



IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISC. APPL. NO. 143 OF 2013

BETWEEN

REPUBLIC.....APPLICANT

AND

ATTORNEY GENERAL.....1ST RESPONDENT

DIRECTOR OF PHYSICAL PLANNING....2ND RESPONDENT

AND

EXPARTE

JACOB WAGORA

JOHN WAINYOIKE

REV. EVANSON N. GITU

RAPHAEL KARURI (suing as officials of

ONGATA RONGA/KWARE PLOT OWNERS ASSOCIATION)

JUDGMENT

Introduction

1. The ex-parte applicant ('the applicant') is an association registered under the ***Societies Act (Chapter 108 of the Laws of Kenya)***. It was registered as a society on 12th June 2012 and it brings the Notice of Motion dated 17th May 2013 seeking the following prayers.
1. *That an order of certiorari to quash the Ongata Rongai Development Plan (Revised) Ref No. KAJ.527.2008.02 signed by the Director of Physical Planning on 22nd January 2013 and approved by The Minister on 5th February 2013.*
2. *That an order of prohibition to prohibit the Director of Physical Planning from publishing the*

- said Development Plan Rev. No. AKJ.527.2008.02 on the Kenya Gazette.
3. That an order of mandamus to compel the 2nd respondent to include the objections raised by the Applicant in the Development Plan and/or give reasons as required by the Physical Planning Act.
 4. That costs of this Application be provided for.
 5. Such further orders and other reliefs that the Honourable Court may deem just and expedient to grant.
2. The Motion is supported by the statutory statement dated 2nd May 2013 and the verifying affidavit of Jacob Wangora sworn on 22nd May 2013. The application is opposed by the replying affidavit of Christopher D. Kitonga sworn on 27th June 2013. Both parties filed written submissions which were duly highlighted at the hearing.

Background and Facts

3. The matter in issue concerns the development of the Ongata Rongai Development Plan No. KAJ 527.2008.02 (“the Development Plan”) for Ongata Rongai in Kajiado County under the **Physical Planning Act (Chapter 286 of the Laws of Kenya)** (“the Act”).
4. The facts leading up to the approval of the Development Plan are as follows. The 2nd respondent, the Director of Physical Planning (‘the Director’), prepared the draft Development Plan. In that regard, a notice was published in the print media to the effect that the draft Development Plan was available and open for inspection and comment from members of the public. The notice dated 14th January 2010 called for representations or objections in writing to be received by the Director within 60 days of publication of the notice in accordance with the **Act**.
5. The Director also met with stakeholders and representatives of Ongata Rongai Development Organisation (OREDO) at a meeting held on 12th March 2010 where views were received from members of the public. Following the incorporation of public views and comments, the Development Plan was presented and approved by the Minister on 5th February 2013. It is the approved plan that the applicants now seek to quash.

Applicants’ Case

6. The applicants’ are aggrieved by the fact that having participated in the public consultative meeting held on 12th March 2010, they expected that the issues they raised would be taken into account and the objections raised incorporated into the Development Plan approved by the Minister. They contend that since 2010 they have not received any communication from the Director explaining whether their objections had been factored into the Development Plan or ignored as required by the law. They claim that they were blindsided when the Director proceeded to have a different map drawn and signed and approved by the Minister.
7. The applicants refer to a letter dated 5th March 2010 written by OREDO raising several objections to the draft Development Plan. The Director replied to this letter by his letter dated 22nd April 2010 stating that, “*We have noted all the issues you have raised in objecting to the approval of the plan. We are now summarising all the comments that we have received with a view to incorporating them in the final plan.*” The applicants aver that there was no written response to the objection as required by **section 19(3)** of the **Act**.
8. The applicants contend that the Development Plan violates the residents’ right to own property and live peacefully in Ongata Rongai. They claim, inter alia, that the approved Development Plan interferes with and destroys existing property rights by creating new plots which do not exist on the ground. They contend that this will lead to numerous disputes. They also claim that Development Plan interferes with public utility plots which are for the benefit of the public.
9. The applicants therefore submit that the Development Plan threatens their right to own property

under **Article 40** of the Constitution. They aver that the Development Plan should be quashed to allow for public participation.

Respondent's Case

10. The respondents oppose the application. The 2nd respondent's case is that the procedure set out in the **Act** was followed. The Director avers that he facilitated public participation through the holding of a consultative meeting with stakeholders and members of the public including OREDO. The respondent denies having received any communication from the applicants as a group or in their individual capacities as the applicant society was only incorporated after the final map was arrived at.
11. The respondents submit that the Director considered all the views that were presented and the same were found to touch on amenity areas such as schools, road and easements which were accepted and incorporated in the Development Plan presented to the Minister for approval. The respondents submit that the Director is entitled to accommodate or decline representations made by stakeholders but he is not obliged to accept all suggestions made.
12. The respondent avers that the **Act** sets out a procedure for appealing to the Liaison Committee and thence to the High Court. He submits that since no appeal was preferred within the period prescribed, the Director certified the Plan and presented it for approval in accordance with the **Act**. In the circumstances, the respondents argue that this is no case to warrant the grant of orders. They further submit that the applicant has alternative means to contest the Development Plan.

Determination

13. The application before the court is one for judicial review. It is well established that judicial review deals with the process giving rise to the decision and not the merits of the decision. In ***Municipal Council of Mombasa v Republic and Umoja Consultants Ltd Civil Appeal No. 185 of 2001 (Unreported)*** the Court of Appeal observed 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.*"
14. Thus the issue to be resolved is whether the Director followed the process provided in the **Physical Planning Act** in coming up with the Development Plan. The process of dealing with objections to the Development Plan is set out in **section 19** of the **Act** which provides as follows;

19.(1) The Director shall, not later than thirty days after the preparation of a regional physical development plan, notify in writing to the local authority whose area is affected by the plan to make representation in respect of the plan and publish a notice in the Gazette and in such other manner as he deems expedient to the effect that the plan is open for inspection at the place or places and the times specified in the notice.

(2) The notice shall request any interested person who desires to make any representations against, or objections to the plan, shall write to the Director not later than sixty days after the date of the first publication of the notice or such date as is specified in the notice.

(3) The Director may in his discretion accommodate or decline to accommodate such representations or objections to the plan, and in either case, shall within thirty days of his decision, notify the petitioner in writing accordingly, and shall give reasons in the

case of decline.

(4) If the petitioner is aggrieved by the decision of the Director he may appeal to the relevant liaison committee under section 13 against such decision and to the National Liaison Committee under section 15 if he is aggrieved by the decision of the respective liaison committee.

(5) A person who is aggrieved by a decision of the National Liaison Committee may appeal against such decision to the High Court in accordance with the rules of procedure for the time being applicable in the High Court.

15. It is not in dispute that the Director complied with **section 19(1) and (2)** of the **Act**. Pursuant to the notice, OREDO raised a written objection to the Development Plan in its letter dated 5th March 2010 and the objection was duly acknowledged by the Director. In terms of **section 19(3)**, the Director is obliged to write to the objector stating the reasons for declining the objections. The Director did not furnish any evidence of having dealt with the objection as contemplated by **section 19(3)** of the **Act**. The letter dated 22nd April 2010 addressed to OREDO only states that the comments were being reviewed with a view to incorporating them into the Development Plan.

16. The main contention in this case is that the applicants are not entitled to the relief sought as they did not specifically lodge the written objection. The letter of objection dated 5th March 2010 from OREDO is written by Jacob Wangora, its Chairman. Subsequent correspondence, letters dated 12th April 2013 and 3rd August 2012, addressed to the Director calling for a response to the objection raised by OREDO, are written on behalf of the applicants by the same Jacob Wangora as Chairman on OREDO and the applicant society.

17. I have no doubt that the Director complied with the obligation under **Article 10** of the Constitution to engender public participation by holding a meeting with stakeholders and receiving views of from the public. However, there is a specific statutory duty to deal with written objections. A written objection was raised by OREDO in its letter of 5th March 2010. There is no evidence that the objection was dealt with by furnishing written reasons for declining to incorporate their objection in the final Development Plan forwarded to the Minister. In this respect, there is clear violation of **section 19(3)** of the **Act**. What the **Act** requires is written reasons by the Director for declining to incorporate the objections otherwise the provisions for appeal to the Liaison Committee under **section 19(4)** and thence to the High Court under **section 19(5)** would be rendered otiose. It is the written reasons furnished by the Director that provide the objector an opportunity to pursue an appeal.

18. As regards the issue of whether the applicant, Ongata Rongai/Kware Plot Owners Association, is entitled to agitate this matter. I approach the issue from the National values and principles of governance set out in **Article 10** of the Constitution which states as follows;

10. (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

(2) The national values and principles of governance include—

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

(c) good governance, integrity, transparency and accountability; and

(d) sustainable development.

19. The matter before the Court concerns development planning which if not done properly will undermine sustainable development. The letter of objection OREDO raised pertinent issues of planning which cannot be swept by a side wind. The requirement for dealing with the specific objections promotes good governance, integrity, transparency and accountability in the entire process of development planning. By its nature, development planning affects the livelihoods of thousands of people hence it is important that these values are infused in the process.

20. The objection by OREDO affected the community and the applicants as members of the community are entitled to know the reasons for declining the objection. Furthermore, two organisations, OREDO and the applicant, represent the same interests in the community. The objection by OREDO was lodged by Mr Jacob Wangora who is entitled to know its fate. I therefore find and hold that the Motion before the Court has been properly brought by a party with a direct interest in the objection and who is affected by the outcome of the process.

21. Finally, the Director's failure to respond to the written objection raised denies the objector a right to invoke the appellate process clearly set out in **section 19(4) and (5)** of the *Act*. Had the objection been dealt in accordance with the law, these proceedings would have been unnecessary as the parties affected would have appealed.

Disposition

22. For the reasons I have outlined above, I find merit in the Notice of Motion dated 17th May 2013 and I make therefore the following orders;

- a. **That an order of certiorari be and is hereby issued to quash the Ongata Rongai Development Plan (Revised) Ref. No. KAJ.527.2008.02 signed by the Director of Physical Planning on 22nd January 2013 and approved by the Minister on 5th February 2013.**
- b. **That an order of mandamus be and is hereby issued to compel the Director of Physical Planning to give written reasons for declining to accommodate objections raised by Ongata Ronkai Environmental Development Organization (OREDO) in its letter dated 5th March 2010 in accordance with section 19(3) of the *Physical Planning Act*.**
- c. **There shall be no order as to costs.**

DATED and DELIVERED at NAIROBI this 24th March 2014.

D.S. MAJANJA

JUDGE

Mr Oonge instructed by M. N. Oonge and Company Advocates for the ex-parte applicant.

Mr Odhiambo, Litigation Counsel, instructed by the State Law Office for the respondent.