



IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISC. CIVIL APPL. NO. 45 OF 2010

BETWEEN

REPUBLICAPPLICANT

AND

THE ATTORNEY GENERAL..... 1STRESPONDENT

THE CITY COUNCIL

OF NAIROBI2ND RESPONDENT

THE COMMISSIONER OF LANDS.....3RD RESPONDENT

CHIEF MAGISTRATE NAIROBI.....4TH RESPONDENT

THE COMMISSIONER OF POLICE.....5TH RESPONDENT

AND

EXPARTE

PETER GATHECHA GACHIRI

MICHAEL MUTUNGA MAIGWA

JUDGMENT

1. The 1st *ex-parte* applicant challenges a notice issued by the Nairobi City Council (“City Council”) ordering him to stop construction and cancelling approved building plans. He also seeks to block the arrest and stop charges of fraud being preferred against him on the ground that there is a

pending suit in the High Court which will determine the lawful owner of the suit property.

2. Before the hearing, the Court was informed that the 2nd *ex-parte* applicant, who was the 1st applicant's foreman, was tried and acquitted in 2012 of the offence of erecting a building structure without approved plans contrary to **section 30(1)** of the ***Physical Planning Act in Nairobi Criminal Case No. 55 of 2010***. In the circumstances this matter is limited to the case of the 1st *ex-parte* applicant ("the applicant") who is yet to be charged in court.
3. This matter was filed prior to the promulgation of the Constitution when the Attorney General had the power to prosecute criminal offences. **Article 157** of Constitution now vests such power in the Director of Public Prosecutions ("the DPP"). Accordingly reference in shall be made to the DPP instead of the Attorney General where the circumstances permit.

Background

4. The applicant's case is outlined in the Statutory Statement dated 17th February 2010 and the verifying affidavit and supplementary affidavit of Peter Gathecha Gachiri sworn on 17th February 2010 and 14th February 2011 respectively.
5. The applicant states that he is the owner of LR No. NAIROBI BLOCK 75/1036 ("the suit property"). He states that he was issued with an approval to develop the same by the City Council on 16th November 2009. On 1st February 2010, while he was in the process of developing the plot, the City Council entered his premises and asked him to stop further construction by issuing an enforcement notice and charging the 2nd applicant.
6. The applicant complains that he was denied a hearing prior to the enforcement notice being issued and that he ought to have been given the adequate notice and an opportunity to present documents authenticating his title to the property. The applicant contends that the decision by the City Council was made in bad faith and for ulterior motives as evidenced by the fact that the Director of Planning had approved the construction and issued the cancellation within a period of three months thereafter.
7. The applicant alleges that a third party instigated investigations into the title of the suit property on the ground that it was fake and as a result he fears that he will be arrested and charged. He contends that it is the High Court that has jurisdiction to inquire into the issues relating to the purported double allocation of the suit property. He avers that the intended prosecution will violate his right to a fair trial because the determination of the owner of the suit property cannot be exhaustively determined before the Magistrates Court.
8. In the application dated 2nd March 2010, the applicant seeks the following reliefs from this court:
 - a. *That an order of prohibition do issue directed against the second respondent restraining and prohibiting it from demolishing the first applicant's building erected on L.R. No. NBI Block 75/1036 Mumia's Road or in any way interfering with the Applicant's user, development of the said plot, or enforcing any notice to the applicant in regard thereto or interfering with the applicants enjoyment of the said premises to wit L.R. Block 75/1036 Mumias road pending hearing and determination of **HCCC No. 307 of 2009-Joseph Mulusya & others v IDB Capital & others***
 - b. *That an order of prohibition do issue directed against the Chief Magistrate Nairobi or any other Magistrate under him or her manning the City court from commencing, continuing or entertaining the prosecution or in any other manner facilitating the prosecution of the applicants herein receiving any evidence against the applicant or conducting any further proceedings in Nairobi City Court Case No. 55 of 2010 or any other case relating to the applicant's occupation/enjoyment ownership, development and user of L.R. No. 75/1036 against the applicant pending the hearing and determination of Nairobi High Court Central Registry Civil Case No.*

- 307 of 2009 *Joseph Mulusya Wambua & others vs IDB Capital & Others*
- c. That an order of prohibition do issue directed at the Commissioner of Police restraining and prohibiting him or his agents and officers under his authority from effecting the arrest of, investigating, inquiring into, questioning, issuing summons directed at or in any other manner harassing or intimidating the 1st applicant herein Peter Gathecha Gachiri on account of the matters arising out of his acquisition, ownership, user, enjoyment and development of L.R. No. 75/1036 Mumias road pending the hearing and determination of Nairobi High Court Central Registry Civil Case No. 307 of 2009 *Joseph Mulusya Wambua & others vs IDB Capital & Others*
 - d. That an Order of prohibition do issue directed at the Attorney General of the Republic of Kenya restraining and prohibiting him from initiating, continuing the prosecution of or in any other manner facilitating the prosecution of the Applicants herein on account of the issue of acquisitions, ownership, development, enjoyment and user of L.R. No. NVI/Block 75/1036 Mumias road pending the outcome of Nairobi, Central Registry Environment and Land Case No. 307 of 2009 between *Joseph Mulusya Wambua & others vs IDB Capital & Others*
 - e. That an order of prohibition do issue directed against the Commissioner of lands restraining and prohibit him his servant, registrars and agents from interfering with the 1st applicant's registration as the owner of .L.R. No. NBI/Block 75/1036 and from interfering with or cancelling the registration particulars of the said parcel pending the hearing and final determination of Nairobi High Court Central Registry Civil Case No. 307 of 2009 *Joseph Mulusya Wambua & others vs IDB Capital & Others*
 - f. That an order of certiorari do issue to bring into this Honourable Court for the purpose of it being quashed the notice dated 1st February 2010 from the 2nd respondent purporting to cancel and/or disapprove the applicant's development of NBI/Block/75/1036 Mumias ROAD buruburu
 - g. That cost of and incidental to this application be borne by the respondents

Respondents' case

9. The 1st, 3rd and 4th respondents ("the respondents") oppose the application and submit the court should not grant the reliefs sought. They submit that the Police have discretion to investigate offences and that the office of the DPP is independent. They submit that the applicant has not made a case to warrant the court's interference in either the investigation or intended prosecution. They rely on the cases of ***Ismail Mohamed Garat alias Korio & 5 Others v The Senior Principal Magistrate Garissa & anothe, Garissa Petition No. 1 of 2012 (Unreported)*** and ***William S.K. Ruto & Another Nairobi HCCC No. 1192 of 2005 [2010]eKLR*** in support of the proposition.
10. The City Council opposes the application through the deposition of Patrick Tom Odongo, its Director of City Planning, sworn on 21st July 2010. He depones that sometime in early 2010, officers from his department undertook an audit of the developments in Buruburu area in order to ensure compliance with the law. The audit established that the applicant had obtained approval to develop the suit property by misrepresentation. He stated that the applicant had been granted approval on the basis that the suit property did not constitute part of any disputed private or public utility allocation. In the course of the audit, it emerged that the suit property had been set aside and earmarked for development of a public car park. The City Council took the decision to cancel the building permission granted to the applicant and advised him to discontinue construction. Despite service of the enforcement notice, the applicant continued with construction on the suit property as a result of which his foreman was arraigned in court and charged.
11. The City Council asserts that it is within its power to prohibit or control the use and development of land and buildings within the area of Local Authority and also to consider and approve all development applications and grant all development permissions and as such, the applicant is not entitled to the orders sought. The City Council submitted that the applicant having failed to appeal against the cancellation notice, it could not challenge the notice through the process of court. Counsel for the City Council relied on the cases of ***Ali and 3 others v City Council of Nairobi [2003] KLR*** and ***Speaker of the National Assembly v Karume [1990 – 1994] EA 546*** to support the proposition that the avenue of appeal against the cancellation notice was open to the applicant

and thus he could not invoke the court's jurisdiction having failed take advantage of his statutory right.

Determination

12. I have considered the written and oral submission and the prayers in the motion and two issues emerge for consideration. The first concerns the cancellation of the applicants development approval and the second relates to the investigation, arrest and charging of the applicant.
13. The orders of judicial review in the motion are sought pending hearing and determination of **Nairobi HC ELC 307 of 2009 Joseph Wambua Mulusya, Mulusiah Land Consultants Ltd, Eagle Supermarket Ltd v IDB Capital Ltd, James Kanhru Gachiri, PV Rao and Kolluri Kamastry** ("the High Court Case"). The applicant's case therefore hinges on the outcome of the proceedings in that case.
14. The applicant has annexed the pleadings in the High Court Case to his verifying affidavit at pages 39 to 51. The documents evidencing the case are as follows; the Certificate of Urgency and accompanying Chamber Summons and Supporting Affidavit of Joseph Wambua Mulusya and the Defence of the 1st, 3rd and 4th Defendants. The plaint is not annexed hence it is difficult to make out the cause of action and reliefs sought in the matter. However, from what I can make out is that the plaintiff filed a suit against the bank, receivers and a third party who had purchased the business undertaking from the receivers on account of default in servicing the loan. The property in dispute in that case is NAIROBI/BLOCK 75/36 which is the same property the applicant asserts in this case is his. What is interesting though is that the applicant is not a party to the High Court case despite it being litigation concerning the suit property which he claims to own. It is therefore difficult to see the High Court case concluding in his favour as the court cannot make an order in his favour without him joining the case. It is with this in mind that I will now deal with two issues I have identified.

Notice of Cancellation of Approval

15. Prayers 1 and 7 deal with the the letter dated 1st February 2010 referenced, 'CANCELLATION/DISAPPROVAL OF DEVELOPMENT ON NBI/BLK/75/1036-MUMIAS ROAD BURUBURU-PLAN REG. NO. EU 591 OF 16/11/2009, which informed the applicant that approval granted was cancelled on the ground that, "*It has been established that the approval was granted inadvertently as you knowingly misrepresented facts to this Council to obtain approval. Information reaching this office reveals that the property was marked/planned for public car parkThis is therefore against the approval conditions.....*"
16. Prayer 1 seeks an order of prohibition pending the hearing and determination of High Court Case. It cannot be granted because there is no nexus between the subject of the investigation and the case in which the applicant is not a party. I decline to such a prayer as to do so would subject the City Council's statutory authority to enforce the **Physical Planning Act (Chapter 286 of the Laws of Kenya)** to the vagaries of court proceedings which neither this Court nor the parties have control over.
17. Prayer 7 seeks orders to quash the letter of 1st February 2010. The said letter was followed by an enforcement notice issued on the same day. The issue arising from approval of development projects under the **Physical Planning Act**, ("the Act"). According to its long title, it is an "*Act of Parliament to provide for the preparation and implementation of physical development plans and for connected purposes.*" The City Council has statutory mandate under **section 29** of the Act to regulate and monitor development plans and activities within its area. **Section 30** makes it an offence for any person to carry out development within the area of a local authority without a development permission granted by the local authority. **Section 38** empowers the Local Authority to issue of an enforcement notice where the developer proceeds to develop without permission or where the conditions attached to the development permission have been breached.

18. The Act provides for avenues of appeal for a person aggrieved by the enforcement notice. **Section 38(3)** provides that “Unless an appeal is lodged under subsection (4) an enforcement notice will take effect after the expiration of such period as may be specified in the notice.” Any person aggrieved by the issuance of the enforcement notice may in writing appeal to the respective liaison committee within sixty days of receipt by him of notice of such decision as provided for under **section 13** of the Act.

19. I agree with the respondents that the applicant had an avenue through which to contest the decision on its merits through the mechanisms provided under statute but has not done so. The Act provides a well tiered mechanism of handling disputes. It is an established principle that where there exists an alternative remedy, then the same ought to be exhausted before this court’s jurisdiction is invoked and should only intervene in exceptional circumstances. As regards the Act, I agree with the decision in **Republic v City Council of Nairobi ex parte Leah Aida Wambete [2010]eKLR** where the court observed, “Section 38 of the Act sets out an elaborate procedure to be followed in the issuance, execution and determination of any grievances relating to Enforcement Notices. The said provisions read alongside sections 13 and 15 of the same Act reinforces the position that, before a party exhausts the procedure set out therein, any action in the High Court would be premature.” (See also **Speaker of the National Assembly v Karume [1990-1994] EA 552** and **International Centre for Policy and Conflict & 5 others v The Hon. Attorney General & 4 others, Nairobi Petition 552 of 2012, [2013]eKLR**).

20. In the circumstances, I am satisfied that the applicant has avenue to contest the enforcement notice and as such I decline to grant the orders sought in prayer 7 of the Motion.

Investigation, Arrest and Prosecution of the applicant

21. The applicant’s fears are set out in the following paragraphs of his verifying affidavit;

[24] THAT the arrest of my foreman and his arraignment in court has left me with the distinct impression that my neighbour is using the enforcement machinery of the Second Respondent and he criminal justice system to intimidate, harass and bring pressure to bear upon myself to concede my right over L.R. No. 75/1036 Buruburu.

[25] THAT the same person has instigated investigations into allegations that my title to L.R. No. 75/1036 is fake yet as shown from the certificate of official search annexed on pages 16A-17 of the bundle, the Registrar has confirmed that I am the registered owner of the land in question

[26] THAT I am fearful that the First Respondent will try and arrest me and charge me in court as I am informed by the employees of the 3rd respondent who raided my premises that their C.I.D were looking for me.

22. In his deposition, the applicant refers to the complaint against him being instigated by an unnamed third party. In the absence of particulars of the said person, the relationship with that person and how the process is being misused or abused, it is difficult to make a case to support the contention that the process is being abused. It also makes it difficult for the respondents to respond to the allegations. Moreover, it would be improper to make a finding against a third party, whether known or unknown, with giving him a chance to defend himself. I therefore find that there is insufficient evidence to conclude that the criminal process is being abused as alleged or at all.

23. There is also no evidence that the 3rd respondent’s action of investigating him is actuated by malice or is for an ulterior motive or is otherwise an abuse of court process. The issue of whether the applicant’s title is fraudulent is a legitimate matter for inquiry and it is not for this court to assume the role of the 5th respondent and carry out a forensic examination of all the evidence.

24. I am afraid this is not one of the circumstances in which the Court would ordinarily intervene to

stop the Police from exercising its investigative mandate. After the investigation is concluded, the DPP will exercise independent judgment to determine whether or not to commence criminal proceedings against the applicant.

25. The contours of the powers of the DPP are set out in **Article 157** of the Constitution. The Office of the DPP exercises discretion as to whether or not to institute criminal proceedings against a person or body. In the discharge of its functions, the office is subject only to the Constitution and the law. This court will not ordinarily interfere with the free exercise of the independence of that office unless it is shown that there is a breach of the Constitution or the law.

Disposition

26. It is apparent that the applicant's case cannot succeed. Consequently, the Notice of Motion dated 2nd March 2010 is dismissed with no order as to costs.

DATED and DELIVERED at NAIROBI this 31st day of January 2014

D.S. MAJANJA

JUDGE

Ms Kimere instructed by Gichuki King'ara and Company Advocates for the ex-parte applicants.

Ms Chege, Litigation Counsel, instructed by State Law Office for the 1st, 3rd and 4th respondents.

Mr Mutua instructed by Kithi and Company Advocates for the 2nd respondent.

Mr Njogu, Litigation Counsel, instructed by the Director of Public Prosecutions for the 5th respondent.