sup>th</sup> August, 2016.
  - c. The Respondent has never disputed the validity of the Change of Use for the other property Nairobi/Block 91/413 issued on 29<sup>th</sup> August, 2013.
  - d. Yet the purported draft agenda item for Town Planning Committee Meeting of 15<sup>th</sup> August, 2016 does not have both Nairobi/Block 91/412 and Nairobi/Block 91/413.

e. It is therefore clear that the purported draft agenda item for Town Planning Committee Meeting of 15<sup>th</sup> August, 2016 has been tailored, after the fact, to further the Respondent's hidden agenda and cannot be relied upon.

13. It was therefore the interested party's case that the allegations of forgery are just an after-thought hence the Respondent's Enforcement Notice requiring the premises to be vacated within a period of 7 days is illegal, unfair, biased, and procedurally unfair as the Applicant and the interested party were not heard before such a drastic decision was made.

14. It was submitted on behalf of the Applicant that the Enforcement Notice served on the Applicant was given in breach of rules of natural justice as the Applicant was not heard before the Respondent declared the change of use illegal. In fact, the Respondent has not denied this in the Replying affidavit and that this was contrary to section 4(3) of the ***Fair Administrative Action Act, 2015*** which provides that 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-

*i. prior and adequate notice of the nature and reasons for the proposed administrative action;*

*ii. an opportunity to be heard and to make representations in that regard;*

*iii. notice of a right to a review or internal appeal against an administrative decision, where applicable.*

15. It was averred that as a result of the unlawful and unreasonable acts of the Respondent, the Applicant was being exposed to the risk of extreme financial losses and indeed had already suffered some financial losses and reputational damage due to the highhanded and aggressive intrusion of the Respondent's officers when serving the Enforcement Notice.

16. While the Respondent contended that the change of user was a forgery, it was submitted that the Respondent had not denied on oath or at all that the decision to issue the Enforcement Notice was in breach of section 4(3) aforesaid which is the basis of the Applicant's complaint before this Court. In support of the submissions the applicant relied on **Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR** in which the court stated as follows:

**"In my view, a statement made on oath should as a matter of fact be expressly denied on oath. If not challenged, it remains a fact and the truth for that matter."**

17. The same decision was relied upon for the holding that:

**"Section 112 of the Evidence Act Chapter 80 of the laws of Kenya provides: "In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him." Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of Kimotho –vs- KCB (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession."**

18. On the same point the Applicant relied on **Interactive Gaming & Lotteries Limited v Flint East Africa Limited & 2 others [2014] eKLR** where it was stated as follows:

**"It is my view and I so hold that the evidence of Iavor Kurtev and Ivaylo Buzoukov and in particular the latter was crucial to Flint's case yet no explanation was given for their convenient and almost deliberate abstention from participating in these proceedings. In the case of *Green Palms Investments Ltd vs. Kenya Pipeline Co. Ltd Mombasa HCCC No. 90 of 2003*, it was held that the failure by a party to call as a witness any person whom he might**

reasonably be expected give evidence favourable to him may prompt a Court to infer that the person's evidence would not have helped the party's case and would have been prejudicial to its case and that the witnesses may have technically avoided to testify to escape being embarrassed on cross-examination. In my view this is a classic case in which adverse inference ought to be invoked."

19. It was the Applicant's case that the high standard of proof for forgery had not been attained and reliance was placed on **R.G Patel v. Lalji Makani, [1957] E.A 314**, where it was held that:

**"All allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required."**

20. Similar reliance was placed on **Zakayo Michubu Kibuange vs. Lydia Kaguna Japheth & 2 Others [2014] eKLR**, where the Court of Appeal expressed itself as follows:

**"Forgery is a very serious allegation to make and more so, if it involves one's signature on a disputed document. One would have expected that having made such serious allegation and accusation, the appellant would have done the right thing and immediately took remedial steps such as reporting the alleged forgery to the relevant authorities for appropriate action or intervention. Instead what does he do? He sits tight and cheekily invites the 1<sup>st</sup> respondent to prove that his signature was not a forgery by invoking the assistance of document examiners. It is a cardinal principle of law that he who alleges must prove. The appellant having failed to undertake the necessary inquiry as to the forgery or not of his signature, the allegation was merely self-serving and without any basis at all."**

21. With respect to the contention that the change of user to office does not cover the Applicants Spa beauty shop which is a commercial use and that the office use is not commercial use and that premises licensed for office use cannot be used for commercial purposes, it was submitted that this argument is misguided and without basis and the applicant relied on section 30(6)(a) of the Act the definition of the term "commercial premises" in the *Physical Planning (Building And Development) (Control) Rules*, and the **Black's Law Dictionary 6<sup>th</sup> Edition** at page 1082 and 1083 which defines "Office" as:

***A place for the regular transaction of business or performance of a particular service.***

22. It was submitted that the Respondent on its own volition placed two advertisements in the *Daily Newspapers* on 8<sup>th</sup> May, 2013 clearly shows that the intended change of use was from residential to commercial which according to the relevant Act and Regulations includes office and then proceeded to issue the Applicant with various licenses/permits to conduct its Business. Based on these conduct by the Respondent it was submitted that the Applicant had legitimate expectation that the Respondent having issued a valid Change of Use and business licenses/permits would allow the Applicant to quiet possession of the property and carry out its licensed business activities without any interruption and harassment and relied on *Halsbury's Laws of England 4<sup>th</sup> Edition VOL 1(1) paragraph 92* which states as follows regarding legitimate expectations:

***"A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though there is no other legal basis upon which he could claim such treatment. The expectation may arise either from a representation, or from consistent past practice. In all the instances the expectation arises by reason of the conduct of the decision maker, and is protected by the courts on the basis that principles of fairness, predictability and certainty should not be disregarded....."***

23. It was therefore submitted that the Respondent has by its unilateral act of declaring the Applicant Change of Use forgery and business activity as illegal breached the Applicant's legitimate expectation and subjected the Applicant to extreme loses. Based on section 4(3) of the *Fair Administrative Action Act, 2015* it was asserted that the Applicant was not given prior and adequate notice of the nature and

reasons for the proposed administrative action, yet the actions of the Respondent are very drastic and which will subject the Applicant to extreme financial losses hence this is a classical example of what amounts to unfair administrative action. In this respect the applicant relied on **Kenya Human Rights Commission v Non-Governmental Organizations Co-Ordination Board [2016] eKLR** where it was stated thus:

**“Thus, a person whose interests and rights are likely to be affected by an administrative action has a reasonable expectation that they will be given a hearing before any adverse action is taken as well as reasons for the adverse administrative action as provided under Article 47 (2) of the Constitution. Generally, one expects that all the precepts of natural justices are to be observed before a decision affecting his substantive rights or interest is reached. It is however also clear that in exercising its powers to superintend bodies and tribunals with a view to ensuring that Article 47 is promoted the court is not limited to the traditional judicial review grounds. The Fair Administrative Action Act, 2015 must be viewed in that light.”**

24. The applicant also referred to **Kenya Medical Association Housing Cooperative Society Limited vs. Attorney General & Another [2016] eKLR**, where the Court stated as follows:

**“On the allegation that the respondent breached rules of natural justice by failing to give the applicant a hearing before issuing agency notices it is worth appreciating that the rules of natural justice are fundamental rules which are a cushion to ensure public bodies do not make decisions at their whims to the detriment of those affected. In *Ridge v- Baldwin* [1963] 2 ALLER 66 at page 81 Lord Reid stated that: *“Time and again in the cases I have cited it has been stated that a decision given without regard to the principle of natural justice is void.”***

25. Further support was sought from the decision of Lord Wright in **General Medical Council Vs Spackman [1943] 2 ALL ER 337** at 345 that:

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

26. Similarly in **Nairobi HC Miscellaneous Application 480/2008, Republic -vs- Minister for Local Government and County Council of Maragwa Ex-parte Councilor Paul Mugeithi Joel**, (quoted with approval in **Kenya Medical Association Housing Cooperative Society Limited vs. Attorney General & another [2016] eKLR**, Nyamu, J (as he then was) observed that:

***“The right to hear the other side is not necessarily a right to personal hearing before the body making the decision, what is vital in such a situation is to ensure that the party to be adversely affected by the decision is timely informed of the substance of the case it has to meet which must be reasonably and clearly formulated such a party who stands to be prejudiced should be given a reasonable opportunity to present its case”.***

27. It was averred that the Respondent had not rebutted the Applicant’s claim that it was not given prior and adequate notice of the nature and reasons for the proposed administrative action and that the Respondent made a unilateral decision that has extensive ramification on the hard earned investment by the Applicant without giving the Applicant an opportunity to be heard prior to the notice contrary to Section 4(3) of the ***Fair Administrative Action Act, 2015***. According to the applicant, the actions of the Respondent fly on the face of mandatory requirement of the law, is illegal, unfair and unreasonable.

### **Respondent’s Case**

28. The application was opposed by the Respondent. According to the Respondent, the Ex-parte

Applicant did not acquire any change of user from residential to commercial and the respondent has a mandate to issue enforcement notices if ex-parte Applicant is non complaint since without the development approval which in this case is the change of user then the Respondent has the mandate to issue enforcement notices. In support of this position the Respondent relied on section 30 of **Physical Planning Act** which provides that **no person shall carry out development within the area of a local authority without a development permission granted by the local authority.**

29. It was contended that the contents in the PPA 2 serial No.006184 purportedly dated 3<sup>rd</sup> September 2013 of which the Ex-parte applicant is using as evidence of approval of the development approvals, does not tally with the agenda held by the Town Planning Committee held on the 15<sup>th</sup> August 2013 as indicated in the PPA 2 which is based on the conclusions made by the Urban Planning Department through a letter dated 22<sup>nd</sup> November 2016. It was averred that the item 34 stated in the PPA 2 for the Town Planning Committee meeting of 15<sup>th</sup> August 2015 is for the Nairobi/Block 83/1569 which is located along Moi Drive, Umoja Innercore Estate and not Plot Nairobi/Block 91/442 which is located in Gigiri and that the alleged approval annexed to the Applicant's application and dated 29<sup>th</sup> August 2013 does not originate from the Respondent as the same is a forgery.

30. The Respondent averred that upon discovery of the existence of fraudulent approvals, the Respondent wrote an internal memo to its departments highlighting the fraudulent approvals therefore issuing an enforcement notice to the Ex-parte applicants to stop further illegal conversion. The Respondent insisted that section 38 of the **Physical Planning Act** provides that the local authority may serve an enforcement notice on the owner, occupier or developer of the land who does not have requisite development approvals and relied on section 3 of the Act which defines "developments" to include the making of any material change in the use of density of any buildings of land. It was therefore contended that the exclusive use by the ex-parte applicants of his premises as a beauty salon shop, from its previous use as an office is a material change of user within the meaning of section 3 of the **Physical Planning Act** for the reasons that substantial and greater physical and social impact is likely to arise from the exclusive use of the premises as beauty salon shop as opposed to an office.

31. In the Respondent's view, commercial use includes amongst others office use and when one wants to change a premise from an office use to a shop, it is required that development permission is sought from the Nairobi City County since it is not the same thing to say that change of use from residential to office is the same thing as office to commercial which is this case a shop.

32. The Respondent asserted that it is indicted in the PPA 2 that the alleged change of use is from residential to office and not residential to commercial as alleged by the Ex-parte applicant.

### **Determination**

33. I have considered the issues raised in this application and this is the view I form of the matter.

34. It must be remembered that the purpose of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285.

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

**"Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."**

36. In this application we are not concerned with the merits of the decision to issue Enforcement Notice No. 1563.

37. Article 47 of the same Constitution provides:

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

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

38. That the issuance of the said Enforcement Notice No. 1563 was an administrative action by the Respondent is not in dispute since section 2 the ***Fair Administrative Action Act, 2015*** defines “administrative action” to include:

***(i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or***

***(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;***

39. The same section defines “administrator” as “a person who takes administrative action or who makes an administrative decision.” Section 3 on the other hand provides:

***(1) This Act applies to all state and non-state agencies, including any person***

***(a) exercising administrative authority;***

***(b) performing a judicial or quasi-judicial function under the Constitution or any written law; or***

***(c) whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.*** [Underlining Mine].

40. The Respondent was therefore under a duty to ensure that its action was expeditious, efficient, lawful, reasonable and procedurally fair. Procedural fairness necessarily requires that persons who are likely to be affected by the decision be afforded an opportunity of being heard before the decision is taken. Further, it is a Constitutional requirement that that person be given written reasons for the action. It has not been contended that the *ex parte* applicant herein was ever afforded an opportunity to be heard before the impugned decision was made.

41. Therefore the Respondent was obliged to afford the applicant a hearing before it made its decision which decision, undoubtedly, affected the interest of the applicant by depriving it of its rights to the enjoyment of a property to which it lay claim by erecting the same. As was held by the Court of Appeal in **Onyango Oloo vs. Attorney General [1986-1989] EA 456:**

**“The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...To “consider” is to look at attentively or carefully, to think or deliberate on, to take into account, to attend to, to regard as, to think, hold the opinion... “Consider” implies looking at the whole matter before reaching a conclusion...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial**

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

42. Therefore in arriving at the decision that the change of user was a forgery, the Respondent was constitutionally obligated to follow the due process of the law. Such a decision ought not to be arbitrarily made without affording the persons to be affected thereby an opportunity of being heard and any purported action which does not comply with the law must be set aside based on the three "I's" i.e. Illegality, irrationality and impropriety of procedure.

43. It is therefore my view that as the rules of natural justice were flouted, all actions taken pursuant thereto were null and void. As the appellate option was clearly less convenient, beneficial and effectual, the proper remedy was to move this Court.

44. In the premises I find the Notice of Motion dated 23<sup>rd</sup> November, 2016 merited and grant the following orders:

**1. AN ORDER OF PROHIBITION to prohibit the Respondent or its officers and/or agents from taking any adverse action and interfering with the *ex parte* Applicant's business pursuant to the Enforcement Notice No. 1563.**

**2. I also issue an order of certiorari removing to this Honourable Court for the purpose of the same being quashed, and quashing the Respondent's Enforcement Notice No. 1563 dated 9<sup>th</sup> November 2016 requiring the *ex parte* Applicant to stop operating and to vacate the premises being Nairobi/Block 91/412 situated at UN Crescent Gigiri Estate in Nairobi County.**

**3. The Applicant is awarded the costs of these proceedings to be borne by the Respondent.**

Dated at Nairobi this day 26<sup>th</sup> day of May, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

*Mr Kimani for the applicant*

*Mr Makokha for the Respondent*

CA Mwangi