REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 189 OF 2012

IN THE MATTER OF APPLICATION FOR LEAVE TO COMMENCE JUDICIAL REVIEW PROCEEDINGS

IN THE MATTER OF: THE PHYSICAL PLANNING ACT

CAP 286LAWS OF KENYA

BETWEEN REPUBLIC .....APPLICANT

VERSUS

CITY COUNCIL OF NAIROBI .....RESPONDENT

EX PARTE: TEEJAY ESTATES LTD

JUDGEMENT

Introduction

1. In these proceedings the ex parte applicant herein, **Teejay Estates Ltd**, seeks the following orders:

> **1. THAT an order of Certiorari do issue to remove to the High Court and quash the Enforcement Notice No 9566 issued on 3rd May, 2012 against the Applicant directing the removal of the boundary wall securing property known as L.R NO 209/346/48 situated at Kileleshwa Estate off Riverside Drive.**
>
> **2. An order of Prohibition prohibition directed to the Respondent prohibiting them from taking any further action in effecting Enforcement Notice No 9566 issued on 3rd May 2012 and further on any matters touching on the existing building and developments including boundary wall on the said property known as L.R NO 209/346/48.**
>
> **3. THAT the costs of this application be provided for.**

***Ex Parte* Applicant's Case**

2. According to the ex parte applicant, it is a developer and owner of Plot 209/346/48 located in

Keleleshwa Estate off Riverside Drive Nairobi converser which was in the year 2007 acquired with an intention of developing it for the purposes of a residential purposes. Pursuant thereto, it obtained the services of an architectural firm conversant with the relevant laws and by-laws applicable to draw architectural plans of development of 15 number of units in total. By then, it was averred that the applicant had considered security of residents and their properties to be paramount hence need for the premises be secured by a perimeter fence with one point of entry and exit.

3. It was averred that in the of drawing the plans the applicant took into account the security of the intended residents, based on the fact that the area is surrounded with open spaces such as the Arboretum and the open field of Chiromo Campus and made provision for a perimeter wall securing the premises which was a vital component and which was included in the buildings development plans. The applicant averred that before commencement of construction as required, it submitted the said plans to the Respondent for approval and that the same were duly approved by the Respondent's relevant department. It was averred that upon the said architectural plans being approved, the applicant commenced the said development, and that at every stage of the development, it as required by the law, called upon the respondent to carry out physical inspection to confirm compliance before continuing to the next step all the way in such manner including the security perimeter fence which was included in the approved plans.

4. The applicant averred that on completion of the development the structural and architectural experts from the side of respondent conducted a comprehensive physical inspection of the premises with a view of ascertaining compliance of the approved plans which inspection gave the premises a clean bill. Pursuant to the said inspection aforesaid the respondent issued the applicant with a Certificate of Occupation and since then premises have remain occupied since the year 2010 without any disturbance at all from the Respondent or any quarters whatsoever as nothing had changed as from initial approved development plan and in particular touching the said boundary wall.

5. However, sometime in the year 2011 a new next neighbour in the name of **Aquila Properties Ltd**, the interested party herein, the registered owner of L.R 209/346/47 started making complaints against the applicant and against other neighbours to the proprietor of L.R No 209/346/46 claiming that the stone boundary wall encroach into its property, which encroachment the applicant. It was therefore averred that the gist of the dispute between the interested party on land parcel no. 209/346/46 and the applicant is in respect of boundaries neighbouring and abutting the property owned by the said Aquila Properties Limited who made a formal demand directed to the Applicant's sister Management Company. However prior to the formal demand letter afore said and the enforcement notice issued herein several meetings were held between representatives of Aquila Properties Ltd and the Applicant including the surveyors to resolve the issue but those efforts were unsuccessful.

6. It was contended that since the failure of the talks to resolve the boundary issue some representatives of the said Aquila Properties Ltd verbally swore that they will take all means including Physical Planning offices of the City Council of Nairobi to attain their objective of removing the disputed boundary wall. It was averred that on 3rd May, 2012 before the lapse of 10 days the advocates for the interested party served the applicant's workers with an Enforcement Notice by the Respondent claiming that the boundary wall in dispute between the applicant and its neighbour was put up without approval. The applicant averred that the said notice coming soon after threats for removal of the same boundary wall which is a subject of dispute with the said neighbours points towards interested party's actual execution of its threats to use the Respondent to coerce the Applicant to accede to the said demands.

7. To the Applicant it is strange that the boundary dispute now comes up in another form through the respondent who approved the construction of the same thus points to malice on the part of Respondent.

8. It was averred that the Respondents herein stood their ground insisting that the applicant removes the wall in the enforcement notice regardless of several meetings with the director of physical planning who was presented with the approved plans and occupation certificate.

9. In the Applicant's view, the respondent is acting at the behest of the interested party, in bad faith and is malicious without motivation of genuine enforcement of the law.

Respondent's Case

10. In opposition to the application, the Respondent filed the following grounds of opposition:

> **1. That the application has not complied with the provisions of the Civil Procedure Rules 2010 more particularly Order 53 of the same.**
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> **2. That the application is not supported by the relevant pleadings as required by the Civil Procedure Act.**
>
> **3. That the ex parte applicant has not disclosed sufficient information to warrant the order sought.**
>
> **4. That the application is frivolous, vexations and otherwise an abuse of the court process.**
>
> **5. That the applicant has not exhausted or sought an alternative remedy nor has he demonstrated to this court why the judicial review is more preferable to the alternative remedy.**

Interested Party's Case

11. In opposition to the application, the interested party herein, Aquila Properties Limited, averred that it is the registered owner of LR.209/346/47 which abuts the applicant's plot LR No. 209/346/48. To the interested party, the road leading to the interested party's property passes the applicant's before it reaches the interested party's that is located in a *cul de sac*. However, the applicant built a perimeter wall on L.R. 209/346/48, which wall has not only encroached on LR 209/346/47 but the common public road.

12. It was the interested party's case that the plans submitted by the applicant to the respondent for approval were for the construction of flats and not a perimeter wall hence the encroachment of the applicant's wall on the public access road is in contravention of the respondent's terms of approval. It was therefore averred that the interested party's complaint was founded on the fact that applicant had encroached on a public road thereby restricting the interested party's access to its property and therefore the Enforcement Notice issued by the respondent was in order as the applicant was notified of intention to remove the offending wall.

13. It was the interested party's case that since the applicant never obtained approval for the construction of the perimeter fence, the respondent was entitled to issue the enforcement notice, as it did hence the applicant's claim of coercion of the respondent by the interested party is lacking in truth and has no basis in law.

Determinations

14. I have considered the foregoing as well as the submissions on record.

15. Although the interested party's position is that the enforcement notice was not a decision but just a notification to the ex parte applicant to show evidence of the approvals issued to him, a perusal of the said enforcement notice is clear that it gave the applicant seven days within which to remove the boundary wall. There was no mention of the requirement that the applicant furnishes evidence of the approvals issued to it. What is a decision for the purposes of judicial review? In ***Public Administration, A Journal of the Royal Institute of Public Administration,*** by **P H Levin,** at page 25 a "decision" is defined as "a deliberate act that generates commitment on the part of the decision maker toward an envisaged course of action of some specificity." In this case there is no doubt that the enforcement notice amounted to a decision for the purposes of administrative or judicial review proceedings.

16. It is however contended that these proceedings were prematurely commenced as the Applicant had not exhausted the remedies available to it.

17. 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.***
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> ***(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.***
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> ***(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.***

18. In this case, there is no evidence that the applicants have invoked the jurisdiction the Liaison Committee as provided under the foregoing provisions. Similarly, there is no explanation as to why the applicant found it less convenient, beneficial and effectual to invoke the said Committee's jurisdiction.

17. It follows that if the applicants were unhappy with the said notice they were expected to challenge the same by way of an appeal to the liaison Committee as required under section 38(4) above. This, the applicants seem not to have done. In **Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE** Judicial Review Case No. 441 of 2013 this Court expressed itself as hereunder:

> **"…one must not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by Ochieng, J in John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003, 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. Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute. This position was re-affirmed by the Court of Appeal in Speaker of The National Assembly vs. Karume Civil Application No. Nai. 92 of 1992, where it was held that there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."**

18. It was similarly held in **Republic vs. National Environment Management Authority [2011] eKLR**, that where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted.

19. It is now a 'cardinal principle that save in the most exceptional circumstances, the judicial review

jurisdiction would not be exercised and the court must not exercise it where there exist alternative remedy or the decision of the court is likely to affect 3rd parties without notice and without affording such parties effective remedy. In **Re Preston [1985] AC 835 at 825D Lord Scarman** was of the view that a remedy by judicial review should not be made available where an alternative remedy existed and should only be made as a last resort.

20. This position has now acquired statutory underpinning by the enactment of the ***Fair Administrative Action Act***, No. 4 of 2015 under which section 9(2) provides:

> ***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.***

21. Subsection (3) thereof provides:

> ***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 applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).***

22. Subsection (4) of the said section however provides:

> ***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.***

23. In my view it is upon the applicant to satisfy the Court that exceptional circumstances do exist to justify the invocation of public interest in order to exempt the applicant from pursuing the alternative remedy provided under the law. In this case no such attempts have been made. In this respect the holding in **Constitutional Petition Number 359 of 2013 Diana Kethi Kilonzo vs. IEBC and 2 Others** deserves recitation. In that case it was held that:

> "**We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities."**

24. It follows that the applicant ought to have exhausted the remedy provided under section 38(4) of the ***Physical Planning Act*** before invoking this Court's judicial review jurisdiction.

25. It follows that these proceedings are incompetent and misconceived and the same are struck out with costs.

26. Orders accordingly.

Dated at Nairobi this 16th day of November, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Butyoi for Mr Momanyi for the Applicant

CA Mwangi