



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**[JUDICIAL REVIEW DIVISION]**  
**MILIMANI LAW COURTS**  
**MISCELLANEOUS CIVIL APPLICATION NO. 126 OF 2016**

IN THE MATTER OF THE PHYSICAL PLANNING ACT, CAP 286, THE COUNTY GOVERNMENT ACT, No. 17 of 2012, FAIR ADMINISTRATIVE ACTION ACT, No. 4 of 2015, THE LAW REFORM ACT, CAP 26, ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010, THE CONSTITUTION OF KENYA, 2010 AND ALL OTHER ENABLING PROVISIONS AND PROCEDURES OF THE LAW

**BETWEEN**

REPUBLIC.....APPLICANT

**VERSUS**

1. COUNTY DIRECTOR-PHYSICAL PLANNING DEPARTMENT- KIAMBU COUNTY]
2. COUNTY PLANNING TECHNICAL COMMITTEE KIAMBU COUNTY]
3. PHYSICAL PLANNING LIASON COMMITTEE-KIAMBU COUNTY]
4. THE COUNTY GOVERNMENT OF KIAMBU].....RESPONDENTS

**AND**

1. SHAINAZ SHAMSHUDIN J. JAMAL]
2. MUNIRA SUMAR].....EX PARTE APPLICANTS

**JUDGMENT**

1. By a Notice of Motion dated 20th April, 2016, the Exparte applicants herein Shainaz Shamsudin J.Jamal and Munira Sumar seek from this court judicial review orders:

- a. That orders of certiorari to call, remove, deliver up to the court and quash the decisions by the 1st respondent contained in letter dated 22nd February, 2016 to the applicants;*
- b. That orders of Certiorari to call, remove, deliver up to the court and quash the decisions by the 1st, 2nd and 4th respondents in County Government of Kiambu, Planning Enforcement Notices*

S.No. 0161 and S.No. 0051 dated 7th September, 2015 and 9th November, 2015 respectively to the applicants;

*c. That orders of certiorari to call, remove, deliver up to the court and quash the decisions by the 1st, and 2nd respondents in Minutes No. CPTC/014/2015/084 OF 23RD September 2015 cancelling architectural and structural drawings Rev-01GCE-010b-15 for Apartments Developments on Plot No. Kiambaa/Kihara/6211 at Gachie, Kiambu County including subsequent decisions arising there from;*

*d. That orders of certiorari to call, remove, deliver up to the court and quash the 1st respondent's cancellations of the 1st, 2nd and 4th respondents' approvals on the Architectural and Structural Drawings Rev-01-GCE-010b-15 for Apartments on Plot No. Kiambaa/Kihara/6211 at Gachie, Kiambu County;*

*e. That orders of Mandamus to remove into this court directing the 1st respondent to forthwith avail in this court and deliver up to the applicants all the Work Inspection Sheets signed by the 1st Respondent duly approving the construction works for the residential flats/developments by the applicants on Plot No. Kiambaa/Kihara/6211 at Gachie, Kiambu County;*

*f. That orders of Mandamus to remove into this court directing the 1st, 2nd and 4th respondents to issue the applicants with construction permit for the development of Apartments on Plot No. Kiambaa/Kihara/6211 at Gachie, Kiambu County pursuant to the applicants' approved Architectural and structural Drawings-Rev-01-GCE-010b-15 by Notice dated 10th June 2015;*

*g. That an order of prohibition to remove into this court to prohibit the 1st, 2nd and 4th respondents from proceeding to execute County Government of Kiambu, Planning Enforcement Notices SNO.0161 and S.No. 0051 to the applicants dated 7th September 2015 and 9th November 2015 respectively and any other decision arising there from particularly by entering and demolishing Apartments Developments under construction on Plot No. Kiambaa/Kihara/6211 at Gachie, Kiambu County pursuant to the applicants' approved Architectural and structural Drawings-Rev-01-GCE-010b-15 by Notice dated 10th June 2015;*

*h. That an order of prohibition to remove into this court to prohibit the 53rd respondent from proceeding with, issuing any hearing Notices, hearing ,adjudicating and or determination of the applicants' appeal lodges on 3rd December, 2015 against the County government of Kiambu, Planning Enforcement Notices S.No. 0161 and S.No. 0051 to the applicants dated 7th September 2015 and 9th November 2015 respectively, the 1st, and 2nd respondents in Minutes No. CPTC/014/2015/084 of 23rd September 2015 cancelling architectural and structural drawings Rev-01GCE-010b-15 for Apartments Developments on Plot No. Kiambaa/Kihara/6211 at Gachie, Kiambu County including subsequent decisions arising there from;*

*a. That the applicants be and are hereby granted exemptions under section 9(3) of the Fair Administrative Action Act No. 7 of 2015;*

*b. That the costs of this application be in the cause*

*c. That the court does grant any other relief that it may deem fit to grant.*

### **THE EXPARTE APPLICANTS' CASE**

2. The exparte applicants' case is premised on the grounds on the face of the Notice of Motion, the amended statutory statement, the verifying affidavit and the exhibits annexed to the amended Exparte Chamber Summons dated 17th March, 2016.

3. According to the exparte applicants, they are the registered proprietors of the property comprised in Title No. Kiambaa/Kihara/6211 located in Gachie in Kiambu County. That in March 2015, the Ex parte

Applicants applied and lawfully obtained change of user for the aforesaid property from an agricultural property to a residential one.

4. That the Ex parte Applicants planned to develop the said property by building residential apartments and duly obtained the relevant licenses.

5. That following the successful change of user, the ex parte applicants duly submitted for approval the Architectural designs and plans to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents for the proposed residential apartment comprised of a three storey building. That the said Drawings and plans were subsequently approved vide a notice dated 10<sup>th</sup> June 2015.

6. That the 2<sup>nd</sup> Respondent in addition approved the issuance of a construction permit to the ex parte applicants but that upon the said approval and in July 2015, the Ex parte Applicants submitted the Structural Drawings for the said developments for approval and formally requested for a construction permit previously authorized in the notice dated 10<sup>th</sup> June 2015.

7. That despite several requests, the 1<sup>st</sup> and 2<sup>nd</sup> Respondent did not issue the construction permit but always assured the Ex-parte Applicants that the permit would be issued anytime and that even the Structural Plans were in order and approved

8. That on or about August 2015, the 1<sup>st</sup> Respondent and it's officers advised the Ex-parte Applicants to commence construction work as the approved plans and permit were a matter of procedure and that they would be issued in due course.

9. That the Ex-parte Applicants commenced construction works based on the assurances and representations made by the Respondents. It is averred that the Respondents always visited the construction site to inspect the progress of the works and signed Work Inspection Sheets approving the construction.

10. That despite the foregoing, the 1<sup>st</sup> respondent visited the construction site in the company of the Ex-parte Applicants' neighbours and demanded that the construction stops forthwith and issued a Planning Enforcement Notice SNO. 0161 alleging that the construction works were going on without the approval of the development plans and the approval of the plan amendments. In addition, that the Respondents seized and confiscated the work inspection sheets duly signed by the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents and demanded that the Ex-parte Applicants resubmit the structural plans.

11. That the Ex-parte Applicants stopped construction works, resubmitted and paid for the structural plans for re-approved as demanded on 10<sup>th</sup> and 16<sup>th</sup> September 2015.

12. That on 22<sup>nd</sup> September 2015, the 1<sup>st</sup> Ex parte applicants received calls from the Deputy Director Physical Planning Department and the 1<sup>st</sup> Respondent who all informed him that the approved Structural Plans were ready for collection. However, that when the 1<sup>st</sup> Ex parte Applicant went to collect the said approved structural plans on 24<sup>th</sup> September 2015, she found that the approved and or approvals on the approved Architectural and Structural Plans had been cancelled on 23<sup>rd</sup> September 2015 by the 1<sup>st</sup> Respondent's crossing on the Architectural and Structural approvals.

13. The ex parte applicants lament that they were never accorded any hearing before cancellation of the already approved structural plans, which approvals the exparte applicants had relied on to commence construction work which was underway.

14. Further the exparte applicants claim that they were later served with a notice dated 2<sup>nd</sup> November 2015 purporting to retrospectively decline approval of the structural Plans in a meeting allegedly held on 23<sup>rd</sup> September 2015 by 2<sup>nd</sup> Respondent.

15. It is further averred that the 1<sup>st</sup> Respondent is a member of the 2<sup>nd</sup> Respondent and that therefore the alleged decision of the purported meeting of 23<sup>rd</sup> September 2015 is suspect in light of the contrary decisions communicated to the Ex-parte Applicants by 1<sup>st</sup> Respondent officers.

16. That on 9<sup>th</sup> November 2015, the Ex parte applicants were served with another Planning Enforcement Notice No. 0051 which notice accused the Ex parte Applicants of developing residential apartments without the approved Structural Plans Amendments and demanded immediate cessation of any further construction works.

17. That on 3<sup>rd</sup> December, the Ex parte Applicants lodged an appeal with the 3<sup>rd</sup> Respondent against the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondent's Planning Enforcement Notices No. 0051 and 0161, but that the said appeal has never been considered for hearing or any action taken in an attempt to hear and determine it.

18. In addition, the exparte applicants aver that vide a letter dated 22<sup>nd</sup> February 2016 the Respondents have threatened to enforce and execute their Planning Enforcement Notices No. 0051 and 0161 issued to the ex parte applicants at any time by demolishing the ex parte applicants' development works.

19. That it was the above circumstances that compelled the exparte applicants to seek the court's intervention by way of judicial review of administrative action.

### **THE RESPONDENT'S CASE**

20. The respondents filed Notice of Appointment through their County Attorney Mr Ranja, Senior Legal Counsel, County Government of Kiambu on 30<sup>th</sup> March, 2016. They also filed grounds of opposition dated 28<sup>th</sup> April, 2016 and a replying affidavit sworn by John Mbabu the County Director of physical Planning on 29<sup>th</sup> April, 2016.

21. It is the respondents' contention that the applicants' application is prematurely before this court as the exparte applicants have refused to follow the dispute resolution procedures laid out in the Physical Planning Act;

22. That section 33 of the said Act provides that a challenge to a decision rejecting development application shall lie as a matter of right to the relevant Liaison Committee established under the Physical Planning Act Cap 286;

23. That section 38 of the said Act provides that a challenge to an enforcement Notice shall lie as a matter of right to the relevant Liaison Committee established under the Physical Planning Act Cap 286 Laws of Kenya;

24. That the present application is premature and it offends section 9(2) of the Fair Administrative Action Act No. 7 of 2015, that requires a party to exhaust all remedies provided for under the written law before seeking judicial review orders; and therefore the said application should be struck out for being frivolous, vexatious and otherwise an abuse of the court process as the exparte applicants have refused to exhaust all the remedies available under the Physical Planning Act.

25. In the replying affidavit of John Mbabu, the deponent deposes that the act of cancelling the architectural and structural drawings and plans was in accordance with the county guidelines and policies established by the Physical Planning Act.

26. According, to the deponent, the procedure for obtaining a construction permit and issuance of the appropriate architectural and structural approvals is that:

- a. the developer is required to submit architectural plans to the sub County which plans are then evaluated and approved and the developer is then referred to the structural engineer who is to issue the structural drawings;

- b. upon issuance of the structural drawings the developer then resubmits the architectural drawings together with the structural drawings;
- c. upon evaluation of both the structural and architectural drawings the developer is issued with the construction permit to allow the developer commence construction;
- d. in the event that construction started without following this procedure the developer is then required to submit a structural integrity report for purposes of regularizing his documentation and once approved the construction permit is issued.

27. That from the Notice of motion and annexures, the exparte applicant deliberately failed to follow the procedure for issuance of the relevant construction permit, as shown by documentation stamped on 16th September, 2015 and 23rd September, 2015 stamped by the applicant's structural engineer and as received by the county Structural engineer respectively.

28. That the enforcement notice dated 7th September, 2015 was in accordance with the law since the applicants only sought structural drawings after they had been issued with enforcement notices directing them to comply with the law, and that requiring the developer to comply with building regulations cannot be unreasonable, biased and or driven by bad faith.

29. That cancellation of the approvals was necessitated by the fact that the applicant obtained the said approvals by making false declarations and intentionally misleading the county officers in that the applicants presented the architectural drawings marked as proposed apartments for development yet the building had already been constructed which revealed that they had all along made false declarations.

30. That the applicants having commenced the construction works before complying with the relevant procedures, ought to have sought for regularization of the building plans by submitting a structural engineers' report on the soundness of the building, rather than providing proposed architectural plans and thereby deliberately misleading county officials on the status of the development.

31. That therefore any legitimate expectations of the applicants ought to have been guided by the principles and requirements that are prescribed for the issuance of development approvals and the fore knowledge that failure to comply with the law would attract penalties hence any loss on their part is only attributable to the applicants' failure to comply with the legal requirements for issuance of development approval.

32. That the 3rd respondent has the jurisdiction to hear the appeal filed by the applicants contrary to their depositions that it does not have the jurisdiction to do so.

33. That there are no special circumstances shown to warrant exemption of the applicants from the application of the procedures provided for in the Physical Planning Act.

34. That construction permit could not be issued to the applicants who had refused to follow the laid down procedures to obtain the permit.

35. that the applicants should not have continued to construct while awaiting the appeal process outcome and that they only ran to the court to seek the court's protection to avoid the respondents from undertaking their statutory mandate.

36. That constructing without appropriate documentation is a sign of bad faith and that the letter dated 22nd February 2016 shows that the appeal was being considered since appeals are heard once a month for reasons that membership to the Committee is drawn from various offices within the County and therefore the decision of the Liaison Committee may delay. Further, that if the applicants were dissatisfied with the appeals committee they should have filed an appeal to the National Liaison Committee as provided for in sections 33 and 38 of the Physical Planning Act.

37. That as there is an appeal pending, the jurisdiction of this court can only be invoked at the appellate stage not judicial review.

38. That there is no reason why the court should exempt the applicants from the application of sections 9(2) of Fair Administrative Action Act hence this application is premature.

39. That this court cannot prohibit a public body from undertaking its statutory mandate.

40. And finally that this application does not meet the threshold for the court to exercise its discretion in favour of the applicants hence it should be dismissed.

### **EXPARTE APPLICANTS' SUBMISSIONS**

41. In their written submissions filed in court on 30th June, 2016 the exparte applicants have raised the following issues for determination:

#### **a. Whether the Ex Parte Applicants have exhausted the Dispute Resolution Mechanisms Under the Physical Planning Act, Chapter 286 Laws of Kenya**

42. It was submitted that the respondents in response to the applicants' application opposed the exparte applicants' application on the basis that the Ex parte Applicants have not exhausted the dispute resolution mechanisms as stipulated in **Sections 33 and 38 of the Physical Planning Act** and **Section 9(2) of the Fair Administrative Act No. 7 of 2015** thus contending that the application herein is prematurely before this court. In response thereto, the exparte applicants' counsel submitted relying on the case of **Republic vs. National Environmental Management Authority, Civil Appeal No. 84 of 2010,[2011]eKLR**, where the Court of Appeal held that:

***“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 procedure under Civil Procedure Act (Cap 21, Laws of Kenya) and the Civil Procedure Rules made hereunder, 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. ”***

43. It was therefore submitted that the instant application is rightly before this court as the Ex parte Applicants are not challenging the merits of the decisions made by the Respondents but rather the manner in which the decisions were made and the procedure followed in making the aforesaid decisions.

44. It was further submitted that in the circumstances of this case, there exists special circumstances to warrant the institution of judicial review proceedings in place of the alternative remedy of appeal provided for in the Physical Planning Act as was stated in the **Republic vs. National Environmental Management Authority(Supra)**where the Court of Appeal 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 that 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 existed in its case which would remove it from the appeal process set out in the statute...”***

45. It was also submitted that it is not in dispute that despite the Exparte Applicants' pending Appeal, the Respondents have by a letter dated 22<sup>nd</sup> February 2016 threatened to proceed with the impugned

Enforcement Notices No. 161 and No. 0051 dated 7<sup>th</sup> September 2015 and 9<sup>th</sup> November 2015 respectively notwithstanding the Statutory stay of enforcement thereof under Section 38 (7) of the Physical Planning Act following the lodging of the appeal with the 3<sup>rd</sup> Respondent on 3<sup>rd</sup> December 2015.

46. In addition, it was submitted that following the cancellation of the previously approved Structural Plans and Drawings on 23<sup>rd</sup> September 2016 without affording the Ex parte Applicants the opportunity to be heard, the Ex parte Applicants lodged an appeal against that decision to cancel on 3<sup>rd</sup> December 2015 but that the said appeal has never been determined or even heard six (6) months down the line.

47. It was submitted that under *Rules 3, 4 and 5 of the Physical Planning (Appeals to Physical Planning Liaison Committee) Regulations, 1998*, once an appeal is lodged, the Secretary to the relevant liaison committee shall within ninety (90) days of receipt of the appeal in writing notify the Applicants the date on which the Liaison Committee shall consider the appeal; and that the Secretary to the Liaison Committee shall inform the appellants of the decision of the Committee within sixty (60) days of the making thereof.

48. However, that in this case, over 6 months had lapsed and that the 3<sup>rd</sup> Respondent has to date not taken any steps prescribed by law to have the appeal heard hence the 3<sup>rd</sup> Respondent is culpable of inexcusable and inordinate delay, which is a deliberate and unreasonable delay and or failure to discharge a public duty imposed by the law on the part of the 3<sup>rd</sup> Respondent consequently frustrating the Ex-parte Applicants opportunity to seek justice from the appeal forums under the Physical Planning Act.

49. That therefore the Ex-parte Applicants cannot even Appeal to the National Liaison Committee or the High Court of Kenya pursuant to *sections 15, 33(4) and (5) of the Physical Planning Act* since there is no decision to Appeal to the said forums in the absence of the 3<sup>rd</sup> Respondent's decision on the Ex-parte Applicants' Appeal.

50. It is the Ex parte Applicants' submissions that the Regulations to the Statute are couched in mandatory terms and that therefore the Respondents have a statutory mandate to comply with the rules there under. That it is for the Respondents to set the date for hearing and determination of the appeal once the same has been lodged.

51. That this statutory duty should be performed within 90 days and the Appellant notified of the decision made within 60 days of the making of that decision, which has not been done up to date and no reasons or explanations have been given by the respondents for the inordinate delay and in flagrant breach of express statutory provisions.

52. That the Respondents in spite of the statutory stay of enforcement have threatened demolition of the building *ultra vires* and in breach of express statutory provisions in order to render the Appeal as filed nugatory. That the 3<sup>rd</sup> Respondent is therefore culpable of breach of the mandatory statutory duties imposed upon it to determine the appeal within the specified period in law. That the 3<sup>rd</sup> Respondent's ineptness or inactivity on the Ex-parte Applicants' Appeal is clear breach of **Article 51 of the Constitution and section 4 of the Fair Administrative Action Act, 2015** that require fair, efficient, reasonable and lawful decision. It is submitted that any decision that may later come after lapse of the statutory period is unlawful.

53. That therefore the foregoing constitutes exceptional and special circumstances to warrant the intervention of this court and that it is in the interest of justice and fairness that when the Respondents have demonstrated blatant breach of their mandatory statutory duties by failing, neglecting and or ignoring to consider the appeal lodged by the ex parte applicants for over 6 months, it makes it imperative for the Ex parte Applicants to seek the intervention of the court in the nature of judicial review proceedings.

54. The applicants urged the court to exercise its discretion against the Respondents for breaching the law

and to be guided by the maxim that he who comes to equity must come with clean hands and that equity will not allow a statute to be used as a cloak for fraud.

55. Therefore, it was submitted that although the Respondents allege that the Ex parte Applicants have not exhausted the alternative remedies yet the Respondents have stubbornly refused, neglected, failed and or ignored to participate in the said process once the ex parte applicants initiated the same by lodging the appeal to the liaison committee on 3<sup>rd</sup> December 2015.

56. It was further submitted that the application herein for judicial review is rightly before this court as there exists exceptional circumstances as herein above demonstrated to justify the departure from the appellate procedure prescribed for under *Sections 33 and 38 of the Physical Planning Act, Chapter 286 Laws of Kenya* and as is contemplated for under *Section 9(4) of the Fair Administrative Action Act No. 7 of 2015*. Reliance was placed on the case of *Republic v Commissioner of Customs Services Ex parte Imperial Bank Limited [2015] eKLR* where the Court cited with approval the decision in *Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300* Where it was stated as follows

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

57. Further, that the court referred with approval to the decision in *Republic vs. The Commissioner of Lands Ex parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998* where it was held as follows

***“...Although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been extended using the principle of proportionality.....The court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectations...”***

58. On the second issue of whether the Respondents’ Impugned Decisions are tainted with Procedural Impropriety, it was submitted that the Respondents have all along acted without following the procedures laid down under the Physical Planning Act, Chapter 286 Laws of Kenya. That the Ex parte Applicants having submitted for approval of the Structural Plans and Drawings way back in May 2015 which plans and drawings were subsequently approved as is evidenced by the notice dated 10<sup>th</sup> June 2015; and that the exparte applicants having subsequently applied for the Construction Permits on 29<sup>th</sup> July 2015 pursuant to the notice of 10<sup>th</sup> June 2015, the same however, was never issued.

59. That on 7<sup>th</sup> September 2015, the Respondents purported to issue the Planning Enforcement Notice S.No. 0161 and another one on 9<sup>th</sup> November 2015 being Planning Enforcement Notice S. No. 0051, alleging that the developments had been made without the approved architectural structural plans and amendment plans yet no amendments were ever requested or notified to the Ex-parte Applicants. That the Enforcement Planning notice dated 7<sup>th</sup> September 2015 was an afterthought, an approbation and

reprobation of the duly signed Work Inspection Sheets seized from the Ex-parte Applicants and verbal approvals of the works by the 1<sup>st</sup> Respondent.

60. That the said notices were issued in bad taste and were meant to occasion loss to the Ex parte Applicants. Suffice to say, that the Planning Notice dated 9<sup>th</sup> November 2015 was *ultra vires section 33(2) of the Physical Planning Act* in so far as it purported to notify a decision allegedly made on 23<sup>rd</sup> September 2015.

61. In addition, that upon being served with the Planning Enforcement Notices, the Ex parte Applicants duly re-submitted the structural drawings and plans and indeed paid for the same on 10<sup>th</sup> and 16<sup>th</sup> of September 2015 and that on or about 15, 17<sup>th</sup>, 18<sup>th</sup> and 25<sup>th</sup> September 2015, the 1<sup>st</sup> Respondents and its officers contacted the Ex-parte Applicants and advised that the structural plans had been approved and were ready for collection. Further, that the said 1<sup>st</sup> Respondent and its officers inspected the construction works at every stage and approved Works Inspection Sheets approving the works. That it is therefore not plausible under what circumstances the approved structural drawings and plans were purportedly cancelled on the 23<sup>rd</sup> of September 2015.

62. It was further submitted that the cancellation that was done on 23<sup>rd</sup> September 2015 was done in the absence of the Ex parte Applicants and without hearing their case in defence. That they were never afforded an opportunity to be heard or even afforded an opportunity to present their case in defence thereof. That the decision was made in secret and in complete exclusion and involvement of the Ex parte Applicants which is contrary to the rules of natural justice of being heard as embodied in Article 47 of the Constitution and that the reasons thereof were given on 2<sup>nd</sup> November 2015 way outside the 30 days of the making of such a decision.

63. Further, it was submitted that the Respondents have acted in breach of the procedures set under the Act for considering appeals. That the applicants lodged the appeal on 3<sup>rd</sup> December 2015 yet the appeal has never been heard or even set down for its hearing. That the mandatory statutory requirements are that the appeal once filed should be heard within ninety (90) days and a decision communicated within sixty days of its making. That in this case, over six months have lapsed and yet the appeal has never been set down for hearing and that no reasons have been given by the respondents for deviating from the laid down procedures and no indication has been given as to when the appeal will be considered. It was therefore submitted that the conduct of the 3<sup>rd</sup> respondent goes against *Article 50(1) of the Constitution* which is the right to a fair trial which must be expeditious and that the Committee is in breach of the applicants' right to a fair and expeditious trial considering that the same cannot be limited under *Article 25(c) of the Constitution*.

64. The applicants' counsel further submitted that whereas Section 38(7) of the Physical Planning Act is emphatic that an appeal lodged to the relevant Liaison Committee operates as a stay of enforcement of any Planning Enforcement Notices that may have been issued and that the Planning Enforcement Notices may not be issued during the pendency of the said appeal, that in this case, the respondents have written vide their letter dated 22<sup>nd</sup> February 2015, threatening to enforce the Planning Enforcement Notices SNO. 0161 and SNO. 0051 yet there has been no construction going on since the said notices were issued. That both the Enforcement Notices indicate that construction has reached the 2<sup>nd</sup> floor and the letter dated 22<sup>nd</sup> February 2016 as well states that the construction is at the 2<sup>nd</sup> floor and as such, no construction has been made since the enforcement notices were issued.

65. It was the Ex parte Applicants' submissions that the Respondents have neither followed the laid down statutory procedure as prescribed, are in breach of the rules of natural justice and especially the right to be heard and giving of reasons for a decision nor have they afforded the applicants a fair and expeditious hearing in the appeal process thus have occasioned much prejudice to the Ex parte Applicants.

66. The Ex-parte Applicant submitted that the Respondents impugned decisions contravened the rules of natural justice as decreed in *Article 47 of the Constitution* are unlawful, null and void in so far as they are

tainted with procedural impropriety. They relied on the decision in **Onyango Oloo vs. Attorney General [1986-1989] EA 456**, where the Court of Appeal held that *denial of the right to be heard renders any decision made null and void ab initio*. Further reliance was placed on the **Republic v County Government of Kiambu Exparte Dagoretti Slaughterhouse Company Limited [2016] eKLR** which adopted the **Onyango Oloo case (supra)** with approval and held that *contravention of the rules of natural justice and fair hearing is procedural impropriety and the resultant decision thereof is void*.

67. The Ex-Applicants submitted that the decision of the Court in the **Onyango Oloo case (Supra)** applies with equal force in the instant case and prayed the Court to find so.

68. On the third issue of whether the Respondents Decisions are in Breach of the Legitimate Expectations of the Ex Parte Applicants, the Ex-parte Applicants submitted that the Respondents are in breach of the Ex parte Applicants' legitimate expectations in that the Planning Enforcement Notices were issued when the Respondents had unequivocally approved the architectural plans and drawings, had continuously inspected the progress of the works and even approved and signed the Work Inspection Sheets which they later on seized and confiscated. That the Exparte Applicants expected that once they applied for the Construction Permit, that the same would be issued to them and that their construction works would not be stopped without being afforded an opportunity to be heard.

69. In addition, it was submitted that the Ex-parte Applicants expected that upon their re-submission of the structural drawings and plans, and upon payment of the requisite fees, the same would be approved and that there would be no retrospective cancellation of the already approved structural drawings and plans. That the Respondents however, cancelled the same on 23<sup>rd</sup> September 2015 without involving the applicants or affording them the opportunity to be heard despite having assured the Ex-parte Applicants otherwise.

70. The Ex-parte Applicants submitted that the 1<sup>st</sup> Respondent is statutorily empowered to control developments and is also a member of the 2<sup>nd</sup> Respondent hence it's assurance or approval of the Ex-parte Applicants developments and or construction permit is a procedural matter raised legitimate expectation that the developments are not illegal.

71. It was further submitted that the Ex-parte Applicants also had a legitimate expectation that once they lodged their appeal with the liaison committee, the same would be set for hearing expeditiously and fairly within ninety (90) days and a decision made sixty days thereafter as is provided for in the statute. However, that the appeal has never been heard or a decision made six months down the line.

72. The applicants also submitted that the letter dated 22<sup>nd</sup> February 2016 breaches their legitimate expectations to the extent that it threatens to enforce the Planning Enforcement Notices issued herein yet such enforcement has automatically been stayed by the lodging of the appeal on 3<sup>rd</sup> December 2015. Reliance was placed on the decision in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240** where the Court explained legitimate expectations as follows:

*“.....legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the respondents, which is, the value or the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation. An abrupt change as was intended in this case, targeted at a particular company or industry is certainly abuse of power. Stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way... Public authorities must be held to their practices and promises by the courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised.”*

73. It was submitted that a similar holding was made in **Republic vs. Attorney General & Another Ex Parte Waswa & 2 Others [2005] 1 KLR 280**.

74. The exparte applicants' counsel further submitted that the Respondents have through their conduct and numerous oral representations made promises to the ex parte applicants, and that it is on the basis of these conduct and representations that the Ex-parte Applicants have relied on to embark on the building and construction process thus expending huge sums of money towards the project. Therefore, it was submitted that the cancellation of the structural plans and drawings, the confiscation of the Work inspection Sheets, the threats of enforcing the Planning Enforcement Notices when the same are statutorily stayed; and the delay in expediting the appeal lodged by the applicants have all breached their legitimate expectations of being treated in a fair and prudent manner by the Respondents.

75. On the 4th issue of whether the Respondents' Impugned Decisions are Irrational, Ultra Vires the law and illegal, it was submitted on behalf of the exparte applicants that the Respondents have vide their letter dated 22<sup>nd</sup> February 2016 threatened to enforce the Planning Enforcements Notices issued herein. That the said threats are illegal and outside their powers as such enforcement is statutorily stayed pending the hearing and determination of an appeal lodged to the relevant liaison committee. The appeal therein was lodged on 3<sup>rd</sup> December 2015 and has never been set down for hearing and as such, there was an automatic stay of enforcement pursuant to *Section 38(7) of the Physical Planning Act* hence the Respondents cannot purport to breach that express statutory provision as their actions will be illegal and beyond their mandate.

76. It was further submitted that the notice dated 2<sup>nd</sup> November 2015 and the Planning Enforcement Notice dated 9<sup>th</sup> November 2015 is also illegal as it purported to give reasons for a decision that was made on 23<sup>rd</sup> September 2015, which is clearly outside the statutory requirement under *Section 33(2) of the Physical Planning Act* that reasons be given within 30 days of the said cancellation. The applicants' counsel submitted that the decisions by the respondents purport to review and cancel approvals that were already granted, without giving the Ex-parte Applicants opportunity to be heard contrary to Article 47 of the Constitution.

77. Secondly, that the said notice is an afterthought and flies in the face of the Respondent's approvals of developments illustrated by Work Inspection Sheets duly signed by the Respondents in so far as it purported to allege developments without approved structural plans and or amendments.

78. The applicants' counsel therefore submitted that the actions of the Respondents in seizing and confiscating the Work Inspection Sheets are an illegality and in addition are outside the mandate and scope of authority of the Respondents. that the act of cancelling the previously approved Architectural and Structural plans and drawings is outside the scope of authority of 1<sup>st</sup> respondent, and that the assertion that the cancellation was informed by false declarations is baseless as no evidence was been led to prove the particulars of the false declarations on the part of the ex parte applicants. Further, that the 1<sup>st</sup> Respondent does not have the mandate to cancel and or reverse his own decisions. The Ex-parte Applicants submitted that such a decision to cancel or reverse falls within the scope of the 3<sup>rd</sup> Respondent and as such, the 1<sup>st</sup> Respondent acted outside its scope of its authority in cancelling the previously approved Structural Plans and drawings without affording the Respondents an opportunity to be heard and defend themselves against the accusations of false declarations.

79. the Ex parte Applicants submitted that the issuance of the notice dated 22<sup>nd</sup> February 2016 by the 1<sup>st</sup> Respondent is an action outside his scope of authority as he cannot enforce that which is statutorily stayed pending the appeal lodged on 3<sup>rd</sup> December 2015. The actions of the 1<sup>st</sup> Respondent are in bad faith and are intended to hurt the development project of the applicants who have expended a lot of money into the project only for it to be stopped for no valid reasons.

80. It was also submitted that the actions of the respondents are not only illegal but also ultra vires and beyond their scope. That the same are unreasonable and are made in bad taste with the aim of scuttling

the development ambitions of the applicants. Needless to say, the 1<sup>st</sup> Respondent has demonstrated actual bias and undue influence and or coercion by neighbours as the last time he visited the construction site to declare the same unlawful, he was in the company of some neighbors.

81. The Ex-parte Applicant submitted that the impugned decisions are nullities in so far as they are illegal and ultra vires the law. That the decisions purport to deprive the Ex-parte Applicants their lawful right of use of their property without basis in law.

82. That the Respondent's impugned decisions herein flouted the elementary statutory and natural rules of justice and the Court should not allow decisions arrived in the circumstances of the case to stand. That the Ex-parte Applicants commenced and continued with constructions following the advice, assurance and subsequent approvals thereof by the Respondent. That therefore the Respondents cannot be allowed to allege construction was without approval yet they at all material times of the works, inspected and gave approval illustrated by Work Inspection Sheets, assured the Ex-parte Applicants that structural plans were approved, that construction permit has been authorized and will issue and the physical approved plans and construction permit is a procedural propriety.

83. The Ex-parte Applicants relied on the decision of this Court in **Republic v Principal Registrar Of Government Lands & another & other [2014] eKLR**, wherein the Court quashed the Respondent's decision to cancel the Ex-parte Applicants title to property on grounds that the cancellation was unlawful for having been *ultra vires* the elementary rules of natural justice hence unlawful. That the Honourable Court granted judicial review orders and held inter-alia as follows at paragraph 26 of the ruling thereof:-

*"In my view the decision of the Respondent to deprive the applicant of his interest in the suit property without being afforded an opportunity of being heard was not only made in excess of jurisdiction by the applicant as no finding had been made that the suit property was unlawfully acquired by the applicant, but was also tainted with irrationality, illegality and procedural impropriety since it was made in breach of the rules of natural justice. It has been held that where the manner in which the proceedings were conducted were appalling as all elementary rules of procedure were flouted, no court worth its salt can allow orders obtained in this manner to stand regardless of the magnitude of the allegations made against any of the litigants. See Kamlesh Mansukhlal Damji Pattni vs. Nasir Ibrahim Ali & 2 Others Civil Application No. Nai. 5 of 1999."*

84. On the fifth and last issue whether the judicial Review Orders are available to the exparte applicants, the Ex-parte Applicants submitted that they have illustrated a case for grant of judicial review orders. As demonstrated by affidavits and submissions herein, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents approved the Ex-parte Applicants architectural plans by a notice dated 10<sup>th</sup> June 2015 and authorized it's sectors offices to enable issuance of the construction certificate. That has not been done to date and no lawful reasons have been given by the Respondents. Secondly, the 1<sup>st</sup> Respondent's and it's officers authorized commencement of construction before physical issuance of Construction Permit and approved Structural plans, issued and approved the works by signing the Work Inspection Sheets but later forcefully seized them in an attempt to seize all evidence of legality of the works that the Ex-parte Applicants may have ultra vires the law and or without any lawful reason.

85. The Respondent subsequently purported to issue unlawful Planning Notices, cancel the approved Structural and Architectural Plans, ignore and or neglect determination of the Ex-parte Applicants Appeal and threaten to demolish the Ex-parte Applicants notwithstanding the statutory stay of execution pending determination of the appeal afforded by law. It is clear that the Respondents have acted ultra vires the law, threaten to further breach the law and unlawfully deny the Ex-parte Applicants rights afforded by the law.

86. The Ex-parte Applicants submitted that the Application satisfies the threshold set out in Law Reform Act, Fair Administrative Action Act, 2015, the constitution. The Exparte Applicants further submitted that they have demonstrated the grounds for grant of judicial review orders set out by this Court at paragraph 25 in the case of **Republic v Principal Registrar Of Government Lands & another &**

**other [supra]** which this Court adopted with approval from the decision in **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**, when it cited the decision of the Court in **Council of Civil Unions vs. Minister for the Civil Service[1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478** at 479.

87. In Conclusion, it was submitted that the Ex parte Applicants have demonstrated that this is the right forum for the dispute herein because the alternative dispute resolution mechanism of appeal has completely failed, neglected and ignored to commence proceedings so as to solve this dispute as per the mandatory statutory requirements.

88. That the Ex parte Applicants have in addition demonstrated that they are entitled to the grant of judicial review reliefs herein as they have demonstrated with high precision that the actions and decisions of the respondents are tainted with illegality, are ultra vires, do not conform with the legitimate expectations of the ex parte applicants and above all, they are tainted with procedural impropriety as there has been blatant breach of the statutory prescribed due process by the respondents.

89. The exparte applicants therefore prayed that the Notice of Motion Application dated 20<sup>th</sup> April 2016 be allowed in terms of prayers 1- 11 therein.

### **RESPONDENTS' SUBMISSIONS**

90. The Respondents on their part contended that the cancellation of the plans was in order as the applicants failed to follow due process by commencing construction prior to the issuance of the appropriate documentation. The Respondents further contended that the applicant has failed to use the dispute resolution mechanism provided for in law despite the fact that they had submitted to it and the matter now awaiting hearing before the Liaison committee.

91. According to the respondents, the issue for determination in the instant suit is therefore, Whether the Court ought to exercise its discretion to grant the prayers sought.

92. It was submitted that in making a determination relating to the grant of Judicial review remedies the Courts are guided by the principles set out in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185of 2001** where it was held that:

***“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”***

93. It was therefore submitted that it follows, therefore, that in arriving at a decision to grant judicial review orders, the Court ought to be concerned with whether or not the administrative organ undertaking the mandate took into consideration relevant or irrelevant matters in arriving at the decision the applicant now seeks to challenge. That this position was recognized and appreciated by the Courts, as is noted by the Judgment of **Odunga J** in **Republic v County Government of Kiambu Ex-Parte Fechim Investments Limited [2016] eKLR**, where the learned Judge made reference to **Reid vs. Secretary of State for Scotland [1999] 2 AC 512**, where it was held that:

***"Judicial review is a constitutional supervision of public authorities involving a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As***

*regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through the taking into account of an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence."*

94. It was submitted that in order therefore to determine whether or not the concerned body took into consideration irrelevant or relevant consideration the Court has to look at the evidence provided by the parties, however the consideration of the evidence has to be done with limitations as was held **Reid vs. Secretary of State for Scotland**. And that in exercising its discretion, we submit that the Court ought to consider the following:-

*a. Whether the Respondents actions amounted to an illegality, were ultra vires, exceeded their authority or was erroneous*

*b. Whether the applicant has exhausted remedies available to them by statute*

95. On Whether the Respondents actions amounted to an illegality, were ultra vires, exceeded their authority or was erroneous, the Respondent submitted that the applicant was provided with the reasons of cancellation of their plans as is evidenced by the Applicants Annexure marked SJJ7. Further, the applicants upon being served with the enforcement notice were sufficiently informed that they were developing without approved structural drawings. Upon being issued with the notice dated 7<sup>th</sup> September, 2015, the Applicant proceeded to apply for structural drawings on the 16<sup>th</sup> of September 2015, 9 days after the issuance of the notice.

96. That this Applicant's conduct is an admission of having constructed without obtaining the requisite approval as is required. That the Applicant has however sought to deliberately mislead this Court in their further affidavit by stating that this submission was a resubmission. That If this was true the Applicant ought to have annexed copies of receipts showing the first payment similar to those annexed to the Applicant's further affidavit.

97. That by their own admission the applicants have indicated, in paragraph 3.1 of their notice of motion dated 20<sup>th</sup> April, 2016, that the building had been developed up to the 2<sup>nd</sup> Floor. They then upon being issued with the enforcement notice make an application for issuance of a structural approval. The reasonable conclusion that follows from their actions is that the building had no approval during its construction.

98. That It is for this reason, that is, constructing without obtaining the necessary approvals as is required by law, that the respondent cancelled the approvals previously issued. It was the Applicant's duty, once the cancellation was done, to have their building plans do through a regularization process noting that they had mislead the Respondent and caused the issuance of approvals based on misrepresentations.

99. That the 1<sup>st</sup> Respondent, having discovered that it had been misled by the Applicant, cancelled the plans that had been issued, the Applicant despite this cancellation continued with the construction of the building without the necessary approval. This act caused the issuance of enforcement notices to have Ex-parte applicant comply with the provisions of the Physical Planning Act.

100. It was therefore, submitted that the 1<sup>st</sup> Respondent in cancelling the ex parte applicant's plans and issuing the various enforcement notices acted within the law and as such their actions cannot be said to have been erroneous, ultra vires and or an illegality.

101. Further, that a prima facie look at the varied affidavits filed in the instant suit reveals that the 1<sup>st</sup> Respondent took into consideration relevant facts in arriving at its decision to cancel the proposed plans and in issuing the various enforcement notices.

102. that the allegations that the 1<sup>st</sup> Respondent visited the construction site under undue influence such an averment goes to the merit of the impugned decision and this Court ought not make a determination on the same. Such an issue ought to be brought before the Liaison Committee for determination.

103. On whether the applicant has exhausted remedies available to them by statute it was submitted that the ex parte applicant upon cancellation of their plans and issuance of the enforcement notices proceeded in December 2015 to file an appeal with the liaison committee. The applicant subsequently through their advocate wrote a letter to the Director Physical Planning complaining about issuance of the enforcement notices. The County Director Physical Planning through a letter dated 22<sup>nd</sup> February, 2016 informed the ex parte applicant that the enforcement notices were still in force.

104. That being aggrieved by the existence of the notices the applicants proceeded to Court and Sought to stay the proceedings before the Liaison Committee of the first instance despite the fact that it is evident that the respondents were considering the applicants appeal taking note that the 1<sup>st</sup> Respondent did respond to their advocate's letter.

105. That although the Applicants allege that there has been undue delay in hearing the appeal by the liaison committee and it is this reason that has caused them to come before this Court, that the Applicant is still prematurely before this Court because, there continue to exist alternative dispute resolution mechanisms that are available to them under the Act which they are yet to exhaust. That the applicant had the opportunity to raise the issue of delay in the form of an appeal before the National Liaison Committee as provided by both Sections 33 and 38 of the Physical Planning Act.

106. That the existence of alternative means of dispute resolution being a bar to the exercise of discretion by a court reviewing an administrative action is the reason why Section 9 (2) of the Fair Administrative Act No. 7 of 2015 was enacted.

107. That the Courts even prior to the enactment of this provision have ruled that availability of other remedies is a bar to the exercise of discretion as highlighted in **Republic vs. The Commissioner of Lands Ex parte Lake Flowers Limited Nairobi HC Misc Application No. 1235 of 1998** where it was held that availability of other remedies can be an important factor in exercising the discretion whether or not to grant the relief.

108. Further reliance was placed on **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** where 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.

109. It was submitted that 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.

110. It was submitted that from the foregoing reason it is evident that the applicants have not exhausted the alternative remedies that are available to them under the Physical Planning Act, that it is further evident that their first port of call was the remedies available under statute, which shows that they are aware of the dispute resolution mechanism available to them under statute. It was therefore submitted that the Court should make a finding that the applicant has not exhausted the available remedies provided to them by statute.

111. Further, that the 1<sup>st</sup> Respondent's actions were neither an illegality nor ultra vires as the decisions were made after taking into consideration the applicants conduct of failing to comply with the law.

112. it was also submitted that the applicant has failed to demonstrate reasonable grounds to warrant the Court grant exemptions under Section 9(3) of the Fair administrative Act No. 7 of 2015.

113. The respondents submitted that the 1<sup>st</sup> Respondent did not take into account irrelevant factors in arriving at its decision to cancel the applicants plan and issue the subsequent enforcement notices.

114. And finally, that the applicants have failed to provide reasonable grounds that would cause the Court to exercise its discretion and issue the prayers sought because it is evident that the Respondent acted within the law and further, that the applicant has triggered the alternative dispute resolution mechanism under statute and has yet to exhaust the same as is the requirement of Section 9 of the Fair administrative Act No. 7 of 2015.

## **DETERMINATION**

115. In my humble view, based on the Judicial Review grounds as set out in the applicants' statutory statement, verifying affidavit, annexures, grounds of opposition, replying affidavit and the respective parties' advocates written submissions and statutory as well as case law relied on in extensor by both parties, the issues for determination are as framed by the exparte applicants' counsel, which this court will determine each on the basis of the evidence available.

116. However, before determining those issues, it is important to outline the scope of Judicial Review remedies of certiorari, mandamus and prohibition.

117. The scope of the above three Judicial Review remedies was outlined by the Court of Appeal in the case of **Kenya National Examinations Council Vs Republic Exparte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 [1997] e KLR** in which the Court of Appeal held *inter alia*:

***“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way... These principles mean that an order of mandamus compels the performance of a public duty which is imposed on a person or body of persons by a***

*statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of mandamus compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then mandamus is wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done...Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of certiorari and that is all the court wants to say on that aspect of the matter.”*

118. From the above detailed holding, it is clear that an order of **mandamus** cannot issue to quash a decision. It can only be sought to **compel** the exercise of discretion in a certain manner. And where the decision has already been made, unless the decision is quashed, **mandamus** would not be an efficacious remedy. Further, **mandamus** cannot be sought in a manner as to achieve what ought to have been sought by way of **certiorari** since the period for seeking the latter is restricted by statute.

119. With respect to the prayer for **prohibition**, the said remedy can only **prevent** the making of a **contemplated** decision. In other words **prohibition** ought not to be issued in the nature of **declaration** but is directed at a **contemplated** action. Unless therefore the applicant shows that the Respondent contemplates an action in the circumstances under which orders of judicial review may be granted, the Court will not readily issue an order of **prohibition**.

120. In the present case, the *exparte* applicants seek for four (4) remedies of **certiorari**; two (2) remedies of **mandamus**; and two (2) remedies of **prohibition** plus one (1) remedy of **exemption from pursuing alternative remedy**, as stipulated in Section 9 of the Fair Administrative Action Act No.4 of 2015.

121. I will commence with the issue of whether the *exparte* applicant had any legitimate expectations and whether in the circumstances of this case, the respondents' decisions are in breach of the *exparte* applicant's alleged legitimate expectations.

122. On what legitimate expectation is, **Halsbury's Laws of England, 4<sup>th</sup> Edition Volume 1(1) paragraph 92** states:

*“ 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 ( see O' Rerilly V Macknan [1983] 2. AC 237 at 275. The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent practice. In all 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.”*

123. In the instant case, the applicants claim that the Planning Enforcement Notices were issued when the respondents had unequivocally approved the architectural plans and drawings; had continuously inspected the progress of the works and even approved and signed the work inspection sheets which they later seized and confiscated.

124. That the *exparte* applicants legitimate expectations are that they expected that once they applied for a construction permit, the same would be issued to them and that their construction works would not be stopped without being afforded an opportunity to be heard.

125. In addition, that the *exparte* applicants expected that upon their resubmission of the structural drawings and plans, and upon payment of the requisite fees, the same would be approved and that there would be no retrospective cancellation of the already approved structural drawings and plans.

126. It is further averred that the applicants had a legitimate expectation that once they lodged their appeal with the Liaison Committee, the same would be set down for hearing expeditiously and fairly within 90 days and a decision made sixty days thereafter as provided for in the statute.

127. The applicants further aver that the letter dated 22<sup>nd</sup> February 2016 by the respondents stating that the Enforcement Notices were still in force breaches their legitimate expectations as it threatens to enforce the planning enforcement notices yet the enforcement is automatically stayed by the lodging of the appeal on 3<sup>rd</sup> December 2015.

128. In **Republic V Kenya Revenue Authority exparte Shake Distributors Limited HC Misc Civil Application No. 359 of 2012**, the court held:

*“ such an expectation arises where a decision maker had led someone affected by the decision to believe that he will receive or retain a benefit or advantage (including that a hearing will be held before a decision is taken).”*

129. The court in the above case however held that there must be a promise or representation made by a public body that it will act in a certain manner.

130. In **Republic Vs Commissioner for Investigations & Enforcement Exparte Wananchi Group Kenya [2014] e KLR** it was observed that the claim for legitimate expectation must be made within the confines of the law. That *where there are express provisions of the law, there cannot be a legitimate expectation to the applicant since legitimate expectation cannot arise in the face of clear statutory provisions.*

131. In other words, a legitimate expectation cannot be invoked where the applicant seeks to evade the law or procedural requirements in obtaining a construction permit, and a public authority is not expected to confer any legitimate expectation by way of a promise that the applicant need not comply with the clear substantive or procedural statutory provisions is evident and therefore the applicant cannot benefit from the non-compliance with the law, as was held in the cases of **Celtel Kenya Ltd Vs The Commissioner of Customs and Excise & Another HCC Miscellaneous Application No. 165/2006; Aberdare Freight Services Ltd V Kenya Revenue Authority HC Miscellaneous Application No. 946/2004** and **Coastal Bottlers Ltd V The Commissioner of Domestic Taxes HC Miscellaneous Application No. 1756/2005.**

132. From the decision of **Keroche Industries Ltd Vs Kenya Revenue Authority & Others** (supra), a legitimate expectation can only be invoked against the public authority where there is discretion in the public authority's performance of a public duty and not where there is clear statutory provision as to how a public duty should be performed. In other words, a public authority cannot undertake or promise an applicant that the public authority shall not obey the law so as to favour the applicant.

133. **P. Cane on Administrative Law, 4<sup>th</sup> Edn (OUP, 2004), pp. 205-206 and Chris Hilson, Policies, the Non-Fetter Principle and The Principle of Substantive Legitimate Expectations: Between a Rock and a Hard Place** 11 *Judicial Review* 289 2006 at p. 290) stated::

*"A legitimate expectation will arise only if the court thinks that there is no good reason of public policy why it should not. This is why the word 'legitimate' is used rather than the word 'reasonable': the matter is not to be judged just from the claimant's point of view. The interest of the claimant in being treated in the way expected has to be balanced against the public interest in the unfettered exercise of the decision-maker's discretion; and it is the court which must ultimately do this balancing."*

134. In the instant case, the applicants claim that the respondents through their conduct described above and numerous oral representations made promises to the applicants and that it is on the basis of that conduct and oral representation that the exparte applicants relied on to embark on the building and construction process thus expending huge sums of money towards the project. That the

cancellations of the structural plans and drawings, the confiscation of the work inspection sheets, the threats of enforcing the planning enforcement notices when the same are statutorily stayed and the delay in expediting the appeal lodged by the applicants have all breached their legitimate expectations of being treated in a fair and prudent manner by the respondents.

135. In a rejoinder, the respondents contend and maintain that the cancellation of planning and architectural drawings was in order because the applicants failed to follow the procedure laid down in construction, and by commencing the constructions works before being issued with the appropriate documentation, they were in breach of the laid down procedures for construction.

136. In Judicial Review, indeed, the court is not concerned with the merits of the decision but the process. In this matter, albeit the applicants have maintained that they applied for approval of the architectural drawings and structural plans, and the construction permit and that they were later directed to resubmit the drawings for reconsideration, indeed, the court has not been shown any receipts showing that the applicants paid for the approval which was cancelled. Instead, they have only annexed receipts for the payments when they “resubmitted” the plans for approval, and what they call amendments sought by the respondent.

137. In addition, the fact that the building was as at 20<sup>th</sup> April 2016 gone up to 2<sup>nd</sup> floor without evidence of payment of the 1<sup>st</sup> approval which was cancelled means that the building was being constructed without appropriate approvals, including a construction permit.

138. Without delving into the merits thereof, I am not satisfied on the material before this court that the respondents could have made any oral representations to the applicants to continue with construction works without a construction permit and expect to obtain it retrospectively. In my view, that would be an extremely dangerous promise made in violation of section 38(1) of the the Physical Planning Act, which requires that any development of land must be with prior permission of the relevant local authority.

139. In this country, however, what this court observes, gathering from the alleged promise, is that the inhabitants would be willing to negotiate on whether or not to obey the law and make promises which in my view, and in the circumstances of this case would lead to devastating consequences when a building which is not approved by experts is constructed to house human life eventually comes down with occupants because it did not meet certain minimum construction requirements. This is what we are seeing everyday in the Kenyan urban centres, of buildings becoming death traps.

140. In my humble view, a statutory limitation period for hearing and determining an appeal cannot be relied upon to formulate a legitimate expectation which latter is usually based on conduct or promises as shown by the decision in **Keroche Industries Ltd Vs Kenya Revenue Authority** (supra) case.

141. The applicant cannot by way of Judicial Review claim that the fact that their appeals were not heard within 90 days and a decision thereof rendered in 60 days from the date of hearing, then their legitimate expectations were breached. In my view that argument is an abuse of the application of the doctrine of legitimate expectation.

142. Where there is a clear statutory provision, as is the case herein, a party is bound to adhere to those provisions and not to promise that he/she will hear the parties and or render the decision within the stipulated statutory period. To hold otherwise would be to render statutory provisions mere undertakings by public bodies.

143. Furthermore, the fact that the statutory provisions provide for an automatic stay of enforcement once an appeal is filed, and that in this case the respondents were violating the statutory provisions on stay upon the appeal being lodged, by proceeding to enforce the notice is not, in my view, breach of legitimate expectation. The law remains the law until repealed. The respondents cannot promise not to enforce the notices because there is an appeal. They are bound by that law. It therefore follows that where there is breach of the limitation period under law by the respondents, the respondents cannot be

prohibited, or stopped by Judicial Review proceedings. Since what is pending before the Respondents for determination is an appeal, the remedy in my view is for the applicants to invoke the provisions of Article 165(6),(7) of the Constitution which vests in the High Court supervisory jurisdiction over subordinate courts, any person, body or authority exercising a Judicial or quasi judicial function, and in the exercise of that jurisdiction, the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6) and may make any order or give any discretion it considers appropriate to ensure the fair administration of justice.

144. This court further finds that delay on the part of respondents on hearing an appeal lodged by the exparte applicant cannot form a ground for Judicial Review, to stop the process of hearing that appeal simply because timelines are set by the statute. Hearing and determining of the appeals within those statutory set timelines is a statutory duty. This court can only compel performance of a statutory duty, not prohibit the performance thereof. The applicant in this case has not sought the order of mandamus to compel the performance of the statutory duty of hearing the appeal.

145. But if I may briefly revisit the provisions of Rules 3,4 and 5 of the Physical Planning (Appeals to the Physical Liaison Committee ) Regulations, 1998, although it appears that the intention of the Legislature was to ensure that an appeal proceeding relating to development permits are disposed of expeditiously, and that in any event that the Committee must within 90 days of receipt of the appeal notify the applicant the date of hearing of the appeal; and that the decision be made within 60 days from date of hearing, the said Regulations made pursuant to section 49(1)(c) of the Physical planning Act as enacted in 1996 and which came into force on 29<sup>th</sup> October, 1998 have never been amended to accord with the Constitution of Kenya 2010 which requires the court or other quasi judicial bodies or authorities to render substantial justice in all matters that come before them. Determination of some of the disputes can take a longer period, even where the adjudicating authority is ready and able to determine them much faster. The speed at which matters are resolved is dependent on many factors. There are instances where the parties cannot file all the necessary documents, submissions and authorities and argue the case within the given period of time. It would in my humble view, be illogical if an adjudicating authority would fail to give its determination or if its decision would be rendered a nullity simply because the hearing has lasted more than the period stipulated under the statute or rules.

146. Further, even where there are approvals and construction permits issued, in my view, there can be no foreclosure in the construction process which is undertaken by human beings and which is prone to errors or deviations. Revisiting of the process might be necessary otherwise the respondents would be permanently barred from correcting any errors may have been committed advertently or inadvertently in the course of the said construction. to foreclose any prior approval is to declare that once construction of a building commences, whether or not there is malfeasance or misfeasance, come rain or shine, it cannot be stopped, which, again, as I have stated, would be setting an extremely dangerous precedent for the construction industry. It is for that reason that, I believe, the work inspection sheets are provided, for the respondents to regularly inspect the construction work as it progresses to check on the quality of work being undertaken in line with the building or structural development designs and plans and requirements.

147. On the basis of all the above analysis, this court finds that the exparte applicants have, on the material placed before the court, failed to establish that they had any legitimate expectations which were breached by the respondents.

148. On the claim that the respondents were threatening to enforce the two enforcement notices issued to the exparte applicants, yet the Physical Planning Act provides for a statutory stay under section 38(7) of the Act, it is important to reproduce that section as enacted and it provides as follows:

***“38(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 they may within the period specified in the notice appeal to the relevant liaison committee under section 13.**

**(5) Any person who is aggrieved by a decision of the liaison committee may appeal against such decision to the National Liaison Committee under section 15.**

**(6) An appeal against a decision of the National Liaison Committee may be made to the High Court in accordance with the rules of procedure for the time being applicable to the High Court.**

**(7) Any development affecting any land to which an enforcement notice relates shall be discontinued and execution of the enforcement notice shall be stayed pending determination of an appeal made under subsection (4),(5) or (6).**

149. What is referred to as the enforcement notice, is a notice served by a local authority (now the County Government) under the said Section 3 and 4 upon the owner, occupier or developer of the suit land requiring the owner, occupier or developer to comply with the provisions of that Section.

150. In this case the enforcement notice required the developer, that is to say, the applicants to stop the construction of the building until the necessary approvals were granted.

151. In my humble view what the exparte applicants say was enforcement which had been stayed automatically is as follows:

**“38(7) Any development affecting any land to which an enforcement notice relates shall be discontinued and execution of the enforcement notice shall be stayed pending determination of an appeal made under subsection (4),(5) or (6).”**

152. With utmost respect to counsel for the applicants, he no doubt misapprehended the above provision which is crystal clear that any development affecting any land to which an enforcement notice relates shall be discontinued and execution of the enforcement notice shall be stayed pending determination of an appeal made under subsection (4) (5) or (6).

153. And as earlier stated, delay in hearing and determining the appeal by the Liaison Committee cannot be a ground for Judicial Review orders of prohibition but mandamus to compel the performance of that duty since it is not a discretionary power but an obligation under the Act, that the Secretary to the Committee informs the applicant of receipt of the appeal and sets a date for its hearing within 90 days and a decision rendered within 60 days.

154. Courts have over time interpreted such provisions providing for time limits within which matters should be determined elastically to provide that where such time for making of a decision is provided in the rules, then the decision should be made within reasonable time. Such decision cannot be rendered a nullity merely because the appeal was not heard within 90 days and or the decision not rendered within 60 days from the date of hearing.

155. On the issue raised by the *ex parte* applicants as to whether they have exhausted the Dispute Resolution Mechanisms under the Physical Planning Act, Cap286 Laws of Kenya, the *ex parte* applicants intensely submitted that this application is not premature and that notwithstanding the availability of an alternative remedy under Sections 33 and 38 of the Physical Planning Act and Section 9(2) of the Fair Administrative Action Act, 2015, that the availability of such alternative remedy is not a bar to proceedings by way of Judicial Review. They relied on the decision in **Republic V National Environmental Management Authority, CA 84/2010[2011] e KLR** which is a Court of Appeal decision. The applicants also in one of their prayers No. 10 of the Notice of Motion sought for exemptions under section 9(3) of the Fair Administrative Action Act, 2015.

156. The *ex parte* applicants submitted that they are not seeking to challenge the merits of the decision but the procedure followed in making the aforesaid decision. Further, that there are special circumstances to warrant institution of Judicial Review proceedings in place of alternative remedies of appeal provided for in the Physical Planning Act. The *ex parte* applicants contended that while the appeal was pending, the respondents threatened to enforce the Enforcement Notices S.No 0161 and 0051 notwithstanding the statutory stay of enforcement under section 38(7) of the Physical Planning Act. Further, that the respondents cancelled the previously approved structural plans and drawings without affording the applicants a hearing and further that there had been delay in hearing and determining the appeal within the stipulated periods of 90 and 60 days as set out in Rules 3,4 and 5 of the Physical Planning ( Appeals to the Physical Liaison Committee ) Regulations, 1998. Consequently, that failure to discharge that public duty within reasonable period was frustrating the *ex parte* applicant's opportunity to seek justice from the appeal forum under the Physical Planning Act.

157. Reliance was placed on **Republic V Commissioner of Customs Services *ex parte* Imperial District Local Government Council & Others** (*supra*) and the case of **Republic V Commissioner of Lands *ex parte* Flowers Limited** (*supra*).

158. On the other hand, the respondents maintained that there was an elaborate appeal procedure provided for under the Physical Planning Act, which the applicants invoked but that have abandoned that process midway, yet the respondents were in the process of considering the said appeal and that therefore this Judicial Review application is premature.

159. Furthermore, a reading of the Physical Planning Act namely, the Physical Planning (Appeals to the Physical Planning Liaison Committee) Regulations, 1998 reveals the following under **Rule 3** which provides for the procedure of approaching the Liaison Committees. It provides:-

***“All appeals shall be made on forms P.P.A 8 and P.P.A 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 directions printed on the forms.”***

160. The rule further reads that the **Secretary to the relevant Liaison committee shall within ninety days of receipt of the application in writing inform the petitioner the date on which the Liaison Committee shall consider the appeal.**-----

161. The above provision does not state that the appeal shall be heard within 90 days as contended by the applicants, but that the Secretary to the Liaison Committee shall within 90 days of receipt of the appeal inform the petitioner the date on which the appeal shall be considered. And after the decision is rendered, Under the Rules, the Secretary to the relevant Liaison Committee is obligated to inform the petitioner of the decision of the Committee within sixty (60) days.

162. And where the petitioner is not satisfied with the decision of the Committee, the petitioner may appeal to the National Liaison Committee within thirty days (30) of receipt of the decision of the Committee. The rules also provide for a final appeal to the High Court through the Rules of the Court.

163. Section 38(7) of the Act requires that any development affecting any land to which an enforcement relates *shall be discontinued and execution of the enforcement notice shall be stayed pending*

determination of an appeal made under subsection (4), (5) and (6) of the Act.

164. Though the provisions of Rules 38 (4), (5) and (6) of the Physical Planning Act are expressed in the discretionary language “may appeal to the relevant Liaison Committee” or “may appeal to the National Liaison Committee” what in effect these provisions do, is to provide an elaborate procedure for dispute resolution at the technical level before an appeal as of right to the High Court as provided under subsection (6) of Section 38 of the Act can be invoked.

165. It is now settled law and judicial opinion that where the Constitution or any law provides a procedure for settlement of disputes, that procedure shall be followed before resort to the High Court or any other procedure provided by law. That is the effect of Articles 50(1) and 159(2) of the Constitution which stipulates that :

“50(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent or impartial tribunal or body.”

166. And Article 159(2) which states –

“159(1) .....

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles –

(a) justice shall be done to all, irrespective of status;

(b) justice shall not be delayed;

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

(d) justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this Constitution shall be protected and promoted.”

167. In **Samson Chembe Vuko V Nelson Kilumo & 2 Others [2016] e KLR**, the Court of Appeal citing several other decisions with approval among them:

**i. Speaker of the National Assembly vs Karume [2008] 1 KLR 425** where the Court of Appeal held inter alia:

*“.....where there is a clear procedure for the redress of any particular grievances s prescribe by the Constitution or the Act of Parliament, that procedure should be strictly followed....”*

**ii. And in Mutanga Tea & Coffee Company Ltd Vs Shikara Limited & Another [2015] e KLR** the Court of Appeal reiterated the foregoing 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 that:*

*“[W] here there is a clear procedure for the redness 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 ex parte Kimani Wa Nyoike & 4 Others [2008] e KLR (ER) 296)

“It is readily apparent that in those cases the Court was speaking to 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 resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court. (Emphasis added).

The basis for that view is first that Article 159 (2) (c) of the Constitution has expressly recognized alternative 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 reading 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. (Emphasis added).

Secondly, such alternative dispute resolution mechanisms normally have the 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 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.....”(emphasis added).

168. From the above decisions and others, it is clear that as recent as 27<sup>th</sup> day of May 2016 when the Court of Appeal rendered the decision on **Samson Chembe Vuko V Nelson Kilumo** (supra), parties ought not to invoke the jurisdiction of the High Court in Judicial Review matters where there is an alternative dispute resolution mechanism established by an Act of Parliament and which is efficacious .

169. In the instant case, although the applicants claim that the respondents have failed to hear and determine the appeal filed and or render the decision within 60 days from the date of hearing which hearing was to take place within 90 days from date of filing thereof, and that the respondents were instead threatening to enforce the two Enforcement Notices issued on 7<sup>th</sup> September 2015 and 9<sup>th</sup> November 2015 respectively by a letter of 22<sup>nd</sup> February 2016, this court notes that the two Enforcement Notices directed the applicants to “*stop any further construction immediately*” and in the latter notice, it added “*until the approvals are granted.*”

170. Further, in the letter dated 22<sup>nd</sup> February 2016, the applicants were being reminded that the respondents had noticed that construction works had been going on without full approvals; and that the enforcement notices served were still in force. What that latter letter was saying, as read with the enforcement notices is that indeed the Enforcement Notices were still in force. As to what was in force, on the face of it, in my view was the “*stoppage of construction work*” “*until the approvals are granted.*”

171. However, the applicants’ understanding of the Enforcement Notices is that the moment the

appeal was filed then the Enforcement Notices would not take effect, without indicating in what manner the said notices would be stayed. In my humble view, the rule is clear that where there is an appeal, the development would stop and the Enforcement Notice stayed. However, the enforcement notices are in the form of a negative order which cannot be stayed. They would only be stayed if they were requiring demolition of the development as stipulated in section 38 (2) of the Act which provides:

***“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.”***

172. The notices stopped any further construction immediately until approvals are granted. This court does not envision how such a negative notice can be enforced by the respondents and or what threat was being issued to the applicants, to implement the Enforcement Notices whereas the appeal filed was still pending hearing and determination by the Liaison Committee.

173. I find that there would only be an appropriate stay where there was a positive notice such as for demolition or removal of the building. In this case, it is my humble view that the ex parte applicants are unnecessarily and overly overzealous in this matter when they claim that the respondents were threatening to enforce the Enforcement Notices.

174. This court does not expect a stay under the Rules to mean that the applicants continue with construction works notwithstanding the allegation by the respondents that such construction works were being undertaken without full approval of the architectural and structural drawings by the relevant body(s) under the County Government of Kiambu, as envisaged under section 38 of the Physical Planning Act.

175. Furthermore, this court notes that the appeal was filed on 3<sup>rd</sup> December 2015 whereas the Enforcement Notices were issued on 7<sup>th</sup> September 2015 and 9<sup>th</sup> November 2015 respectively and by 16<sup>th</sup> March 2016 the applicants herein were in court seeking for Judicial Review complaining that the respondents had refused to hear the appeal within 90 days and to render the decision within 60 days as per the Rules. The explanation given by the respondents for the delay which delay from 3<sup>rd</sup> December 2015 to 16<sup>th</sup> March 2016 was about 3 months and 13 days was that the process of hearing appeals takes place once a month and the members of the Liaison Committee are drawn from various offices within the County but that the appeal was being considered as per the letter of 22<sup>nd</sup> February 2016 and that if the applicants were dissatisfied with that process they could still appeal to the National Liaison Committee as stipulated in Sections 33 and 38 of the Physical Planning Act, and only come to the High Court by way of an appeal.

176. The letter of 22<sup>nd</sup> February 2016 was a concern that the construction work was going on despite the lack of full approval. The applicants do not deny that indeed there was no full approval of the construction work. There is nothing on record to show that the respondents had refused to hear the appeal as filed, as the applicant never wrote to the respondents complaining that the latter had refused to hear the appeal.

177. Furthermore, Section 38(6) of the Act is clear that the applicants herein could only come to the High Court by way of an appeal. (see **Korir J in Republic Vs City of Nairobi Ex parte Inderpal Singh & Others [2013] e KLR & 2 Others** where the learned judge held:

***“The availability of an alternative remedy is not a bar to the commencement of judicial review proceedings. Judicial review proceedings are more often than not aimed at correcting defects***

*in the decision making process whereas an appeal is directed at the merits of a decision. In my view, the court can only determine whether an appeal was the more efficacious remedy after considering the circumstances surrounding each particular case.”*

18. As pointed out above, the dispute herein relates to discharge of the respondents’ statutory powers under the Physical Planning Act. That being the case, any complaint concerning exercise of those powers should be handled in accordance with the provisions of that Act. In **International Centre for Policy and Conflict & 5 others v. The Attorney General & 4 others (2013) eKLR as cited in the case of DIANA KETHI KILONZO & ANOTHER –V- IEBC & 10 OTHERS 2013 (2013) EKLR** it was stated:

1. *“An important tenet 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. 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 parent statute. 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 contrarily to the institutional independence of IEBC granted by Article 249 of the constitution.” Where there exists sufficient and 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).

178. In **Damian Belfonte v The Attorney General of Trinidad and Tobago C.A 84 of 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 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 a misuse, an abuse of the Court’s process.”*

179. In **Narok County Council vs. Trans Mara County Council & Another Civil Appeal No. 25 of 2000**, the Court of Appeal expressed itself as follows:

*“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 matters 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 be done in the event of a disagreement...Where the 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 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 duty 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 do, 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”.*

**16. In PETER OCHARA ANAM & OTHERS –V- CONSTITUENCIES DEVELOPMENT FUND CDF BOARD & OTHERS KISII PETITION NO.3 OF 2010 (unreported) (2011) eKLR**, Hon Mr. Justice Makhandia, as he then was stated as follows:

*“The provision is couched in mandatory terms and has 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 these remedies, in bringing this petition, the petitioners have deliberately avoided the procedure and remedy provided for under the Act. They have not proffered any explanation as to why they did not refer any of the complaints they have raised to the 1<sup>st</sup> respondent as required by law. It has been stated constantly that where there exists sufficient and adequate 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 provision; otherwise such available statutory provisions would be rendered otiose...”*

180. In the circumstances of this case, the Physical Planning Act establishes an elaborate mechanism for resolving any disputes/complaints that may arise from exercise of powers donated by that Act to the respondents or any other public authority created thereunder the Act. To this end, **Section 7** of the Act establishes Physical planning Liaison Committees whose functions include:-

*“To hear appeals lodged by persons aggrieved by decisions made by the Director or local authorities under the Act.” See Section 10(2) (e) of the Act.”*

181. In this case, the applicants are not complaining that the Liaison Committee had no jurisdiction to hear and determine the appeal since the Liaison Committee are not a party to this judicial review proceedings but that they had not heard and determined the appeal within the stipulated period, which, in my view, is not an appropriate ground for judicial review.

182. Accordingly, I find that there are no exceptional circumstances in this case to warrant exemption under Section 9(4) of the Fair Administrative Action Act No. 4 of 2015 to be granted.

**183. On the Assertion that the respondents’ decisions were tainted with procedural impropriety** it was submitted that the respondents have all along acted without following the procedures laid down under the Physical Planning Act. That the structural plans and drawings having been approved by the notice dated 10<sup>th</sup> June 2015; the applicants applied for a construction permit which was never issued; and that what followed were the 2 enforcement notices claiming that construction was being carried out without the approved plans and amendments yet no amendments were requested or notices to the applicants hence the enforcement notices were an afterthought and an approbation and reprobation of the already duly signed work inspection sheets seized from the exparte applicants and verbal approvals by the 1<sup>st</sup> respondent.

184. It is further claimed that the Enforcement Notices were issued in bad taste and that the one of 9<sup>th</sup> November 2015 was ultra vires Section 33 (2) of the Physical Planning Act in so far as it purported to notify a decision allegedly made on 23<sup>rd</sup> September 2015. It is further contended that it is unclear under what circumstances the approved plans were cancelled, without according the applicants a hearing thereby breaching the Rules of natural justice and the provisions of Articles 47 and 50(1) of the Constitution.

185. Having considered the issues raised in this case, I am of the humble view that they tilt more towards the merits of the decision as opposed to the process through which the decision was made hence more

sued to be dealt with by way of the pending appeal. I say this because the issues concerning whether or not the applicants had satisfied the conditions for grant of the development approvals and construction permit are matters that require the technical input of the Liaison Committee. From the affidavit evidence on record including evidence that oral approvals were given by the respondents for construction of a two storied residential building, I am unable to find that the respondent acted in excess of its powers or acted unreasonably in deferring the applicant's development permit.

186. The argument that the respondent could not recall the approval earlier on given to effect the impugned development is not supported by the law and factual scenario, considering the contents of the two Enforcement Notices and the letter of 22<sup>nd</sup> February, 2016. This is so in view of the fact that the approval was subject to the applicants meeting the requirements under **Sections 31, 41 and 51** of the Physical Planning Act.

187. Furthermore, section 34 of the Act grants the respondent discretionary power by notice of deferment served on the applicant in the manner prescribed; to defer consideration of a development application for such period and for such reasons as may be specified in the notice. Therefore, as the approval by the respondent of the applicant's development permit was conditional, the respondent could for good reasons defer its consideration or approval. The merits or demerits of that deferral can only be considered in an appeal and not in these judicial review proceedings.

188. In the end, I find that the decision by the respondents was not tainted with any procedural impropriety and that the issues raised under this issue tilt more towards the merits of the decision as opposed to the process through which the decision was made hence more suited to be dealt with by way of the pending appeal.

189. **On the issue that the respondent's impugned decisions are irrational ultra vires the law and illegal**, it was submitted that the respondents by their letter of 22<sup>nd</sup> February 2016 threatened to enforce the Planning Enforcement Notices which threats are illegal and outside their powers as such enforcement is statutorily stayed pending the hearing and determination of an appeal lodged to the liaison committee; and as stipulated in Section 38(7) of the Physical Planning Act hence implementing enforcement notices is illegal and beyond their mandate.

190. As earlier stated, the Enforcement Notices which are couched in the negative cannot be enforced and neither can they be stayed. What I find contemplated in Section 38(7) to be stayed is where the Enforcement Notices were in the positive such as requiring demolition of the building as contemplated in section 38(2) of the Act.

191. I have also found that the reasons given for cancellation of approvals were not outside Section 33(2) of the Physical Planning Act for reasons that the question whether or not the applicants had satisfied the conditions for grant of the development permit are matters that require technical input of the Liaison Committee.

192. From my assessment of the evidence on record, I am unable to find that the respondents acted ultra vires, or were irrational or acted illegally in cancelling the prior approvals. I find that the allegations that the respondents were not entitled to recall the earlier approvals given to effect the impugned development is not supported by the law and facts regarding construction which was proceeding without any construction permit in writing and which any person inspecting the construction would rely on. This is so because the approvals given are subject to the applicants meeting the requirements of Sections 31, 41 and 5 of the Physical Planning Act.

193. Section 31 of the Act provides that:

***“Any person requiring a development permission to make an application in the form prescribed in the Fourth Schedule for the Clerk to the Local Authority responsible for the area in which the land concerned is situate,***

194. And section 32(1) and 32(1) provides –

**“(1) A local authority to which a development application is made under section 31 shall not later than thirty days after the receipt of the application, refer it to the Director for his comments.**

**2.2. The local authority may when considering a development application submitted under sub-section (1) consult with any, or all of the following persons –**

**a. the Director of Survey**

**b. the Commissioner of Lands**

**c. the Chief Engineer (Roads) Ministry of Public Works and Housing, and**

**d. other eleven officers listed under that sub-section.”**

195. Section 34(2) requires that every application for consent shall be made to the Commissioner setting out the particulars therein prescribed, including –

**“(a) the applicant’s proposals for apportionment of any development conditions, in the original lease and for the development and maintenance of development of each portion of land be assigned or sublet; and**

**(b) be accompanied by suitable plans in quadruplicate on durable material showing the proposed sub-division;**

196. In addition, Section 34 of the Physical Planning Act gives the respondents discretionary power to give notice of deferment to be served upon the applicant in the manner prescribed, to defer consideration of a development application for such period and for such reasons as may be specified in the notice.

197. Therefore, as the approval by the respondent of the applicant’s development permit was conditional, the respondents could for good reasons defer its consideration of approval. And as stated in the notice and letter of 22<sup>nd</sup> February 2016, there was no full approval of the plans submitted hence the applicants were expected to stop any further construction until approvals are granted.

198. The respondents also deposed that in instances where construction work goes on without the necessary approval and it is discovered, then the developer is required to submit a structural integrity report for purposes of regularizing his documentation and that once approved, the construction permit is issued.

199. Although the above deposition is not supported by any legal provision, what this court observes is the applicant’s tacit resistance to submitting to the procedures laid down for approval of construction works which procedures in any event are very flexible by the fact that there is a possibility of retrospective approval of development provided the structural integrity report of the development is positive.

200. Accordingly, I find that the impugned decisions of the respondents are not irrational, ultra vires the law and or illegal. I also find that it would be unfortunate if the court would jump into the arena of this specialized area of the construction industry without the necessary technical expert’s input on the issues relating to structural integrity of the developments.

201. In this case, there was no report or affidavit by a qualified structural engineer to advise on the risks of permitting construction work on a 2 storey building to go on without the necessary approvals of architectural and structural drawings and plans.

202. The case of **Republic Vs Principal Registrar of Government Lands & Another & Others[2014] e KLR** relied on by the applicants related to cancellation of the exparte applicant's title to property which is not the same as cancellation of approvals of structural and architectural plans for construction or developments on land which approvals are normally issued on conditions to be fulfilled by the prospective developer. In the former case, the loss if any would only be material but in the present case, if a building lacks structural integrity, it may collapse and not only will there be material loss but loss of lives and limb.

203. Therefore, as to whether the case for Judicial Review orders has been made, on the whole, I find that the applicants failed to demonstrate that they deserve the discretionary remedies sought in the Notice of Motion dated 20<sup>th</sup> April, 2016 and that this matter is best left to the technical Liaison Committee for a convenient beneficial and effective remedy to determine by way of an appeal on merits and where any party is dissatisfied, they can still appeal to the National Liaison Committee and an appeal there from shall lie to the High Court being the final court in these matters.

204. Accordingly, I have no option but to decline to exercise my discretion in favour of the applicants. I hereby dismiss the Notice of Motion dated 20th April, 2016.

205. As the merits of the issues between the parties have not been determined by this court, I order that each party shall bear their own costs of the application for leave and for the substantive motion herein dismissed.

**Dated, signed and delivered in open court at Nairobi this 16<sup>th</sup> day of November 2016.**

**R.E. ABURILI**

**JUDGE**

**In the presence of:**

Mr Litoro for exparte applicant

Mr Ranja for Respondent

CA: Adline