REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

J. R MISCELLANEOUS APPLICATION NO. 421 OF 2015

REPUBLIC …….....APPLICANT

VERSUS

NAIROBI CITY COUNTY……RESPONDENT

EX-PARTE

NASEEMBANU CHIMANLAL SHAH

JUDGEMENT

Introduction

1. By a Notice of Motion dated 11th December, 2015, the ex parte applicant herein, **Naseembanu Chimanlal Shah,** seeks the following orders:

> **i. An Order of Certiorari do issue to remove and bring to the High Court for purposes of quashing the notice of the Nairobi City County (hereinafter *"the NCC"*) dated 23rd November 2015 by which it directed the *Ex-parte* applicant to remove a building on property L.R. No. 209/30/12 within seven days from the date of the notice.**
>
> **ii. An Order of Prohibition do issue to prohibit the NCC, its agents, servants, or officers from pursuing, acting upon or in any other manner whatsoever effecting its notice to remove or otherwise demolish the building on the said property as prescribed in the notice dated 23rd November 2015.**
>
> **iii. The costs of this Application be in the cause.**

Ex Parte Applicant's Case

2. According to the Applicant, she is the Executrix in the Estate of **Amirali Alibhai Mohamed** (hereinafter, "**the deceased**"). He averred that the deceased was the registered owner of the property referred to as Land Reference No. 209/30/12 situated in Parklands, Nairobi County, within the Republic of Kenya ("hereinafter referred to as "**the suit property**"), having had the same transferred to him by **Ebrahim Nurmohamed Ebrahim Alibhai** on 10th October 1969 or thereabouts. The suit property, it was contended has a one storied building which forms a common boundary between the *Ex-parte* Applicant's property and plot L.R. No. 209/30/11(hereinafter "the adjacent property"). It was disclosed that in November 2014 or thereabouts, construction of office blocks commenced on the adjacent property.

3. The Applicant averred that on 5th November, the Respondent unlawfully moved onto the *Ex-parte* Applicant's property and marked a building thereon for removal for allegedly encroaching on the adjacent property. The Applicant added that on 20th November 2015, without any notice whatsoever, the owner of the adjacent property, through its agents and with the knowledge and approval of the Respondent herein unlawfully descended onto the *Ex-parte* Applicant's property and started destroying the building by removing the roof tiles, on the allegation that the building was encroaching onto its property, LR No. 209/30/11. On the same date the Applicant reported the matter to the Officer Commanding Station, Parklands Police Station, who immediately dispatched police officers to secure the property and this incident was recorded at the Parklands Police Station vide "OB No. 36/20/11/15."

4. The Applicant averred that on 23rd November 2015 the Respondent served the *ex- parte* Applicant herein with an "Enformcement" (sic) Notice alleging that the said building had been constructed without permission as required under section 30(1) of the ***Physical Planning Act*** thereby encroaching on property LR No. 209/20/11**.** The said notice demanded that the *Ex-parte* Applicant herein removes a building structure on the deceased's property within 7 days failing which the Respondent would enter upon the property and remove the said building itself.

5. Based on legal advice, the Applicant contended that the said notice was defective as the notice was issued pursuant to the provisions of Section 30(1) of the ***Physical Planning Act,*** Cap 289 Laws of Kenya, which came into force well after the building had been built hence the notice was irregular, null and void, as it was based on a law that was not in existence when the building was being erected.

6. To the Applicant, the notice was clearly intended to achieve an ulterior motive as it was meant to aid the owner of L.R. No 209/30/11 to demolish the Applicant's building before it was properly established whether the building was encroaching on its property as alleged or at all. It was the Applicant's case that the dispute as to whether the *Ex-parte* Applicant's building encroaches on the neighbouring property is a matter of private law and the Respondent was abusing its statutory powers in arbitrarily determining the issue by the impugned notice.

7. It was submitted by the Applicant that the Respondent sought, through retrospective application of the law, to impugn breach of statutory provisions on the part of the Applicant with the consequence of divesting the Applicant of its rights. The Applicant in support of this submission relied on **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR.**

8. It was submitted that the Respondent's action was ultra vires its mandate since in the Applicant's view, the authority to determine violation of property rights by encroachment or otherwise and prescribing remedies is vested in the High Court and not in the Respondent. To the Applicant the said action was by that virtue irrational.

9. It was further submitted that the decision failed to take into account relevant matters and violated the Applicant's right to a hearing hence was in breach of the rules of natural justice. In support of this submission the Applicant relied on **Republic vs. Kombo & 3 Others exp Waweru Nairobi HCMCA No. 1648 of 2005 [2008] 2 KLR (EP) 478:**

Respondent's Case

10. The Respondent in opposition to the Application filed the following grounds of opposition:

> **1. That the application lacks merit to warrant a grant of an order of judicial review.**
>
> **2. That at the outset, the said application is premature, misconceived and bad in law and the respondent will raise a point of law, to be determined in limine, that the applicants have not complied with section 13(1) of the Physical Planning Act Cap 286 Laws of Kenya which requires that any person aggrieved by a decision of the director concerning any physical development plan or matters connected therewith, may within sixty days of receipt by him of notice of such decision, appeal to the respective liaison committee in**

writing against the decision in such manner as may be prescribed.

3. That respondent will contend as a preliminary point of law, to be determined <u>in limine,</u> that the applicant's suit is hopelessly misconceived, frivolous, totally devoid of merit and *mala fides* for the reason *inter alia,* that the applicants followed the wrong procedure in that is should have instituted an appeal in the liaison committee.

4. That this court has no jurisdiction to grant the orders prayed for in the application dated 11th December 2015 by virtue of Section 13(1) of the Physical Planning Act which provides for a more efficient and effective remedy to the applicants.

11. Since the Respondent did not file any affidavit, the factual averments made by the Applicant were not controverted.

12. The purview of judicial review was clearly set by **Lord Diplock** in the case of **<u>Council for Civil Service Unions vs. Minister for Civil Service [1985] A.C. 374, at 401D</u>** when he stated that:-

> **"Judicial review has I think developed to a stage today when...one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'...By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it...By 'irrationality' I mean what can now be succinctly referred to as "Wednesbury unreasonableness'...it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it...I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision."**

13. Article 47 of the 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.***

14. That the issuance of the Enforcement Notice was an administrative action by the Respondent is not in dispute. 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.

15. Section 38 of the ***Physical Planning Act***, Cap 286 Laws of Kenya provided as follows:

> ***(1) When it comes to the notice of a local authority that the development of land has been or is being carried out after the commencement of this Act without the required development permission having been obtained, or that any of the conditions of a development permission granted under this Act has not been complied with, the local authority may serve an enforcement notice on the owner, occupier or developer of the land.***
>
> ***(2) An enforcement notice shall specify the development alleged to have been carried out without development permission, or the conditions of the development permission alleged to have been contravened and such measures as may be required to be taken within the period specified in the notice to restore the land to its original condition before the development took***

place, or for securing compliance with those conditions, as the case may be, and in particular such enforcement notice may require the demolition or alteration of any building or works or the discontinuance of any use of land or the construction of any building or the carrying out of any other activities.

(3) Unless an appeal has been lodged under subsection (4) an enforcement notice shall take effect after the expiration of such period as may be specified in the notice.

(4) If a person on whom an enforcement notice has been served under subsection (1) is aggrieved by the notice the may within the period specified in the notice appeal to the relevant liaison committee under section 13.

16. Before the Respondent can determine whether a person has encroached onto another person's property and hence needs to remove the same, it is my view and I so hold that the Respondent ought first to afford the person concerned an opportunity of addressing the issue before issuing an enforcement notice. There is no such evidence on record.

17. It was further contended that the enforcement notice was issued pursuant to a legal instrument which was not in existence at the time the property was put up. In **Said Hemed Said Vs. Emmanuel Karisa Maitha & Another Mombasa HCEP No. 1 of 1998** stated as follows:

> **"The general rule is that when the law is altered during the pendency of an action or proceeding, the rights of the parties are to be decided according to the law as it existed when the action or proceeding was begun unless the new statute shows a clear intention to vary or affect such rights and such intention may be even by implication. But in the case of an enactment, which alters or affects only procedure or practice of the Court, the general principle is that it has a retrospective effect unless it has some very good reason against it".**

18. Again in the case of **Mistry Jadva Parbat & Company Ltd vs. Ameeri Kassim Lakha & 2 Others Civil Appeal (Application) No. 296 of 2001** the Court of Appeal stated *inter alia* as follows:

> **"It is also a rule of construction of statutes that prima facie, if a provision of legislation affects procedure only, it operates retrospectively. Whether or not legislation operates retrospectively depends on the intention of the enacting body as manifested by the legislation. In seeking to ascertain the intention behind the legislation, the courts are guided by certain rules of construction and one of these rules is that if the legislation affects substantive rights, it will not be construed to have retrospective effect unless a clear intention to that effect is manifested. Whereas, if it affects procedure only, prima facie, it operates retrospectively unless there is a good reason to the contrary. But in the last resort it is the intention behind the legislation, which has to be ascertained, and the rule of construction is only one of the factors to which regard must be had in order to ascertain that intention".**

19. I associate myself with the position of the Supreme Court in **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others** (supra) where the Supreme Court held that:

> **"A law which looks backward or contemplates the past; one which is made to affect acts or facts occurring, or rights accruing, before it came into force. Every statute which takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty, or attaches a new disability in respect of transactions or considerations already past; one that relates back to a previous transaction and gives it a different legal effect from that which it had under the new law when it occurred...As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature."**

20. Therefore the only issue that the Court would be entitled to determine in this application is whether based on the uncontroverted facts before the Court the decision made by the Respondent in issuance the said enforcement notice ought to stand. As was held by **Emukule, J** in **Republic vs. Kombo & 3 Others Ex Parte Waweru Nairobi HCMCA No. 1648 of 2005 [2008] 3 KLR (EP) 478**:

> **"The rule of law has a number of different meanings and corollaries. Its primary meaning is that everything must be done according to the law. Applied to the powers of government, this requires that every government authority which does some act which would otherwise be wrong (such as taking a man's land), or which infringes a man's liberty (as by refusing him planning permission), must be able to justify its action as authorised by law – and nearly in every case this will mean authorised directly or indirectly by Act of Parliament. Every act of government power that is to say, every act which affects the legal rights, duties or liberties of any person, must be shown to have a strictly legal pedigree. The affected person may always resort to the Courts of law, and if the legal pedigree is not found to be perfectly in order the Court will invalidate the act, which he can safely disregard."**

21. It is clear that the said notice was both unlawful and unprocedural.

22. The only issue raised by the Respondent was that the Applicant ought to have appealed to the liaison Committee. As I have found hereinabove, the respondent was obliged to afford the applicant a hearing before it made its decision which decision, was undoubtedly bound to adversely affect the interest of the applicant by depriving her of her rights to the enjoyment of a property to which she lay claim. 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.....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.*"**

23. However, as was held in **Republic vs. The Commissioner of Lands *Ex parte* Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998** availability of other remedies can be an important factor in exercising the discretion whether or not to grant the relief. In **The Republic vs. The Rent Restriction Tribunal and Z. N. Shah & S M Shah Ex Parte M M Butt Civil Appeal No. 47 of**

1980 the Court of Appeal held that if there is an equally convenient, beneficial and effective remedy available a Court will generally decline to exercise its discretion in favour of an applicant for a prerogative order. The rationale for this position was stated by **Ochieng, J** in **John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003**, in which the learned Judge held that for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate.

24. Where a party has not been heard, to contend that the applicant could appeal the decision of the respondent is to miss the point by a wide margin. This must be so since a decision made in breach of the rules of natural justice is null and void *ab initio*. In addition it is the body making the adverse decision which is obliged to afford the party to be affected an opportunity of being heard and not the appellate body.

25. In this case Section 38(2) of the Act mandated that the enforcement notice specifies the conditions of the development permission alleged to have been contravened and such measures as may be required to be taken within the period specified in the notice for securing compliance with those conditions. It is clear that the enforcement notice did not allude to breach of any conditions. Instead the same was based on alleged encroachment of the adjacent parcel of land. In my view it is doubtful whether the Respondent had the powers under the ***Physical Planning Act*** to issue enforcement notice in those circumstances. One cannot therefore rule out the possibility that the said notice was issued with the intention of achieving collateral purposes. If that was the intention then it would as well amount to abuse of power and constitute a ground for quashing the Respondent's decision.

26. Consequently, I find merit in the Notice of Motion dated 11th December, 2015.

Order

27. In the result I issue the following reliefs:

1. **An order of Certiorari removing into this court the notice of the Nairobi City County dated 23rd November 2015 by which it directed the *Ex-parte* applicant to remove a building on property L.R. No. 209/30/12 within seven days from the date of the notice which decision is hereby quashed.**
2. **An order of Prohibiting the Respondent, its agents, servants, or officers from pursuing, acting upon or in any other manner whatsoever effecting its notice to remove or otherwise demolish the building on the said property as prescribed in the notice dated 23rd November 2015.**
3. **The Applicant will have the costs of these proceedings.**

28. Orders accordingly

Dated at Nairobi this 15th day of June, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ngeno for the Applicant

Miss Mwai for the Respondent

Cc Mutisya