



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**JR MISC. CIVIL APPLICATION NO. 160 OF 2015**

**IN THE MATTER OF AN APPLICATION TO APPLY FOR JUDICIAL REVIEW ORDERS OF MANDAMUS**

**REPUBLIC .....APPLICANT**

**VERSUS**

**THE COUNTY GOVERNMENT OF MACHAKOS.....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**EX PARTE: ELIJAH WAWERU MATHARE & ELIZABETH WANJIKU MATHARE**

**(SUING AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE JOHN WALLACE MATHARE)**

**JUDGEMENT**

**Introduction**

1. By a Notice of Motion dated 10<sup>th</sup> June, 2015, the *ex parte* applicants herein, **Elijah Waweru Mathare & Elizabeth Wanjiku Mathare**, seek the following orders:

**1. That the honourable court be pleased to issue Judicial Review Orders of Mandamus to compel the County Government of Machakos to issue development approvals to the Applicants in regard to development of Parcel Land LR No. 337/11112 Athi River.**

**2. Costs be to the Applicants.**

**Applicants’ Case**

2. According to the applicants who claim to be administrators of the estate of the late **John Wallace Mathare** (deceased), the estate of the deceased owns land parcel LR. No. 337/112 Athi River (hereinafter referred to as “the Plot”).
3. They contended that they applied for development approvals for the said plot but despite having paid and presented all the requisite documents and subsequently appearing variously before the Town Administrator and the Mavoko Town Planning Committee they were denied development approvals to develop plot.
4. They averred that due to the aforesaid failure to issue development approval, they cannot develop their property or at least put it to economic use or secure it and were therefore aggrieved and hold

the delay in approving and/or communication the decision as being unreasonable.

### 1<sup>st</sup> Respondents' Case

5. On their part the 1<sup>st</sup> Respondent in opposing the application averred that the decision to deny the approval was communicated vide a letter dated 25<sup>th</sup> September, 2013, a copy of which was exhibited by the applicants in which the Town Planner informed them of the lack of approval of their plans and the reason thereof.
6. To the 1<sup>st</sup> respondent, the law governing approval of development plans gives a mandatory proviso of obtaining approvals before undertaking any development on any particular parcel of land within the 1<sup>st</sup> Respondent's jurisdiction and the failure to do so is an offence. However, the letter dated 17<sup>th</sup> December, 2007 exhibited by the ex parte Applicants, the applicants begun development before the approvals were issued and acknowledged instructing their contractor to continue with the said development in absence of the same. To the 1<sup>st</sup> respondent, the ex parte Applicants have already committed an offence and are merely seeking the order of this court to ratify their offensive action as legal contrary to the maxim that he who comes to equity must come with clean hands.
7. The 1<sup>st</sup> respondent further averred that the ex parte Applicants are guilty of material non-disclosure and misrepresentation thus undeserving of the orders sought by failing to inform this honourable court that they knew their approvals were denied and the reason thereof. Further it was contended that the ex parte applicants are guilty of material non-disclosure in failing to inform the court that the said parcel of land is under investigation by the 1<sup>st</sup> Respondent and the National Land Commission on the basis that though set aside as a Public Utility (abbatoir), it was registered in the name of a private individual. According to the 1<sup>st</sup> respondent, it is trite that when a person makes an ex parte Application in court he is under an obligation to make full disclosure of all material facts, failure to which the court will set aside the orders obtained on the imperfect statement.
8. It was asserted that the Ex parte Applicants erred in seeking judicial review orders against the 1<sup>st</sup> Respondent yet having acknowledged the letter dated 25<sup>th</sup> September, 2013 that 1<sup>st</sup> Respondent had communicated to the National Land Commission concerning the property in question and was awaiting their reply. It was therefore the 1<sup>st</sup> respondent's case that these proceedings ought to have been instituted against the National Land Commission and not the 1<sup>st</sup> Respondent as both the 1<sup>st</sup> Respondent and the ex parte Applicants are waiting on the response of the National Land Commissions as to the status of the parcel of land.
9. To the 1<sup>st</sup> respondent, the ex parte Applicants' application is wanting in both content and form and thus cannot warrant the orders sought since orders of *mandamus* compel the performance of a duty imposed by statute and where statute leaves discretion as to how that duty is to be performed, the said orders cannot compel the performance of that duty in a specific way. Here, however, the ex parte Applicant's application seek a specific manner of performing a duty by the 1<sup>st</sup> Respondent in its favour by seeking this honourable courts orders to have the 1<sup>st</sup> Respondent mandatorily issue approvals not even leaving room for the 1<sup>st</sup> Respondent to exercise its statutorily given mandate to deny the approvals. To the 1<sup>st</sup> respondent, the said sought order is not justiciable and cannot be granted by this honourable court.

### Determinations

10. Having considered the application, the affidavit in support of and in opposition to the Motion, this is the view I form of the matter.
11. The parameters of judicial review orders of *mandamus* were set out by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** as follows:

**“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...”

12. It is not in doubt that the decision whether or not to issue development plan is an exercise of discretion on the part of the 1<sup>st</sup> respondent. In such circumstances the Court is only entitled to interfere with the exercise of discretion in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See **Republic vs. Minister for Home Affairs and Others Ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 [2008] 2 EA 323.**
13. However when it comes to orders of *mandamus*, on the authority of **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others** (supra) 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. In my view whereas the 1<sup>st</sup> Respondent is under an obligation to consider an application for approval of a development plan, this Court cannot, however, by way of an order of *mandamus* compel the 1<sup>st</sup> Respondent to issue such a plan as the Court can only compel the 1<sup>st</sup> Respondents to consider the same and make a decision one way or the other but not in a particular manner. However the 1<sup>st</sup> Respondent is obliged under Article 47(2) to furnish the applicant with written reasons after considering the application where the decision is likely to adversely affect the applicants. Where no reasons are given and the decision arrived at adversely affects the applicants the Court would as well be entitled to conclude that there were no good reasons for exercising the discretion in the manner it was exercised. However, as was held in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** the Court would be entitled to interfere where in making the decision the decision maker fails to take into account relevant matters or takes into account irrelevant matters.
14. In this case, the 1<sup>st</sup> respondent relies on a letter dated 25<sup>th</sup> September, 2013 from the applicants to the 1<sup>st</sup> respondents informing the respondents that the Town Planner had informed the applicants verbally that the plans were not approved due to the fact that the 1<sup>st</sup> respondent had requested for the status of the plot from the National Lands Commission.
15. Article 47 of the Constitution provides:

***(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***

**(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.**

**(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—**

**(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and**

**(b) promote efficient administration.**

16. Pursuant to the said Article, Parliament enacted the *Fair Administrative Action Act, 2015* and section 4 thereof provides:

**(1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.**

**(2) Every person has the right to be given written reasons for any administrative action that is taken against him.**

**(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-**

**(a) prior and adequate notice of the nature and reasons for the proposed administrative action;**

**(b) an opportunity to be heard and to make representations in that regard; (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;**

**(d) a statement of reasons pursuant to section 6;**

**(e) notice of the right to legal representation, where applicable;**

**(f) notice of the right to cross-examine or where applicable; or**

**(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.**

**(4) The administrator shall accord the person against whom administrative action is taken an opportunity to-**

**(a) attend proceedings, in person or in the company of an expert of his choice;**

**(b) be heard;**

**(c) cross-examine persons who give adverse evidence against him; and**

**(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.**

**(5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.**

**(6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the Constitution, the administrator may act in accordance with that different procedure.**

17. The thread that runs across both the Constitutional decree and the statutory mandate is that the reasons for the adverse decision must be in writing. In this case, there is no positive averment or evidence that these provisions were complied with by the 1<sup>st</sup> respondent.
18. The broad grounds on which the Court exercises its judicial review jurisdiction were restated in the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**. In that case the Court cited with approval **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** and held:

**“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. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...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.”**

19. Under section 5 of the ***Fair Administrative Action Act***, some of the grounds for seeking and granting judicial review orders are that there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law.
20. However, according to ***Judicial Review Handbook***, 6<sup>th</sup> Edition by **Michael Fordham** at page 5, judicial review is a central control mechanism of administrative law (public law), by which the judiciary discharges the constitutional responsibility of protecting against abuses of power by public authorities. It constitutes a safeguard which is essential to the rule of law: promoting the public interest; policing parameters and duties imposed by Parliament; guiding public authorities and securing that they act lawfully; ensuring that they are accountable to law and not above it; and protecting the rights and interests of those affected by the exercise of public authority power.
21. Under the current Constitution, this Court is empowered to invoke its judicial review jurisdiction in the proceedings of this nature in order to grant appropriate orders including the orders sought herein. In other words judicial review jurisdiction has now been fused with the remedies under the Constitution and this is clearly discernible from the remedies crafted under section 11 of the ***Fair Administrative Action, Act***.
22. Like the Biblical mustard seed which a man took and sowed in his field and which is the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, judicial review has been said to stem from the doctrine of *ultra vires* and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three “I’s”) and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. It has been said that the growth of judicial review can only be compared to the never-ending categories of negligence after the celebrated case of **Donoghue vs. Stephenson** in the last century. See **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK)**.
23. Therefore the failure to adhere to the letter and spirit of the Constitution constitute a ground for the grant of orders of judicial review. In this case there is no evidence that the provisions of Article 47 of the Constitution were complied with by the 1<sup>st</sup> respondent.

## **Order**

24. Accordingly the order which commends itself to me and which I hereby grant is an order of *mandamus* compelling the 1<sup>st</sup> Respondents to consider the applicants' application for approval of the development plan and furnish them with reasons thereof in the event that the said decision is adverse to the interests of the applicants within 30 days from the date of service of this order. In default of such reasons, then the 1<sup>st</sup> Respondents shall be deemed not to have any reasons for not approving the said plan in which event an order of *mandamus* shall issue compelling the 1<sup>st</sup> Respondent to approve the said plan.

25. The applicant will have the costs of this application.

26. It is so ordered.

**Dated at Nairobi this 27<sup>th</sup> day of October, 2015**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr Njiraini for the exp Applicant**

**Mr Chege for Mr Kyalo for the 1<sup>st</sup> respondent**

**Cc Patricia**