REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIRIOBI

(MILIMANI LAW COURTS)

MISC. CIVIL APPLICATION NO. 72 OF 2013 (JR)

IN THE MATTER OF THE PHYSICAL PLANNING ACT

BETWEEN

REPUBLIC……..……..……..APPLICANT

VERSUS

MUNICIPAL COUNCIL OF RUIRU…….....…..…….RESPONDENT

***EX PARTE*: STEPHEN KIMANI MIHIU**

JUDGEMENT

Introduction

1. By a Notice of Motion dated 18th March, 2013, the ex parte applicant herein, **Stephen Kimani Mihiu,** seeks the following orders:

    1. That there be orders of *certiorari* to bring to the High Court for quashing the decision of the Municipal Council of Ruiru of 6th February 2013 regarding plot number RUIRU/TOWNSHIP/20.

    2. That there be orders of m*andamus* to compel the Respondent to approve the Applicants development permission application submitted on 25th January 2013 regarding plot no. RUIRU/TOWNSHIP/20.

    3. That costs of this application be provided for.

Ex Parte Applicant's Case

2. The application was supported by the affidavit sworn by the applicant on 18th March, 2013.
3. According to the applicant, on 10th July 2012 he purchased land parcel Ruiru/Township/20 (hereinafter referred to as the suit land) from one **Jackson Kibingu Gichuhi** for Kshs 4.3 Million which purchase was preceded by proper due diligence having carried out the necessary official search and established that the plot had been allotted to one **Jackson Kibingu Gichuhi** on 1st June 1995 after successful application to the Respondent who approved the allotment to the then commissioner of lands.

4. The applicant deposed that he successfully transferred the plot into his name and on 8th November 2013 and was issued with the certificate of lease. He thereafter took possession and commissioned architects to draw plans for him with the intention of developing a four-storeyed commercial/residential building which plans were duly approved by the District Public Health Officer on behalf of NEMA.
5. According to him, on 25th January 2013 he submitted the development plans for approval to the Respondent and on 6th February 2013 received a rejection of approval.
6. The applicant however contended that he was neither invited to make any presentations at the meeting of the Respondent nor was his technical team of surveyor, architects invited to such a meeting.
7. He therefore contended that this amounted to a breach of his right to be heard since he was denied the opportunity to establish that the Respondent council having approved the allotment and subsequent transfer were now acting unreasonably and capriciously in denying him the right to develop the plot.
8. In the applicant's view, the Respondent council having been involved in the preparation and conclusion of the area development plans is stopped from turning back on the same plans it had approved.
9. The applicant lamented that the Respondent had caused him to incur expenses in excess of Kshs 5 Million in purchase price and fees to the technical team and hence denying him his legitimate expectation that the acquisition of the plot was for purposes of developing the same as a gainful investment. He added that the adjacent plots are currently under development and/or developed meaning the Respondent has approved similar plans.
10. To him, the excuse given that there is an existing council house on a small part of the plot is unjustifiable considering the development plan was undertaken by the Respondent council and in any event his development plan has taken into account the existing structure that will not be affected by the new development.
11. It was submitted on behalf of the applicant that as the applicant was never offered an opportunity to ventilate their case in favour of the approval of the building plans, the rules of natural justice were never observed yet the acquisition was approved by the Respondent. In support of the submissions the applicant relied on **Mutiso vs. Mutiso [1984] KLR 536**.
12. It was further submitted that the Respondent's decision went against the applicant's legitimate expectation, was unreasonable, capricious and unfair and in support of this submission the applicant relied on **Lord Tullybetton in Cuncil Service Union vs. Minister for Civil Service [1984] 3 All ER 945**.

Respondent's Case

13. In response to the application, the Respondent filed a replying affidavit sworn by **Lesley Atamba Khayadi**, its clerk on 29th April, 2013.
14. According to him, the council is within its rights to either reject or approve any development plans presented to it as provided for under the ***Physical Planning Act*** (hereinafter referred to as the Act) and that the primary purpose of the Act is underscored in the preamble to the act.
15. He deposed that the Respondent was not party to the alleged sale agreement nor is it aware of the same and unequivocally denies the authenticity of the Applicant's alleged certificate of lease and avers that if the same was issued it was done irregularly, and fraudulently as the same was *inter alia* not available for allotment at the first instance.
16. It was deposed that the council denies the lawful existence of the letter of allotment purportedly issued to **Jackson Gichuhi** for the following reasons that the said letter of allotment is not in the respondent's records as the same was purportedly copied to the respondent; that at the time of the purported issuance of the said letter, there already existed a council house thereon covering over 50% of the property and hence no valid letter of allotment could be issued in the circumstances; that the Respondent did not however approve allotment of its land to the said **Jackson Gichuhi**; that the Respondent has since conducted a thorough search of its records and there are no minutes indicating when the relevant committee(s) sat and duly resolved to allocate any land or all to **Jackson Gichuhi**; and that on the face of the alleged letter of allotment the same is simply untenable.

17. He asserted that the Applicant's application regarding Plot No. 20 was rejected for the reason *inter alia* that there exists a council residential house ("Kangangi Estate") that was constructed before the Applicants alleged lease. To him, while considering the Applicants application the Respondent had regard to the following as enjoined by the ***Physical Planning Act 1996*** and other by-laws

    a. That there is council property on the plot covering more than 50% of the property. The entire plot is 100" by 50" ft and a council property thereon.

    b. That the intended development shall not cover more than 50% the plot.

    c. That the setting up of the intended development shall not inconvenience other near-by land users and tenants

    d. Public interest vis-á-vis private interest.

18. It was further deposed that the Commissioner of Lands cannot allocate any land which is under the control of Local Authority without first getting a resolution from the council concerned advising him to allocate such land yet the council has no such resolution in its records.
19. It was therefore contended that the Applicant is not deserving the orders sought. To the deponent, at the time of consideration of the Applicant's application, the Applicant never availed the necessary documents for the councils' consideration and thus his application was incomplete and that the council's refusal to approve the plans were informed *inter-alia* by the council's engineer one **Mr. John Kamau** that given the plot is 100" by 50" ft and there is a council house thereon; then it would be imprudent to grant the same as it would not be viable to set another building.
20. The deponent deposed that while considering the Applicant's application, he personally in the company of other council officers visited the plot and confirmed that indeed there exists a council house on the plot that covers more than 50% of the entire plot hence to approve the Applicant's application would amount to perpetuating an illegality and fraud.
21. He averred that the attached beacon certificate does not have vital indicators such as the co-ordinates such that a 3rd party can easily identify the property and fails the provisions of the ***Survey Act*** of Kenya
22. It was submitted on behalf of the Respondent that judicial review not being an appeal, the court ought not to consider whether the decision is fair or unreasonable and reliance was placed on **Chief Constable of the North Wales Police vs. Evans [1982] 3 All ER**; **Re Amin [1983] 2 AC 829**, **R vs. Secretary of State for Home Department ex parte Launder [1977] 3 All ER 979**.
23. It was submitted that the applicant's application was not accompanied by the necessary documents such as beacon certificates as required under section 31 of the Act.
24. According to the Respondent instead of exhausting the remedial avenues available to him under section 33 of the Act by way of an appeal to the relevant liaison committee, the applicant resorted to these proceedings which according to the Respondent are not available where there is an alternative remedy unless there exists exceptional circumstances which are not demonstrated in these proceedings. In support of this submission reliance was placed on **Republic vs. Secretary of State for Home Department ex parte Swati**.
25. According to the Respondent it acted within its statutory confines and there is no provision in the Act for an oral presentation.

Determinations

26. Having considered the application, the affidavits on record, the submissions and authorities cited, this is the view I form of the matter.
27. The applicant contends that after he made his application for the approval of the development plan, he was never afforded an opportunity of being heard before the Respondent made the impugned decision.
28. The Respondent's case is that it did consider the applicant's application and found that taking into account the provisions of the Act, his plan could not be approved as to do so would have been

illegal. Obviously the applicant had an opportunity of appealing against the said decision to the liaison committee. He chose not to do so. The law is that judicial review proceedings are special proceedings and ought not to be resorted to as an alternative to ordinary civil litigation o an appellate process. Where therefore the process has been adhered to and parties afforded an opportunity of being heard and a decision made either way, the only option available to a party aggrieved by the decision is to invoke the appellate route unless in the course of arriving at the decision further grounds warranting judicial review remedies are disclosed. As was held by **Ochieng, J** in **John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003**, for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort; the applicant however will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the orders granted to appeal against the same where there is a right of appeal would be less convenient or otherwise less appropriate, the adversely affected party ought to appeal against the said order rather than to challenge a decision in respect of which an application has been made and dismissed by the Tribunal by way of judicial review proceedings.

29. In this case the applicants contend that his application was never heard. If I understand the applicant correctly, he is contending that he was never called upon to appear before the Respondent either in person or through his technicians to defend the building plan. The question which arises is whether the Respondent was obliged to orally hear the applicant. In my view, once an applicant for development plan is afforded an opportunity to make his application in whatever appropriate form and a decision is made and communicated to him, it is upon him to move to the nest rung in the ladder. As was held in **Onyango Oloo vs. Attorney General [1986-1989] EA 456**:

> **"In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings"**

30. It is therefore clear that an opportunity to be heard must not necessarily be by way of oral hearing as is usually the position when one is charged before a court of law, though where witnesses are to be called, the applicant ought to be afforded an opportunity to cross examine the said witnesses. I agree with **Michael Fordham** in ***Judicial Review Handbook*** that:

> **"procedural fairness is a flexi-principle. Natural justice has always been an entirely contextual principle. There are no rigid or universal rules as to what is needed in order to be procedurally fair. The content of the duty depends on the particular function and circumstances of the individual case".**

31. In **Kenya Revenue Authority vs. Menginya Salim Murgani Civil Appeal No. 108 of 2009,** the Court of appeal delivered itself as follows:

> **"In the court's view, the fairness of a hearing is not determined solely by its oral nature. It may be conducted through an exchange of letters as happened in the present case. The hearing does not necessarily have to be an oral hearing in all cases. There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing. Whether an oral hearing is necessary will depend upon the subject matter and circumstances of**

the particular case and upon the nature of the decision to be made."

32. In **R vs. Aga Khan Education Services *ex parte* Ali Sele & 20 Others High Court Misc. Application No. 12 of 2002**, it was held *inter alia* as follows:

> **"On the allegation that there was breach of the rules of natural justice, it is not in every situation that the other side must be heard. There are situations where a hearing would be unnecessary and even in some cases obstructive. Each case must be put on the scales by the court and there cannot be general requirement for hearing in all situations. There will be for example situations when the need for expedition in decision making far outweighs the need to hear the other side and in such situations, the court has to strike a balance."**

33. I also associate myself with Emukule, J in Patrick Mungai & 22 Others vs. Nairobi City Council Planning and Architecture Department [2006] eKLR where he expressed himself as follows:

> **"The second and final part of Applicants' case was that the Applicants were not heard, by the Planning Committee of the Respondents, and that the decision of the Respondents Planning Committee was not consonant with the provisions of the Physical Planning Act 1996 (*No. 6 of 1996*). On the question of the right to be heard, I am of the view that the Applicants were accorded a hearing. The Applicants had no right of hearing before the Town Planning Committee, no member of the public usually has that privilege. If allowed to attend its sittings as either members of the press or interested public, the right is merely to be present and to hear, and not to be heard. The reason is this. When the Town Planning Committee of the Respondents sits, it does not hold a public inquiry to which it solicits views from those in the gallery. It is deliberating the business of the City of Nairobi as elected representatives of the City. It assumes that the City officers, the public servants have done what the law requires of them before they seek the final imprimatur from the Committee to a particular course of action. On the subject of change of user, the applicable law is the Physical Planning Act (*Chapter 286, laws of Kenya*) which came into force on 29-10-1998. Part V of the said Act devotes twelve sections to the question of Control of Development. Having regard to sections 32 (3) (b) (regard to health, amenities and convenience, Section 33 (3) (a) (being bound by any relevant regional or local physical development plan approved by the Minister) and Section 36 (Environmental impact assessment to which I have already referred to above), I am satisfied that the Respondent did consider all these matters before making recommendations to the Town Planning Committee for approval. In addition to compliance with the Physical Planning Act, the Respondents did also comply with the requirements of the consultation with the public who are likely to be adversely affected by the Change of User. The Respondents caused an advertisement to be placed in the local daily newspaper in the East African Standard of 11.03.1999 pursuant to which the 1st Applicant on behalf of the other Applicants wrote his objections on 24-02-2001, and earlier by the Applicants Advocates per their letter of 22-03-1999. The Applicants were thus expressly given an opportunity to raise their objections, and the objections did reach the Respondent. There is no provision in the Physical Planning Act aforesaid, or the Local Government Act that a decision would only be valid if such or other objections raised are accepted. The purpose of the public notification is to sound public opinion, consider objections in accordance with established criteria in accordance with the applicable law, in this case, the Physical Planning Act, and where those criteria are met, the decision of the Town Planning Committee or other arm of a local authority, or the authority is concerned, is valid and legally binding upon the parties concerned, including those who objected to the application for permission for change of user being granted. The Applicants were clearly heard per their own, and their Advocates written objections, and cannot be heard to say that they were denied a hearing. It is to be understood that their objections were evaluated against the Applicant's grounds and were rejected. I also reject the Applicant's contention that they were not heard."**

34. In this case, the Respondent contends that the documents presented by the applicant were insufficient to warrant the approval of the development plan. In other words the Respondent is contending that the application was not merited. It is not for this court to decide whether or not there was sufficient material disclosed by the applicant to warrant a decision in his favour. Whereas the applicant's contention that his application was merited may well be correct, it is not for this Court sitting as a judicial review court to plunge itself into an inquiry as to whether the land in question was suitable for the development which the applicant intended to put therein. That was a matter that was best suited for specialised bodies which are statutorily established to deal with such matters at the appellate level such as the Liaison Committee. The courts will only interfere with the decision of a public authority if it is outside the band of reasonableness. It was well put by **Professor Wade** in a passage in his treatise on ***Administrative Law***, 5th Edition at page 362 and approved by in the case of the **Boundary Commission [1983] 2 WLR 458, 475**:

"The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too lightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended."

35. I am also mindful of the decision of this Court in **Constitutional Petition Number 359 of 2013 Diana Kethi Kilonzo vs. IEBC and 2 Others** in which it was held that:

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

36. Similarly, in this case the applicant made an application for approval of his development plan. The mere fact that his application was not favourably considered does not elevate his case to the standard of judicial review.
37. Having considered the foregoing it is my view that the applicant has not established that his application for judicial review is merited.
38. It is my view that the issues raised by the applicant herein ought to have been raised by way of an appeal rather than judicial review.

Order

39. Consequently, the Notice of Motion dated 18th March, 2013 fails and is dismissed with costs.

Dated at Nairobi this day 15th day of January, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kirugi for Mr Mutiso for the ex parte applicant

Mr Ndolo for Mr Munyalo for the Respondent

Cc Patricia