



REPUBLIC OF KENYA
IN THE HIGHCOURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JR CASE NO 980 OF 2007

REPUBLICAPPLICANT

VERSUS

CITY COUNCIL OF NAIROBI.....RESPONDENT

DIRECTOR OF PHYSICAL PLANNING.....2ND RESPONDENT

ATTORNEY GENERAL3RD RESPONDENT

EX-PARTE

MUTULA KILONZO E.B.S. SC

JUDGEMENT

The application for consideration in this matter is the notice of motion dated 14th September, 2007 in which Mutula Kilonzo the ex-parte applicant seeks orders as follows:-

1. **THAT AN ORDER OF CERTIORARI** directed to the 1st and 2nd Respondents to bring to the High Court and quash the Enforcement Notice dated 24th May 2007 directing the Applicant to pull down the boundary wall in Land Reference No. 330/787 Thompson Estate Riara Lane.
2. **THAT AN ORDER OF PROHIBITION** directed to the 1st and 2nd Respondents, prohibiting them or any of them, their agents, servants, officers or otherwise, from interfering with, trespassing onto, accessing or purporting to trespass, access or alter the dimension, boundaries or abuttal's or in any manner whatsoever dealing with Land Reference No. 330/787 Thompson Estate Riara Lane pending hearing and determination of this Judicial Review.
3. **THAT AN ORDER OF PROHIBITION** directed to the 1st and 2nd Respondents, prohibiting them or any of them, their agents, officers or otherwise servants from further acting on or under the Enforcement Notice dated 24th May, 2007 or any other Enforcement Notice relative to land Reference No. 330/787 Thompson Estate Riara Lane pending hearing and determination of this Judicial Review.
4. **THAT** the costs of this suit be provided for.

Briefly, the applicant's case is that he is the registered proprietor of L.R. No. 330/787 Thompson Estate

Riara Lane Nairobi. Through an Enforcement Notice dated 24th May, 2007 the City Council of Nairobi and the Director of Physical Planning, the 1st and 2nd respondents herein, issued an Enforcement Notice directing the applicant to remove a boundary wall and temporary structures erected on the suit property. The Attorney General is the 3rd respondent.

It is the applicant's case that the said Enforcement Notice was illegal and ultra vires the Physical Planning Act Cap 286 (the Act) in that it was issued in respect of L.R. No. 330/285 and not L.R. No. 330/787. It is also the applicant's case that the Act under which the Enforcement Notice was issued came into force in 1996 and it was not applicable in his case since the boundary wall targeted by the Enforcement Notice was erected in 1994. The applicant argues that he wrote to the 1st and 2nd respondents on 28th May, 2007 pointing out the illegality and unenforceability of the Enforcement Notice but they did not give him a hearing. It is the applicant's case that on 25th July, 2007 the 1st and 2nd respondents trespassed on the suit property and demolished the boundary wall and destroyed the applicant's property.

The 1st and 2nd respondents opposed the application through an affidavit sworn on 8th September, 2011 by the Director of City Planning Mr. Tom Odongo. The 1st and 2nd respondents' case is that the applicant did not dispute the fact that he was the owner of L.R. No. 330/285 Thompson Estate Riara Lane which was cited in the Enforcement Notice. The 1st and 2nd respondents argued that they did not have to respond to the applicant's letter dated 28th May, 2007 since Section 38(4) of the Act clearly provides that any person who is aggrieved by an enforcement notice can appeal to the relevant liaison committee. The 1st and 2nd respondents also attacked the applicant for contradicting himself by claiming in his application that the boundary wall was built in 1994 while in his letter dated 28th May, 2007 he had indicated that the wall was constructed in 1988.

Considering the evidence placed before the court, it emerges that there are two issues for determination of this court namely:-

1. Whether the Enforcement Notice is illegal; and
2. Whether the orders prayed for are available to the applicant.

The applicant submitted that the Enforcement Notice is illegal in that he constructed the boundary wall in question prior to the commencement of the Act. In response to this argument the 1st and 2nd respondents submitted that the applicant was not clear as to the date of the construction of the wall. In his application the applicant indicated that the wall was constructed in 1994 but in his letter dated 28th May, 2007 he indicated that the wall was constructed in 1988. Whatever the case, it is clear that the wall was constructed prior to the commencement of the Physical Planning Act in 1996. Section 38(1) of the Act provides that:-

“38. (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.”

It is clear from the above quoted section that an enforcement notice can only be issued for developments taking place after the commencement of the Act. Since the applicant had already completed the construction of the wall, an enforcement notice could not therefore be issued. That being the position, the applicant could not have resorted to the appeal mechanism provided by the Act. The issuance of the notice was therefore illegal.

The remaining question is whether the prayers sought are available to the applicant. The applicant informed the court that the boundary wall and other developments were demolished by the 1st and 2nd respondents on 25th July, 2007. The applicant had not filed this cause at that time. Quashing the

Enforcement Notice will therefore serve no purpose. The Enforcement Notice though illegal, has already been spent. Quashing the same would be a futile exercise. There is also nothing to prohibit. The 1st and 2nd respondents are at liberty to determine whether the applicant encroached on public land. This court cannot prohibit public officers or offices from performing their duties.

The application is therefore dismissed. The applicant may have had a genuine case but he came to court too late. In the circumstances I order each party to meet own costs.

Dated, signed and delivered at Nairobi this 22nd day of May, 2013

W. K. KORIR,

JUDGE