



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 159 OF 2014

REPUBLICAPPLICANT

VERSUS

NAIROBI CITY COUNTYRESPONDENT

Ex-parte

THE JUNCTION LIMITED

JUDGEMENT

1. The ex parte Applicant, the Junction Limited is the owner of the property known as the Junction Shopping Mall situated on L.R. No.330/127/Dagoretti Corner, Ngong Road in Nairobi County.
2. The Applicant's case is that on 12th September, 2013, the Respondent issued it with a notice under the Public Health Act requiring it to remove what was stated to be illegal structures on the premises. According to the Applicant the alleged illegal structures were well designed stalls located on open space in the premises and they did not in any way interfere with the shoppers or obstruct the existing facilities within the premises.
3. Upon receiving the notice, the Applicant held a meeting with the Respondent's Chief Public Health Officer and the Officer assured the Applicant that it would withdraw the notice if the Applicant resubmitted the architectural drawings of the premises to reflect and regularise the stalls. As agreed, the Applicant prepared the drawings and submitted them to the Respondent on 2nd November, 2013 and on 19th December, 2013 the Respondent approved the drawings and the stalls.
4. Despite compliance, on 14th April, 2014 the Respondent served the Applicant with summons to attend the Subordinate Court of the First Class Magistrate at City Hall Nairobi on 29th April, 2014 in Criminal Case No. 228A of 2014 to answer the charge of failing to comply with the notice dated 12th September, 2013. The Applicant being aggrieved by the said action moved the Court on 25th April 2014 and obtained leave to commence these judicial review proceedings.
5. Through the notice of motion application dated 13th May, 2014 and filed in Court on the same date, the Applicant therefore prays for orders;

“i. THAT an Order of Prohibition do issue to prohibit the Subordinate Court of first class magistrate at the City Hall, Nairobi from hearing Criminal Case Number 228A/14 pursuant to a summons issued to the ex-parte applicant dated 7th March, 2014 and served on 14th March, 2014.

ii. THAT an Order of Certiorari do issue to remove into the High Court for purposes of it being quashed the summons issued to the ex-parte Applicant dated 7th March 2014 and served on 4th April 2014.

iii. THAT costs of this Application be in the cause.”

6. The Respondent opposed the application through the replying affidavit sworn by its Chief Officer of Health Services Dr Robert Ayisi. Through the said affidavit it is averred that the Applicant was indeed issued with notice serial No. 153 to comply with public health requirements.
7. It is, however, denied that a meeting was held between the Respondent's Chief Public Health Officer and the Applicant. It is the Respondent's case that if any such meeting ever took place, there was no undertaking from the Respondent that a notice which had been legally served would be withdrawn.
8. It is the Respondent's case that the drawing and submission of the plans was not part of the requirement as per the notice issued and served upon the Applicant on 12th September, 2013 and in any case the said drawing was purportedly submitted and approved on 19th December, 2013 after the period of the notice had lapsed.
9. According to the Respondent, the Applicant's premises was indeed re-inspected with a view to ascertaining whether the Applicant had complied with the notice but it was found that it had not done so. Consequently the Respondent made an official complaint to the Court at City Hall and that is when the summons was issued.
10. It is the Respondent's case that the applicable law was complied with in charging the Applicant in Court for non-compliance with the requirements of the Public Health Act. Further, that the Applicant was properly charged under Section 115 as read together with sections 118 and 119 of the Public Health Act and that the notice served on the Applicant specified the nuisance which it was required to remove within seven days.
11. The Respondent asserts that the proceedings commenced against the Applicant in the Magistrate's Court are not an abuse of the court process and the single business permit issued to the Applicant does not exempt the Applicant from complying with the requirements of the Public Health Act.
12. It is the Respondent's case that the submission and approval of development plans is provided for under the Physical Planning Act, Cap 286 and what the Respondent sought to enforce were the requirements of the Public Health Act.
13. The Applicant submitted that as at the time the Respondent applied for the summons dated 7th March, 2014, no offence had been committed as the Respondent who was the complainant in the intended criminal case had given approval to the Applicant's development plans. It is the Applicant's case that the Respondent does not claim or state in the replying affidavit of Dr Robert Ayisi that the Applicant has, since approval was given, caused a nuisance or created any conditions liable to be injurious or dangerous to the health of any person.
14. The Applicant asserts that any delay in the submission of the plans was cured by the approval given by the Respondent on 19th December, 2013.
15. The Applicant contends that the actions of the Respondent amounts to an abuse of process and contravenes its legitimate expectation that it would not be charged once the plan was approved.
16. On abuse of court process the Applicant referred to the decision in **Republic v Chief Magistrate Criminal Division & Another ex-parte Mildred Mbuya Joel [2014] eKLR** where it was stated that:

“However, if an applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings”

17. According to the Applicant, it is an abuse of the court process to institute criminal proceedings based on a notice that had been overtaken by events as a result of the approval of the Applicant's plans by the Respondent on 19th December, 2013. The Applicant asserts that the decision was irrational, unreasonable, unlawful and an abuse of the court process as any nuisance caused by the stalls abated as soon as the Respondent approved the Applicant's re-submitted plans.

18. On the issue of legitimate expectation, the Applicant asserted that once the re-submitted plans were approved, it did not foresee a situation where it was going to be charged as a result of a notice issued prior to the approval of the re-submitted plans. It is the Applicant's case that the Respondent's conduct in approving the plans created the assurance and legality that the Respondent had no objection or dispute with the stalls. It is the Applicant's case that the approval created the legitimate expectation that the matter would not be reconsidered unless there was a fresh breach.
19. The Applicant relied on the decision in **Republic V Registrar of Trademarks ex-parte Sonny Holdings Limited & another [2012] eKLR** to support its arguments. In that case Warsame, J (as the then was) considered the doctrine of legitimate expectation and explained its applicability as follows:

“The principle of legitimate expectation seeks to enforce a promise or a benefit from a public authority. Pollard, Papworth & Hughes in *Constitutional and Administrative Law 4th Edition (2007)* define the legitimate expectation as follows:

“It is a principle of good administration or of administrative fairness that, if a public authority leads a person or body to expect that the public authority will, in future, continue to act in a way either in which it has regularly acted in the past, or on the basis of a past promise or statement which represents how it proposes to act, then, prima facie, the public authority should not, without an overriding reason in the public interest, resile from that representation and unilaterally cancel the expectation of the person or body that the state of affairs will continue.”

For a legitimate expectation to arise, there must be a promise or representation that arises from the public body, that would be reasonably expected to continue. In *Council of Civil Service Unions Vs Minister for Civil Service [1984] 3 All ER 935* the principles that are taken into consideration for the existence of legitimate expectation to be said to have occurred: Lord Diplock stated that the decision:

?.....must affect the other person by depriving him of some benefit or advantage which either -

(i) he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue doing until there has been communicated to him some rational grounds for withdrawing it in which he has been given an opportunity to comment, or

(ii) He has received assurance from the decision maker that it will not be withdrawn without giving him first an opportunity to advance reasons for contending that they should not be withdrawn.”

20. A perusal of the documents exhibited through the verifying affidavit sworn by James Matheri on 24th April, 2014 confirms the Applicant's case. The notice dated 12th September, 2013 required the Applicant to:

“Remove all the illegal structures which you have established on the passage way (serving as business establishments) interfering with free movement of people within the premises.

Remove all the illegal structures which you have erected under the stairway (currently used as food establishments).”

21. Upon issuance of the said notice it appears that the Applicant engaged the Respondent. The evidence of the engagement is contained in a letter dated 9th October, 2013 addressed to the Senior Property Manager of the Junction Shopping Mall by the Respondent's Medical Officer of Health, Dr Robert Ayisi. The Letter stated:

“REF: SANITATION OF PREMISES JUNCTION SHOPPING MALL LR NO. 330/271

WAIYAKI WAY

The above matter refers.

Kindly be reminded that you were required to submit approved drawings for the alterations done but upto date you have not done so.

The meeting you had with the Chief Public Health Officer (Mr. David Kiarie) in his office also discussed and agreed on submissions of plans.

For this reason, the notice cannot be withdrawn and further action will be taken if the drawings are not submitted within the time given in the notice.”

22. That letter confirms two things namely that there was a discussion of the notice by the parties herein and that once the plans were submitted and approved, the notice would be withdrawn.
23. The plans were indeed submitted by the Applicant and approved by the Respondent on 19th December, 2013. Nevertheless, the Applicant was issued with summons on 7th March, 2014 requiring attendance in Court on 29th April, 2014 to answer to charges as per the notice dated 12th September, 2013.
24. This indeed amounts to abuse of the court process as there was no longer a case to which the Applicant could answer to as it had complied with the directions of the Applicant by submitting and having the plans approved.
25. Secondly, the Respondent's action breached the Applicant's legitimate expectation that once its plans were approved the notice would no longer be enforceable. There was a promise implied in the Respondent's agreement with the Applicant that the Applicant resubmits the plans which plans were to include the development of the stalls. The Respondent cannot be allowed to go back on its assurance to the Applicant that everything would be in order once the plans were approved. The Respondent had a duty to keep its part of the bargain once the Applicant fulfilled what was required of it.
26. At this stage the logical conclusion would be that the Applicant has established its case and the orders sought should issue accordingly. However, that is not the case in this matter as the Applicant did not comply with a substantive rule in bringing this application.
27. Order 53 Rule 3(2) of the Civil Procedure Rules, 2010 clearly provides that where an application for judicial review orders relates to any proceedings in or before a Court, and the object is either to compel the Court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the application shall be served on the presiding officer of the Court. The requirement is mandatory. The Magistrate's Court is the implementing organ of any quashing orders issued in respect to proceedings before that Court and that is why the Magistrate's Court is a necessary party. In this matter there is no evidence that the magistrate was served and neither was the magistrate made a party to the proceedings.
28. This defect goes to the root of the matter and the defect cannot be cured by Article 159(2)(d) of the Constitution which requires substantive justice to be done in cases before courts. The orders sought herein though couched as if directed at the Respondent are actually directed against the Magistrate's Court at City Hall. In the circumstances I find that the application is fatally defective and I decline to grant the orders sought. The application is therefore dismissed.
29. In view of my findings in this matter, I expect the Respondent to withdraw Criminal Case No. 228A of 2014 from the Magistrate's Court at City Hall, Nairobi.
30. In view of the outcome of this matter, I find it unjust to award costs to any of the parties. Each party will therefore bear own costs of these proceedings.

Dated, signed and delivered at Nairobi this 24th day of June, 2015.

W. KORIR,

JUDGE OF THE HIGH COURT