



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

JUDICIAL REVIEW CASE NO. 63 OF 2013

IN THE MATTER OF AN APPLICATION BY OUTDOOR ADVERTISING ASSOCIATION OF KENYA FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010, THE COUNTY GOVERNMENT ACT NO. 17 OF 2012, AND THE PHYSICAL PLANNING ACT, CAP. 286 OF THE LAWS OF KENYA

AND

IN THE MATTER OF OUTDOOR ADVERTISING ASSOCIATION OF KENYA

BETWEEN

REPUBLIC APPLICANT

VERSUS

COUNTY GOVERNMENT OF MOMBASA RESPONDENT

EX PARTE: OUTDOOR ADVERTISING ASSOCIATION OF KENYA

JUDGMENT

Introduction

0. On the 28th October 2013, the ex parte applicant association filed a chamber summons for leave to file judicial review proceeding for certiorari and prohibition and for an order that the grant of leave do operate as a stay of decisions of respondent made on 29th May 2013 and 8th October 2013 directing the pulling down and removal of all advertising signages, structures and devices of its members erected on road reserves within the Respondent County. The court granted the ex parte applicant leave to file judicial review proceedings and further ordered that the grant of leave do operates as a stay of the decisions. The applicant then filed a Notice of Motion on the same date the 28th October 2013.

0. By a letter dated 29th October 2013 the respondent required the respondent made a demand for the payment of a sum of Ksh.35,473,926.00 as outstanding arrears of contractual payments allegedly owing by Magnate Ventures Ltd., one of the members of the applicant, and giving a 7-day notice for payment in default of which the respondent would remove or cause to be removed all advertisement displays by the said member. The letter also gave notice of its decision 'not to grant or review any advertisement applications to facilitate necessary advertising reorganizations' at the expiry of the calendar year and required the member to remove all advertising devices not later than 31st December 2013.
0. Between the 2nd and 4th January 2014, several advertising devices of the members of the ex parte applicant were destroyed. The applicant contends that the respondent was in contempt of court in its demand for the removal of the advertisement devices for failure by Magnate Ventures to pay alleged arrears and the subsequent destruction of the devices [for which the respondent denies responsibility]. An application for the committal for contempt of court of two of the respondent's officers was filed by the ex parte applicant on the 7th January 2014 and argued before the hearing of the main Notice of Motion herein and ruling thereon reserved. Because of the different considerations of fact and principles in the contempt application and the Notice of Motion for judicial review, the decisions in the two applications both though reserved will for neatness be rendered separately. The ruling on the contempt application will be rendered shortly with notice to the parties.

The Notice of Motion for Judicial Review

0. By the Notice of Motion dated the 28th October 2013 the ex parte applicant sought orders as follows:
 1. An order of certiorari be ad is hereby issued to remove into this court and quash the entire decisions by the respondent made on 29th May 2013 and 8th October 2013 directing the pulling down and removal of all erected advertising singages, structures and devices of members of the ex parte applicant within Mombasa County Road Reserves.
 2. An order of prohibition be and is hereby issued prohibiting the Respondent from pulling down and removing all erected advertising signages , structures and devices of members of the ex parte applicant within Mombasa County Road Reserves.
 3. The costs of this application be paid by the Respondent.
0. The Notice of Motion was based on the grounds for relief set out in the statement and reiterated in the body of the Motion as follows:
 1. The Ex-parte Applicant is an association of advertising companies.
 2. Members of the Ex-parte Applicant have erected and maintained advertising signages, structures and devices within Mombasa County Road Reserves with the approval of Kenya National Highways Authority, Ministry of Roads and the permission of the Respondent's predecessor, Municipal Council of Mombasa.
 3. ON 29th May 2013 and 8th October 2013, the respondent directed the pulling down and removal of all erected advertising signages, structures and devices within Mombasa County Road Reserves.
 4. The decisions are illegal and contravene statute, because the intention and direction to pull down and remove the advertising signages, structures and devices are not made in accordance with the procedure set out in Part V of the Physical Planning Act, cap 286 of laws of Kenya.
 5. The decisions contravene the Ex-parte applicant's legitimate expectation the advertisement signages, structures and devices erected and maintained by its members with the respondent's predecessor's approval and authorization by the National Government's Departments shall not be interfered without the due process of law.
 6. The decisions are unreasonable and irrational, because they are not based on any reasons or grounds.
 7. The decisions contravene the rules of Natural justice and the right to be heard because members of the Ex-parte Applicant have not been notified of any breaches of the law nor have they been required to answer to any charges of contravention of the law if any, in so

far as the advertising signages, structures and devices are concerned.

0. In its reply, the respondent through an affidavit by its legal officer, Jackson N. Mwangi raises in sum the following grounds in opposition to the application:
 1. *Locus standi* – that without a list of fully paid up members and their written executed authority or resolution of the members who have approved applications and licenses issued by the respondent for the year 2013, the applicant has no authority to institute the present representative proceedings.
 2. Abuse of process in view of previously instituted proceedings by M/S Magnate Ventures Ltd, which the respondent contended was suing in these proceedings under the guise of the ex parte applicant, in which the said company had obtained injunctive relief against the respondent over the advertisement billboards.
 3. The respondent's predecessor breached Public Procurement and Disposal Act cap 412 in authorizing the advertisement and the present proceedings was an attempt to ratify illegality in the procurement authorizing advertisement billboards.
 4. Respondent's constitutional (under Article 184 and 4th Schedule of the Constitution) and statutory duty or obligation for greater public safety for the benefit of residents of Mombasa.
 5. The respondent granted ex parte applicants members opportunity to be heard by invitation by the two notices to present grievances over a period of 4 months.
 6. Effluxion of time for the advertisement licences on the 31st December 2013.

Submissions

0. The counsel for the parties – Ms. Ng'ania for the applicant and Mr. Mogaka for the respondent – on the 19th February 2014 made oral submissions, the former with aid of written submission dated the 18th February 2014, and judgment was reserved. The counsel for the ex parte applicant emphasized the breach of the rules of natural justice and statutory procedure under section 38 of the Physical Planning Act and contravention of the ex parte applicant's legitimate expectation and fair administrative action in failing to grant the ex parte applicant's members an opportunity to be heard before the decision to remove the advertisement was reached. Counsel for the respondents summed up the respondents' opposition to the application on the principal grounds of *locus standi* of the applicant and abuse of court process; want of compliance in procurement laws in the approvals for the advertisements; and public interest in safety on the roads which is alleged to be affected by the bill boards. Below is a verbatim record of the submissions.

Miss Ng'ania for the ex parte applicant

I have filed ex parte applicant's submissions dated 18.2.2014 together with authorities. Notice of Motion of 28.10.2013. Judicial review orders of certiorari and prohibition.

1. *Locus standi*

The applicants are a society registered under a society act certificate of registration is annexed to affidavit of Peter Odoyo P.O.1 I refer to Adopt A Light v. Municipal Council of Mombasa No. 6 on the list. I also refer to Article 22, 23 and 260 defies a person including a company or body of persons incorporated or unincorporated. The Association is of incorporated members. There is no need of a list of paid up members and with authority to file the suit.

2. *Scope of Judicial Review*

Ex parte applicant has not challenged the decision's merits. We challenge the process of arriving at the decision. Annexures at p. 14 – P.O.3 to p.37 P.O.5. They exhibit fact to compliance with the requirements of development approvals and annual advertising licenses.

The respondent has sought to challenge the approvals on the merits. The JR scope does not go into the merits. I refer to **Shaban Mohamed Hassan** No. 13 of my list at p. 171 of the application. JR only applies to the decision making process not the decision.

We challenge the orders of the respondents of the 29.5.2013 and 8.10.2013 at p. 39 of the affidavit.

3. Illegality of decision

Members of ex parte applicant have development approvals under s.30 of the Physical Planning Act and are in the nature of a building. Development approval is one time approval not renewable at the end of each year. The notices challenged require removal of advertising devices under the Physical Planning Act. The notice of 29.5.2013 gives a 7 day notice for compliance.

We contend that an enforcement notice can only be given under section 38 of the Cap. 286. The Respondent is not entitled to issue such notice as the structures had development approvals.

Development approvals creates a contract which cannot be withdrawn suo motu I refer to **A One Outdoor Advertising** (2006) eKLR at p. 35 enforcement notice was illegal of the binding contract and it contradicts statute. I refer to Taib decision No. 8 on the list of authorities, on compliance of statute. I also refer to Kenya Forest Association at p. 63 (authority No. 9 on the list).

4. Legitimate Expectation

Advertising has existed for long period. There were several approvals and licenses. The illegal notices of removal contravene the legitimate expectation that the structure would not be removed save in accordance with the law. The applicants will suffer prejudice if the decisions are not granted.

I refer To HWR Wade at p. 63 of the application. Legitimate expectation has been recognized in Kenya Law in **Keroche v. KRA** authority No. 10 at p. 104 exception only where there is sufficient reason from departure.

5. Breach of Nature Justice

Right to be heard is a constitutional right in Article 47 and 50 and section 38-40 of the Physical Planning act. The right of hearing is immutable to the ex parte applicant. HWR Wade at p. 55.

I refer to **Taib v. Minister for Local Government** explaining rules of natural justice. The decision of the respondent breached the rules of natural justice

6. Unreasonableness

The respondent claims public interest of preventing proliferation of advertisement, securing motorists, visibility and interference of pedestrian movement and city's appearance. Where are the complaints leading to this conclusion and how is the complaint reconcilable with the applicant's rights when they have paid for fees and obtained approval. Public interest should not be used to contradict written laws. The laws and rules should be complied with. I refer R. v. Registrar of Titles ex parte Bedan Gichuru on public interest. The court at p. 135-7 Balancing of interests where interests are protected by the law. Public interest taken care of by enforcing the law. The

respondents cannot support their decisions by public interests. The decisions were irrational and cannot be supported by public interest.

The respondent's response is on the validity of development approvals. The decisions were reached in contravention of section 38 of the Act and they are subject to judicial review orders sought. I pray for the notice of motion to be allowed as prayed.

Mr. Mogaka for the Respondent

Motion is opposed. The motion is supported by the statement and the verifying affidavit. The replying affidavit of Mr. Mwangi. Other affidavits are on the contempt application. The replying affidavit of Jackson Mwangi on 15.1.2014.

Overriding reasons

Verifying Affidavit of Peter Odoyo. This JR by Magnate Venture Ltd pretend to be bringing it from the Outdoor Advertising Association. Magnate Ventures is abusing the process of the court. I refer to the verifying affidavit. That the applicants have paid license fees. There is no single evidence of payment other than Magnate Ventures. See P.O.7, at p. 32-35 relate to Magnate Venture. The same with p. 36, 37.

There is no correct averment that the applicants have paid when it is only Magnate Venture. This is only Magnate Venture. It is an abuse of the court process because there are pending before the court relating to the same bill boards. I refer to exhibits in Mwangi's affidavit JM1 HCCC 33 of 2012 seeking to restrain the Municipal Council from allowing other persons from putting up Billboards and the council from removing the Billboards. It is not disputed that the case exists. There is a case dealing with Billboards. They could have gone there and obtained an injunction. There is also case No. HCCC 284 of 2008 which is still pending. They could have amended the case and proceeded in the older suit. This suit seeks the same orders as sought in this case. There is no dispute that this case is pending.

Plaintiffs in this case 284 of 2007 are the same parties that are mentioned in this JR. Does the principle of abuse of court apply to JR. Can a party file suits in the various divisions of the court. This could have sought proceedings in 284 of 2008. They could have taken contempt proceedings in the case where there are previous orders. The JR proceedings should be dismissed. The doctrine of sub-judice and res judicata applies to all litigation. Magnate Ventures is the same parties in the suits. There are no other members indicting that they are affected. There is a question of locus standi. The court should protect its dignity. The respondent is a public entity. There can only be production of a receipt. Even under the Rating Act, person have to produce clearance certificate that it is supported by receipts. There is an allegation that the parties have been paying promptly but no exhibits of receipts by Magnate and all other receipts. A payment entitles a party to carry out business. A payment would permit outdoor advertising to have bill boards but no payment has been shown.

Decision being challenged

The question of the decision having been given contrary to rules of indirect justice. Verifying affidavit at p. 37 and 38. The decision does not say that if the billboards are not removed we shall remove them. It requires the persons to remove them and invite the parties to come to the respondent. It cannot be said to be unreasonable or without hearing. The applicants were invited to go to the county for the address of any grievances on a case by case basis. There is no evidence that any member of the applicant went to the respondent. They did not go. The respondents state that they refused to come, and it gave a further grace period for 4 months until October 8, 2013 when they issued a further

notice. They did not come to court or go to the respondents. No representation was made. They are acting within the law in good faith by the respondent in giving a grace period of 120 days. 8.10.2013 at p. 39 is a further notice to the one of 29.5.2013. It is not unreasonable.

Cap 286 Physical Planning

Advertisement is defined in the Act. The Bill Boards are included. The issues of advertisement has now shifted by the Constitution to County Government schedule 4. In issuing the notices the county government acts in statutory and constituted obligations. They were discharging their duties.

Can a court prohibit a public body from discharging its constitutional mandate unless it is shown it is being done unreasonably, when the mandate is within the law. The decision of the respondent is that Bill Boards are interfering. Planning is a continuous exercise. Planning changes within situation. The legitimate expectation decision should be dealt with on a case by case basis. The parties in this case were given time to air their grievances for a period of 120 days.

It would be unreasonable if the county government if it pull down without notice. The applicant refused to go to the county.

Section 38 of Cap. 286

The provisions of 38 are not applicable. The respondent is exercising powers to plan the town. Certain buildings are condemned out of age and are required to be removed due to expansion of facilities in public interest. Certain individuals are affected and they are either compensated in case of land. In this case, they were invited and they did not state that they attended and found that nothing was forthcoming. They refused to go. Legitimate expectation not breached.

There is no single permit indicated in the applicant's case by Magnate Venture or members of the Applicant. The respondents have exhibited the kind of approval form which shows that normal format of the approval and this has not been challenged. We have shown the form and it has not been challenged. The submission that approval is given once and not required to renew annually is not correct. The payment of trading licenses are paid annually. It is not correct that it is a one-off. It is paid for annually. The application receipts are for Bill Boards at p. 35. The receipt is for the Bill Boards and it is paid for regularly and the submission is not correct.

Billboards on public roads becomes a licensee. There is no certificate of lease. There is no certificate of lease for a term. The form in the replying affidavit gives power to municipal council to alter the circumstances. Clause 8 of Notice 8 (iii) – allows renewal of permits.

The contract between the parties states that the council has power to refuse to renew. Courts cannot rewrite the contract. Enforcement of contract is not the subject of Judicial Review. The By-Laws are set out pp. 9-12 of affidavit of Mwangi. At p. 11 rule 6 - every permit expires on 31st December of each year. No license goes beyond 31st December. Renewal is contractual. There is no allegation that the terms of contract were obtained by duress or misrepresentation.

Rule 5 – payment of fees from time to time and the determined fees. Only Magnate Venture has demonstrated payment. Magnate Venture has orders in other suits. The association has not indicated any payment. The other affidavits cannot be relied on.

Is there any merit in the challenge where parties were invited to go to the respondent. The applicants were given notice to present their grievances. Road reserves within the county is public land and public land held upon trust by county government or Municipal council. It cannot be leased out. The procedure for licensing is in the Local Government Act coming into force in 1963. The Public Procurement Act No. 3 of 2005 coming into force in 2006. Physical Planning Act came into force in 1998. Public Land must be dealt with in accordance with public land. In case of conflict, the public Procurement Act prevails by reason of section 5 of that Act. All land disposal must be by Procurement Act.

There is no dispute that the case before the court applies the Procurement Act. It is not going to the merit of the decision. Courts cannot ignore provisions of the law. Section 27 of the Act requires everybody to comply with the Act. If the Local Authority is in breach of the statute. A court of law cannot sanction an irregularity. The Physical Planning Act is subject to the Procurement Act. The applicant cannot rely on the Physical Planning Act without applying section 5 of the Procurement Act. The Constitution also requires public procurement to follow the law.

Judicial review orders. Overriding interests. In the absence of payment by the others and Magnate abusing process of court and permits are renewable annually, the respondent had a right to require the removal of the devices acting within the law.

Money expected in putting up bill board and no material has been placed before the court through the verifying affidavit. Counsel should have availed information on costs. There is no material before the court.

Permanency of structures

No demonstration that structures are permanent. No affidavit evidence indicating the permanency

Balance of interests

The county government is a government for the people by the people and it represents the people of Mombasa. The complainants are the people through the government. The interests of the applicants are not permanent being renewable annually and subject to public interests.

*The decision in case of **Outdoor Advertising** - the decision was to take effect immediately and no opportunity was granted to applicants to give representation. The sections of the Physical Planning Act are not applicable. In this case the applicants refused to be heard within the 120 days. The Respondent cannot force the applicants to go to them to present their grievance. They are not entitled to complain that they were not heard and they are not entitled to judicial review orders. I refer to Article 227 of the Constitution.*

Miss Ngaira in reply

- 1. Outdoor Association – the ratio in the case is that the procedure was not followed. It does not matter whether 7 days were given. The decision had already been made. Section 38 and 40 of the Physical Planning applies. The procedure to follow is in the Act.*
- 2. Public Procurement Act – A party can benefit from its own illegality. The Notices do not refer that refer to any procurement issues only visibility and interference.*
- 3. Magnate Ventures are only a member. It does not matter that the suit is brought by Outdoor Advertising Association but receipts appeared only Magnate.*
- 4. Respondents cannot escape through the arguments because of the scope of the judicial Review to deal with process rather than merit.*
- 5. Certificate on p. 35 originates from the respondents and it is sent to one of the members of the*

- applicants, Magnate.
6. Constitutional mandate – they were obliged to follow the law in reacting to decisions. They are required to follow the Physical Planning Act – in giving effect to the Constitution.
 7. Notices of 29.5.2013 and Notice of 8.10.2013. They had already made the decision in requiring the applicants to come to him if they are aggrieved. In fact it should have been given by the Liaison Committee under the Physical Planning Act. I pray that the Notice of Motion be allowed.

Issues for Determination

0. In considering whether the judicial review orders of certiorari and prohibition will be ordered in the circumstances of the case, the following issues arise for determination:
 1. Whether the ex-applicant has *locus standi* and whether the proceedings were an abuse of the court process.
 2. Whether the decisions were made in contravention of the rules of natural justice and the ex parte applicant's legitimate expectation.

Determination

Locus standi and abuse of process

0. On *locus standi*, as a constitutional principle of public law and for promotion access to justice, the law makes generous provisions on standing over and above sufficient personal interest in the interest of enforcement of public law duties. See articles 22 and 258 of the Constitution. The constitution recognizes the right of an association to litigate questions of fundamental human rights and interpretation of the constitution on behalf of its members. It should not matter that such questions of fundamental rights or of interpretation of the constitution arise in judicial review proceedings. In these proceedings, the issue of the ex parte applicant's constitutional right to fair administrative action is at the centre of its claim on legitimate expectation and right of being heard before the impugned decisions were taken.
0. As Lord Denning in *R. v. Greater London Council ex parte Blackburn* (1976) 3 ALL ER 184 stated:

“I regard it matter of high constitutional principle that if there is a good ground for supposing that Government Department or public authority is transgressing the law, or is about to transgress it, in a way that offends or injures thousands of her majesty's subjects, then any one of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced, and the courts in their discretion can grant whatever remedy is appropriate.”

0. In adopting the liberalized stance with regard to *locus standi* in the Court of Appeal in ***Adopt-A-Light Ltd. v. The Municipal Council of Mombasa*** Civil Appeal No. 47 of 2007 rejected a contention that different considerations apply to judicial review application as opposed to constitutional matters, and said:

*“Counsel for the appellant sought to distinguish this authority (*Rushin and Anor. v. Minister for Finance and Anor.* [2001] EA 253) on the basis that it was a constitutional matter as opposed to judicial review application herein. To our mind, much as this was a judicial review application the holding above equally applies here, What the 3rd respondent was engaged in was public interest litigation. It came to court in its capacity as stakeholder in the advertising industry as well as a rate payer. The 1st respondent was accountable to 3rd and any other rate payers on how revenue is collected and utilized and how services and goods are procured by the 1st respondent. On the whole, we are in agreement with the learned judge that the 3rd respondent had the necessary *locus standi* to sue on account of either as a person aggrieved, sufficient interest or even as a public spirited person in vindication of the law.”*

I take the view that requiring the ex parte applicant to produce list of fully paid up members who have had approvals, with receipts of payment for licenses, granted by the respondent is to unduly restrict the right of the association's members to approach the court to challenge the decision of the local authority or county government which is expressed to affect *"all Advertisers/Advertising Agents who may have erected or caused to have erected/put in place any Advertising Device(s) within our City's road reserves, dual carriageway aisles and/or at major highway/roads intersections,..."* Accordingly, I reject the objection as to *locus standi* of the ex parte applicant to bring the suit on behalf its members, two of whom have attached relevant documents in the verifying affidavit in support of the judicial review proceedings.

Abuse of process of the court

0. I have perused the orders in the two previous decisions relied on by the respondent as a basis for the abuse of process charge. Although the applicant's member M/S Magnate Ventures Limited is a party in both the suits and the same related to billboards, the claims in the two suits were different from the public law aspect of the present proceedings in that:
 1. Suit no. HCCC 284 of 2008 is shown in the order of 13th October 2008 attached to the replying affidavit of Jackson Mwangi as a suit by Magnate Ventures and two other advertisers and the respondent Association for injunction against the Municipal Council of Mombasa, the respondent's predecessor, against removing or destroying the plaintiffs billboards advertising structures and media and for account of all sums paid by the plaintiffs to the defendant for the billboards etc erected in the municipal Council of Mombasa.
 2. Suit no. HCCC 33 of 2012 is shown in the order of 18th January 2012 as a suit by Magnate Ventures Ltd against an advertising company and the Municipal Council of Mombasa to prevent the putting up of billboards in close proximity to the plaintiff's billboards so as result in blockage of its billboards.
 3. The notices challenged in the present suit affected all advertisers and advertising agents who may have erected advertisement signages or devices, and the challenge is on the legality of the decision of the respondent to remove the billboards on the grounds of *"proliferation of several Advertising Devices/Systems even obscuring visibility to motorists, pedestrian movements and the resultant negative impact they have had on our City's appearance"*.

The claim challenging the decisions to remove the advertisement signages by the notice of 29th May 2013 and 8th October 2013 is clearly in the realm of public law and cannot properly be merged in the private law claims for injunction in the two suits.

Whether respondent's decisions contravened the ex parte applicant's legitimate expectation and right to be heard.

0. The notices the subject of these proceedings were issued in the following terms:

The notice of 29th May 2013 provided:

"COUNTY GOVERNMENT OF MOMBASA

PUBLIC NOTICE

REMOVAL AND RE-ORGANIZATION OF ADVERTISEMENT SIGNAGES STRUCTURES/DEVICES WITHIN MOMBASA COUNTY ROAD RESERVES

The County Government of Mombasa wishes to notify all Advertisers/Advertising Agents who may have erected or caused to have erected/put in place any Advertising Device(s) within our City's road reserves, dual carriageway aisles and/or at major highway/roads intersections, that in

view of the proliferation of several Advertising Devices/Systems even obscuring visibility to motorists, pedestrian movements and the resultant negative impact they have had on our City's appearance, the County Government of Mombasa, in accordance with Building By-laws 231, 232, 233, 234, etc and the Physical Planning Act, therefore, shall pull down within seven days from the date of this notice, at the Advertisers/Advertising Agents cost and consequences, all such signages in such situations with a view to rectifying any contributors towards this situation.

Any person aggrieved by this decision is advised to call in at the Mombasa County Offices with copies of Year 2012 and 2013 Advertisement permits and Receipts where their grievances shall be looked into on a case by case basis.

Muzne Abdulatiff (Mrs)

Interim County Secretary

Dated 29th May 2013”

The notice of 8th October 2013 provided:

“COUNTY GOVERNMENT OF MOMBASA

PUBLIC NOTICE (FINAL NOTICE)

REMOVAL AND RE-ORGANIZATION OF ADVERTISEMENT SIGNAGES STRUCTURES/DEVICES WITHIN MOMBASA COUNTY ROAD RESERVES

Further to our notice which appeared on the Daily Nation on Wednesday 29th May 2013, we hereby give a FINAL NOTICE to all Advertisers/Advertising Agents who may have erected or cause to have erected /put in place any advertising device(s) within our County's roads reserves, dual carriageway aisles and or at major highway roads intersections that in accordance with building by law 231 - 234 etc and the Physical Planning Act therefore, shall pull down and remove all erected advertising devices within SEVEN days from the date of this notice.

At the expiry of this notice, the County Government of Mombasa shall pull down the above mentioned outdoor advertising devices without any further references to the advertisers, as to the cost and consequences arising thereof.

Rose Ngowa

Interim County Secretary”

0. The ex parte applicant has attached the approvals of the Kenya National Highways Authority for 5years from 15th august 2013 for Magnate Ventures, the Provincial Roads Engineer Coast approving locations for Outlook Media billboards and 2013 payment receipts and clearance with respect to Accounts for 2012 for Magnate Ventures. Section 38 of the Physical Planning Act provides for the procedure for enforcement of development permissions in these terms:

“38. Enforcement notice

(1) When it comes to the notice of a local authority that the development of land has been or is being carried out after the commencement of this Act without the required development permission having been obtained, or that any of the conditions of a development permission granted under this Act has not been complied with, the local authority may serve an enforcement notice on the owner, occupier or developer of the land.

(2) An enforcement notice shall specify the development alleged to have been carried out without development permission, or the conditions of the development permission alleged to have been contravened and such measures as may be required to be taken within the period specified in the notice to restore the land to its original condition before the development took place, or for securing compliance with those conditions, as the case may be, and in particular such enforcement notice may require the demolition or alteration of any building or works or the discontinuance of any use of land or the construction of any building or the carrying out of any other activities.

(3) Unless an appeal has been lodged under subsection (4) an enforcement notice shall take effect after the expiration of such period as may be specified in the notice.

(4) If a person on whom an enforcement notice has been served under subsection (1) is aggrieved by the notice he may within the period specified in the notice appeal to the relevant liaison committee under section 13.

(5) Any person who is aggrieved by a decision of the liaison committee may appeal against such decision to the National Liaison Committee under section 15.

(6) An appeal against a decision of the National Liaison Committee may be made to the High Court in accordance with the rules of procedure for the time being applicable to the High Court.

(7) Any development affecting any land to which an enforcement notice relates shall be discontinued and execution of the enforcement notice shall be stayed pending determination of an appeal made under subsection (4), (5) or (6).”

0. The two notices of 29th May 2013 and 8th October 2013 make reference to the Physical Planning Act but no attempt is made to comply with provisions of the Act. The submission by counsel for the respondent that the Act is inapplicable in view of the provisions of the procurement act which overrides all other law is invalid because the procurement act was not cited as one of the enabling acts for the decisions of the respondent. Moreover, the respondent cannot unilaterally purport to cancel development approvals on the grounds that they did not comply with the Procurement Act. The decision must be taken in accordance with the rules of natural justice giving the person affected an opportunity to be heard on question of the compliance with the provisions of the Procurement Act and other relevant matters. In addition the two notices communicated a ready-made decision to remove the billboards which was made without hearing any representations that the affected persons may have had, a defect that the purported 4month opportunity to be heard allegedly granted after the fact did not cure. To be sure the notice period given in the notices was seven days for any aggrieved persons to attend the respondent for a consideration their cases. The decision to remove the billboards had already been made before the invitation to go to the respondent when their ‘grievances shall be looked into on a case by case basis.’ This is clearly *ultra vires* the provisions of the Physical Planning Act.

Findings

0. I have no hesitation in finding that the respondent’s decisions of the 29th May 2013 and the 8th October 2013 were made in breach of the rules of natural justice for the hearing of the affected persons and in contravention of their legitimate expectation created by the provisions of the Physical Planning Act and borne of the development approvals given by the national Roads Authority and the respondent’s predecessor upon payment of the requisite licence fees. There can never be public interest in breach of the law, and the decision of the respondent is indefensible on public interest because public interest must accord to the constitution and the law as the rule of law is one of the national values of the constitution under Article 10 of the Constitution. Moreover, the defence of public interest ought to have been considered in a forum where in accordance with the law, the ex parte applicant members were granted an opportunity to be heard.

There cannot be public interest consistently with the rule of law in not affording a hearing to a person likely to be affected by a judicial or quasi judicial decision.

0. The ex parte applicant is therefore entitled to an order of certiorari to quash the notices of 29th May and 8th October 2013 notifying the ex parte applicant members of pulling down and removal all erected advertising devices within SEVEN days from the date of the notices.
0. The prayer for prohibition sought to prohibit ‘the Respondent from pulling down and removing all erected advertising signages, structures and devices of members of the ex parte applicant within Mombasa County Road Reserves’ is as set out above overtaken by events although the respondent denies that it was responsible for the removal and destruction of the applicant member’s billboards and signages. The order for prohibition cannot therefore be made.
0. It is clear that the respondent’s decision violated the ex parte applicant’s constitutional right to fair administrative action under Article 47 of the Constitution and the ex parte applicant’s members are in the circumstances of the case entitled to damages for breach of the constitutional right. As damages are not recoverable under the judicial review procedure, the court will in interests of justice deem the proceedings as having been brought under Article 22 of the constitution for the enforcement of the constitutional provisions of fair administration action and consequently award damages for the breach thereof. This course of action accords with the decision of the court in *Stanley Munga Githunguri v. Attorney General No. 2* (1986) KLR 1, where the three judge bench of the High Court deemed an application for prerogative orders as one for the enforcement of fundamental human rights under section 84 of the former constitution. The court will therefore make an award of damages to remedy the breach of the fair administrative action by the respondent upon hearing submissions of the parties on question of quantum of damages on a date to be fixed in consultation with the parties.

Orders

0. For the reasons set out above, I make the following orders on the ex parte applicant’s Notice of Motion dated 28th October 2013:
 1. An order of certiorari is granted as prayed in prayer no.1 of the Notice of Motion.
 2. The order for prohibition sought in prayer no. 2 of the Notice of Motion is declined for having been overtaken by events.
 3. The ex parte applicant’s members herein will be awarded such damages for breach of fair administrative action as the court shall determine upon submissions in that behalf by the parties on a date to be fixed.
0. Costs of the Notice of Motion will be in the cause.

Dated and delivered this 14th day of April, 2014.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Gikandi for Mr. Havi for the Ex parte Applicant

No appearance for the Respondent

Mr. Bwire for the 1st Contemnor

Mr. Ibrahim – Court Assitant