



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**MISCELLANEOUS APPLICATION NO. 379 OF 2013**

**INTHE MATTER FOR AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW  
ORDERS OF CERTIORARI**

**AND**

**IN THE MATTER OF LAW REFORM ACT**

**(CHAPTER 26 LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE REGISTRATION OF TITLES ACT**

**(CHAPTER 28 LAWS OF KENYA (REPEALED)**

**REPUBLIC .....APPLICATION**

**VERSUS**

**DIRECTOR OF PHYSICAL PLANNING.....RESPONDENT**

**‘EX-PARTE’ PETER KUGURU**

**JUDGEMENT**

**Introduction**

1. By a Notice of Motion dated 5<sup>th</sup> November, 2013 filed in this Court on 15<sup>th</sup> November, 2013, the ex parte applicant herein, **Peter Kuguru** seeks the following orders:
1. **That an order of Certiorari does issue to quash the letter of the Respondent dated 26<sup>th</sup> Mach, 2013 under Ref: PPD/42/28/XVIII/(3).**
2. **That the Respondent be condemned to pay costs of this application.**

**Ex Parte Applicant’s Case**

2. The application is based on the Statement filed on 25<sup>th</sup> October, 2013 and the affidavit verifying facts sworn by the Applicant the same day.

3. According to the deponent, the Applicant is the registered owner of all parcel of land situate in the City of Nairobi in Nairobi Area measuring nought decimal five six (0.5156 known as L. R. No.209/14687 comprised in a Grant registered as No. I.R.126277 (hereinafter referred to as the suit property). On or around 24<sup>th</sup> November, 2010 Kenya Pipeline Corporation (hereinafter referred to as the Corporation) caused its agent, servants and/or employees to enter and trespass into the suit property without authority whereof they cause wanton destruction by laying heave gauge pipes.
4. As a result thereof the Applicant instructed his Advocate to file a suit against the Corporation being ELC No.589 of 2010 seeking various injunctive reliefs which suit is still pending for hearing and final disposal. However during the pendency thereof the firm of **Lilan & Koech Associates Advocate** wrote to the Director of Physical Planning in early 2013 requesting to be advised if the Applicant's Part Development Plan is authentic. In response thereto on the 26<sup>th</sup> March, 2013, the Director of Physical Planning wrote a letter to the said advocates in which it advised that the drawing in reference purporting to be part Development Plan No.42/28/97/17 was neither authentic nor did it appeal in their records.
5. Pursuant to the said letter the Corporation instructed the Police to investigate the Applicant's title herein and as a result, the Police have been harassing and intimidating the Applicant's wife compelling the Applicant to instruct his Advocates to file Constitutional Petition No.428 of 2013 to stop the police harassment.
6. According to the Applicant, the letter written and/or issued by the Respondent was ultra vires in nature as the letter was arrived at in breach of the rules of natural justice. To him, the Director of Physical Planning overstepped his mandate as donated by the **Physical Planning Act**, Cap 286 by issuing the letter against the Applicant herein. In his view, the decision of the Respondent herein smacks of impropriety, is absurd, arbitrary, ultra-vires, capricious unjust and in flagrant breach of rules of natural justice.
7. He was therefore apprehensive that he would be occasioned a travesty of justice if the said letter continued in place and stood to suffer immense injustice and irreparable harm hence the orders sought ought to be granted.

### **Respondent's Case**

8. In opposition to the application the Respondent filed a replying affidavit sworn on 17<sup>th</sup> February, 2014.
9. According to him, the firm of **Lilan & Koech Associates** wrote to him on the 25<sup>th</sup> February, 2013 following litigation involving part Development Plan Reference No. 42/28/97/17 requesting him to verify its authenticity and whether the same had been approved. He responded to the aforesaid letter on 26<sup>th</sup> March, 2013 providing the said firm with the information requested which the Respondent was privy to.
10. He deposed that upon our scrutiny of their records, he could not trace plan Reference No. 24/28/97/17, and furthermore the last entry for approved physical development plans for 1997 in their register is **PPD No.42/28/97/09** yet the alleged plan was dated to have been approved on the 6<sup>th</sup> September, 1998 which was on a Sunday. According to him, therefore, he did not decide on any issue or give any recommendation, but merely communicated information which had been requested and that the said letter was not a decision capable of being quashed. He deposed that under (Section 4(2) and 5(d) of the **Physical Planning Act** Cap 286 of the Laws of Kenya (hereinafter referred to as the Act) he is the Chief Government Adviser on all matters relating to Physical Planning, which include alienation of land.
11. He further deposed that the alleged decision was made on 26<sup>th</sup> March, 2013 and these Judicial Review proceedings were instituted on 25<sup>th</sup> October, 2013 contrary to the fact that an application for an order of *certiorari* must be instituted within six months from the time when decision was delivered. He further contended that the constitution grants every person a right of access to information and it is therefore his obligation to provide information that is in his possession when the same is required by a person. Apart from that the Act mandates his office to prepare physical development plans for approval by the Hon. Minister, upon approval assign an approval number and it thus follows that they keep all records regarding approved plans and can determine the

- authenticity of the same. In his view, he did not need to conduct any hearing or issue summons to the parties when giving information that was in his possession.
12. According to him, the letter dated 26<sup>th</sup> March, 2013, is not addressed to the *ex parte* applicant neither does he reveal how he came to be in possession of such privileged information hence the application does not raise any issue triable in Judicial Review to warrant the issuance of the order of certiorari.

### **Ex Parte Applicants' Submissions**

13. In support of their case, it was submitted on behalf of the *ex parte* applicants on the authority of *Conveyancing Principles and Practices*, (2010) by **T O Ojienda** that under section 23 of the ***Registration of Titles Act***, the Applicant is the rightful and registered owner of the suit land.
14. It was further submitted that the rules of natural justice provide for the right to be heard and Article 47 of the Constitution was cited to reinforce this submission. It was submitted that the Applicant was not availed any opportunity to respond to the allegations raised by the Respondent nor did the Respondent give any reasons why the said Plan was not authentic and why it does not appear on the records. According to the Applicant the said Plan was issued prior to the Grant and since it was not prepared by the Applicant the Applicant cannot comprehend why the same is missing. In support of his submissions the Applicants relied on **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** and **Peter Okech Kadamas vs. Municipal Council of Kisumu Civil Appeal No. 109 of 1984 [1985] KLR 954; [1986-1989] 194.**
15. The Applicant submitted that the Respondent was under a duty to ensure that its action was expeditious, efficient, lawful, reasonable and procedurally fair and that procedural fairness necessarily requires that persons who are likely to be affected by the decision be afforded an opportunity of being heard before the decision is taken and that it is a Constitutional requirement that that person be given written reasons for the action. It was submitted that the Applicant was not even invited to shed light on how he acquired the property. It was therefore submitted that the Respondent's decision was contrary to the Applicant's legitimate expectation that before any adverse action was taken he would be afforded an opportunity of presenting its case.
16. It was further submitted on the authority of **Attorney general vs. Ryath [1980] AC 718, 730** that a decision affecting the legal rights of an individual which is arrived a procedure which offends against the principles of natural justice is outside the jurisdiction of the decision making authority. It was contended by the Applicant while relying on ***Introduction to Administrative Law*** 4<sup>th</sup> Edn. At page 158 by **David Foulkes** that whether or not a person is entitled to a hearing depends on whether or not he has some right, interest or legitimate expectation of which it would not be fair to deprive him without hearing what he has to say. The Applicant therefore urged the Court to grant the orders sought herein.

### **Respondent's Submissions**

17. On behalf of the Respondent, it was submitted that based on **The Council of Civil Service Union vs. Minister of Civil Services [1985] AC 374**, that the jurisdiction of judicial review is limited to the procedures of administrative body either acted illegally or irrationally.
18. It was submitted that though the Applicant made allegations based on grounds for judicial review, the same were not proved. It was submitted that section 59(1) of the Act vests on the Respondent the mandate to keep plans and as such is empowered to give information as to the authenticity thereof to any third party. The letter, it was submitted does not amount to an illegality since it merely rendered information in good faith.
19. It was submitted that it has not been shown that the decision has a legal binding effect and since it cannot be implemented, it is not capable of being quashed. Since the quashing of the decision cannot change the records held by the Respondent, it was submitted that it has no legal effect.
20. It was the Respondent's contention that the rules of natural justice do not apply to the instant matter as the letter requesting the information does not need adherence to the rules of natural justice.
21. It was contended on the part of the Respondent that the Applicant needs a forum which will

declare the contents of the letter incorrect and his plan authentic and that forum is not in this Court hence the application should be dismissed.

### **Determinations**

22. The parameters of judicial review were set out by the Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** in which it was held 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.”**

23. In **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury’s Laws of England 4<sup>th</sup> Edition Vol (1)(1) Para 60.***

24. It must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See *R vs. Secretary of State for Education and Science ex parte Avon County Council* (1991) 1 All ER 282, at P. 285.

25. In the submissions the Applicant concentrated on the issue of ownership of the suit property. In my view the ownership of the suit property is not the subject of these proceedings.

26. It is clear from the applicant’s case that what provoked these proceedings was a response from the Respondents to the letter written by the Corporation’s Advocates seeking certain information from the Respondent. Under section 5(1)(b) of the Act, one of the duties of the Respondent is to prepare all regional and local physical developments plans. In my view the records held by the Respondent being public information, any person is entitled under Article 35(1)(b) to the same. Therefore there was nothing wrong in the Respondent furnishing the Corporation with the information held in the Respondent’s custody. The said information did not in my view amount to a decision for the purposes of judicial review but was just an extract thereof.

27. The law as I understand it is that a mere letter conveying a decision is not necessarily a decision capable of being quashed unless the said letter also operates as a decision. In this case what was conveyed by the Respondent was merely a position in the records held by the Respondent. If there was any decision made, that decision would be in the records rather than in the letter. In **Republic vs. The Commissioner For Co-Operative Development & Kariobangi Housing & Settlement Co-Operative Society Limited Ex Parte David Mwangi & 15 Others Nairobi HCMCC No. 805 of 1990** the Court held:

**“For a prerogative order of certiorari to issue there must be in existence a decision made in a matter where the tribunal or an authority is bound to act judicially...Where the decision complained against is a letter merely stating that the Society was at liberty to deal with its members as they deemed appropriate and neither stated that the Commissioner had approved the expulsions nor disapproved the expulsions the letter cannot be said to a**

decision which affected the membership of the applicants or any other person in the society more so since the Commissioner is not vested with power of approving or ratifying the expulsion of any member of a Co-operative Society or union...The power to grant an order of certiorari stems from the provisions of section 9(3) of the Law Reform Act, Cap 26, Laws of Kenya and Order 53 is a re enactment of that provision and that subsection talks about “judgement, order, decree, conviction or other proceeding”. The letter of the Commissioner does not fit into any of these categories so that an application for certiorari will not lie on the facts and circumstances of this case...It follows that prohibition will not also issue as well since no decision was taken which would be quashed since prohibition lies where a decision is being taken or has been taken in excess of or in absence of jurisdiction or in breach of the rules of natural justice and it is necessary to stop a repetition or continuation thereof.”

28. This Court appreciates that under Article 35(2) of the Constitution, every person has the right to the correction or deletion of untrue or misleading information that affects the person. However to arrive at a finding that the information held by the Respondent is untrue or misleading would require the taking of *viva voce* evidence and that is not within the purview of a judicial review Court. See Commissioner of Lands vs. Hotel Kunste Ltd Civil Appeal No. 234 of 1995 and Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354.
29. I agree with the Respondent that to quash the letter would not necessarily quash the records held by the Respondent hence it would be an exercise in vain. However, it is trite that the decision whether or not to grant the remedy of judicial review is discretionary. In Republic vs. Judicial Service Commission ex parte Pareno [2004] 1 KLR 203-209 it was held that judicial review orders are discretionary and are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders and would refuse to grant judicial review remedy when it is no longer necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance. Since the court exercises a discretionary jurisdiction in granting prerogative orders, it can withhold the gravity of the order where among other reasons there has been delay and where a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised. See Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 of 2000.
30. Again it is trite that the remedy will not be granted where there are alternative legal remedies which are more convenient, beneficial and effectual. In this case, I have held hereinabove that the Applicant may well seek an order for correction or deletion of information held by the Respondent if the same is untrue or misleading. That remedy in my view is more convenient, beneficial and effectual.
31. Accordingly, I decline to grant the orders sought in the Notice of Motion dated 5<sup>th</sup> November, 2013 which I hereby dismiss with costs to the Respondent.

**Dated at Nairobi this day 30<sup>th</sup> day of May 2014**

**G V ODUNGA**

**JUDGE**

***Delivered in the presence of Miss Cheruiyot for the Respondent***

***Cc Kevin***