



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL & JUDICIAL REVIEW DIVISION**

**MISC. CIVIL APPLICATION (JR) NO. 59 OF 2014**

**IN THE MATTER OF AN APPLICATION BY GURCHARN SINGH SIHRA, MAEVE MARY SIHRA, DAVINDER SINGH BHARIJ AND SOREJ KUMARI BHARIJ TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF THE PHYSICAL PLANNING ACT (CAP 286 OF THE LAWS OF KENYA)**

**IN THE MATTER OF AN ENFORCEMENT NOTICE SERIAL NO. 65134 DATED 6<sup>TH</sup> NOVEMBER, 2013 AND A LETTER REFERENCE CCN/CPD/DC/L03131/YC/tlr DATED 21<sup>ST</sup> JANUARY, 2014, BOTH ISSUED BY THE NAIROBI CITY COUNTY**

**REPUBLIC.....APPLICANT**

**AND**

**NAIROBI CITY COUNTY.....RESPONDENT**

**BERNADETTE GITARI.....INTERESTED PARTY**

**EX-PARTE:**

**GURCHARN SINGH SIHRA**

**MAEVE MARY SIHRA**

**DAVINDER SINGH BHARIJ**

**SOREJ KUMARI BHARIJ**

**JUDGEMENT**

**Introduction**

1. By a Notice of Motion dated 20<sup>th</sup> February, 2014, the *ex parte* applicants herein, **Gurcharn Singh Sihra, Maeve Mary Sihra, Davinder Singh Bharij and Sorej Kumari Bharij** seeks the following orders:

1. **THAT an order of Certiorari be issued to remove to this Honourable Court and quash the decision of Nairobi City County, communicated to the Applicants vide: -**
  - a. **Enforcement Notice Serial No. 65134 dated 6<sup>th</sup> November, 2013 requiring the Applicants to stop further construction on the property known as Land Reference No. 195/45 forthwith and avail the plans for evaluation; and**
  - b. **A letter Reference CCN/CPD/DC/L/03131/YC/tlr, dated 21<sup>st</sup> January, 2014 issued by Nairobi City County, requiring the Applicants to stop construction on the Ex-parte applicants land, Land Reference Number 195/45-Three Dee Lane, Karen.**
2. **THAT an order of Prohibition be granted, prohibiting the Respondent from interfering with the construction of ten (10) town houses on Land Reference Number 195/45 or any other legally and procedurally approved activities thereon, in terms of Plan Reg. No. CPF-AB817, as approved by the Respondent.**
3. **THAT the costs of and occasioned by this application be provided for.**
4. **THAT this Honourable Court be pleased to grant such other/further orders as it may deem just and expedient in the interest of justice.**

### **Ex Parte Applicant's Case**

2. The application is supported by a verifying affidavit sworn by **Davinder Singh Bharij**, one of the applicants herein on 12<sup>th</sup> February, 2014.
3. According to the deponent, the applicants are the registered proprietors of all that piece of land known as Land Reference Number 195/45 (Original Number 195/23/20) (hereinafter referred to as "the property") situate along Three Dee Lane Karen, Nairobi, in various proportions.
4. Sometimes in the year 2012, the applicants applied for change of use of the property from single dwelling unit, to multiple dwelling (Town Houses) which application was approved by the Respondent vide its notification of Approval of Development permission Serial No. 003692 dated 19<sup>th</sup> March, 2012 and signed by one **J. K. Barreh** subject to certain conditions which were clearly enumerated in the aforesaid Notification. The said conditions however did not require the applicants to surrender a portion of the property for a public road.
5. It was deposed that under the said conditions, the applicants were required to inter alia submit to the City Council of Nairobi satisfactory building plans within one year and complete the construction within two years. Accordingly, through their Architect, **Simon Gachunji**, the applicants submitted their proposed building plans for ten (10) town houses which plans were approved by the City Council of Nairobi and communicated to the applicants, vide its letter dated 29<sup>th</sup> November, 2012, addressed to the deponent and **Gurcharn Singh Sihra**.
6. Pursuant to the approval, the applicants applied to the National Environment Management Authority (NEMA) for environment impact assessment license to drill a bore hole on the property which was approved and a license number 0014888 dated 21<sup>st</sup> January, 2013. Similarly, the applicants applied for a National Environment Management Authority (NEMA) environmental impact assessment license for construction of the town houses in the property and the same was approved vide license Registration Number 0015094 dated 10<sup>th</sup> April, 2013.
7. Pursuant to the foregoing, the applicants through competitive bidding, appointed M/s Canton Building and Construction Ltd, as the contractor for the project and executed a contract between themselves and the contractor, in which they agreed inter alia to pay the contractor a sum of Kenya Shillings Four Hundred and Fourteen Million Nine Hundred and Six Four Hundred and Thirty Six (Kshs. 414,906,436/=) as the total contract sum of the project whose construction work was to take seventy six (76) weeks from 15<sup>th</sup> August, 2013 until 15<sup>th</sup> January, 2015. It was a term of the said contract that the applicants were required to pay the contractor a sum of Kenya Shillings Seven Hundred and Seventy Nine Thousand Eight Hundred and Ninety Nine and Thirty Six Cents (Kshs. 799,899.36/=) per day for a period of 532 days (76 weeks). Thereafter the contractor commenced construction of the ten (10) town houses on 15<sup>th</sup> August, 2013, and made substantial progress.
8. According to the applicants, they had spent about Kenya Shillings one Hundred Million (Kshs.

- 100,000,000/=) by the time of the swearing of the verifying affidavit on the construction and related works.
9. Notwithstanding this, on 6<sup>th</sup> November 2013, the City Council of Nairobi delivered to the property an Enforcement Notice Serial No. 65134 dated 6<sup>th</sup> November, 2013, requiring the applicants to “stop further construction forth with and avail your plans for evaluation”.
  10. Having commenced construction on the strength of the approvals obtained from the Respondent, and noting the effect of the Enforcement Notice, the applicants sought legal advice from their then advocates **M/s Njenga Mwaura & Company Advocates**, who wrote a letter dated 29<sup>th</sup> November, 2013 to the Respondent, inter alia demanding immediate withdrawal of the Enforcement Notice which notice was followed with reminder.
  11. On 5<sup>th</sup> February, 2014, the said advocates collected a letter from Nairobi City County dated 21<sup>st</sup> January, 2014 signed by **J. K. Barreh** who approved the change of user in which letter the Respondent alleged that since the owner of the neighbouring property L.R. No. 195/44 surrendered a 9 metre wide road, the applicants were also required to do so. The Nairobi City County however admits in the said letter, that the applicant’s Building Plan was approved by them.
  12. According to the applicants, the Respondent’s Enforcement Notice and Letter dated 21<sup>st</sup> January, 2014 were issued in gross violation of the rules of natural justice as the Applicants were not given an opportunity to be heard, or to respond to the Enforcement Notice and Letter dated 21<sup>st</sup> January, 2014. Further, in issuing the Enforcement Notice and letter dated 21<sup>st</sup> January, 2014 the Respondent acted arbitrarily, capriciously, and without due regard to the Applicants accrued rights under the law. In the applicants’ view, the Respondent’s actions are a gross abuse of power and will greatly prejudice the Applicants and unless the decisions of the Nairobi City County are quashed, the applicants stand to suffer irreparable loss and damage for the reasons that they commenced construction on their property, on the strength of the approvals issued by both the Nairobi City County, and NEMA and that they stand to lose a sum of Kenya Shillings Seven Hundred and Seventy Nine Thousand eight Hundred and Ninety Nine and Thirty Six Cents (Kshs. 779,899.36) for every day the construction works is stopped, since they will still be liable to pay the contractor.
  13. It was submitted on behalf of the applicants that the Respondent had no authority to recall the approved plans which had been acted upon by the applicants hence the enforcement notice and the letter in question were issued illegally and ultra vires the provisions of the **Physical Planning Act** (hereinafter referred to as the Act). Further the same were issued without affording the applicants a hearing in breach of the rules of natural justice. To the applicants the said action amounts to an abuse of power by the Respondent.
  14. Taking into account the capital outlay on the project by the applicants it was submitted that the said action is likely to prejudice the applicants unlike the Respondent or the interested party.
  15. According to the applicants sections 30(1) and 38(1) of the Act only applies where construction is being undertaken without permission hence the instant case falls outside their ambits. To the applicants, the appeal contemplated under section 30(1) only applies in situations where construction has been undertaken without planning permission. Once the building plans had been approved, it was submitted the Respondent became functus officio and could not recall the same.
  16. While highlighting the submissions, it was asserted by **Mr Chacha Odera**, learned counsel for the applicants that the Respondent cannot abdicate their duty to undertake due diligence and then blame it on the applicants. It was submitted that the enforcement notice was not based on the ground of the road reserve or breach of conditions but on illegal structures. It was submitted that whereas under section 38(2) of the Act the enforcement notice is required to specify the breaches and the measures to be taken, the notice herein did not comply with the said requirement. It was not until three months after the notice that the Respondent addressed the issues which addressee departed from the reasons relied upon in the affidavit.
  17. It was submitted that the said reasons and the Notice were given after plenty of resources had been spent. To the applicants, if the said 9 meter road is required the way to get it is not by way of enforcement notice but by way of compulsory acquisition. It was however contended that the Respondent had no powers to issue the said enforcement notice.
  18. In support of their submissions the applicants relied on **Republic vs. City Council of Nairobi ex**

**parte Pergolla Ltd Nairobi HCMisc. Civil Application No. 475 of 2009, Republic vs. NEMA x parte Coral Drive Luxury Homes Ltd [2012] eKLR and Republic vs. City Council of Nairobi & Another ex parte Inderpal Singh Nairobi HCCC No. 69 of 2012.**

**Respondent's Case.**

19. In response to the application, the respondents filed a replying affidavit sworn by **D K Gatimu** the 1<sup>st</sup> respondent's Officer in Charge of Development Control Section and an Assistant Director in the Respondent's County Government Department of Lands and Planning and Housing on 8<sup>th</sup> April, 2014.
20. According to him, sometimes in 2012 the Applicant herein applied to the Respondent for change of User of Property from a single dwelling unit to multiple dwelling (Town House) and on the 19<sup>th</sup> March, 2012 through the office of the Deputy director Planning one **J. K. Barreh** approval of the Applicant's change of user was granted and the same communicated vide Respondent's notification of approval of Development permission Serial No. 003692. Thereafter, the Applicant through its Architect **Simon Gachunji** submitted proposal of building plans for ten (10) number Town houses which the Respondent approved and communicated vide its dated 29<sup>th</sup> November 2012.
21. However, the Respondent in approving the Change of User on the Applicant's application did not realize that there was non-disclosure of material facts in that the Applicants did not surrender 9 metre wide Road as was required to do; the Applicants failed to submit on its Change of User that there was an 18 metre wide public utility Road Reserve to be used between neighbouring property L.R. No. 195/44 and 195/45; the Applicant failed to disclose that the neighbouring plot L.R. No. 195/44 had already surrendered a 9 metre wide Road and applicants were required to do the same; the Applicants were in breach of conditions iv, vi and vii of Notification of Approval of Development dated 19<sup>th</sup> March, 2012; the Applicants were also in breach of Respondent Respondent's (Adoptive by Law) (Building) Order 1968 legal Notice No. 15 of 1969 and Building Code.
22. Consequently, on the 6<sup>th</sup> November, 2013 the Respondent issued an Enforcement Notice Serial No. 65134 requesting the Applicant herein to stop further construction forthwith and avail plan for evaluation which request was done in Public interest and for the betterment of the would be tenants/occupants users of the Dwelling Houses.
23. Based on the advice from the Respondent's counsel on record which information the deponent believed that the Respondent has powers within the Act, to approve, disapprove and or evaluate Building Plan/Change of User within its jurisdictions, and that it acted within its powers and also as per condition set is Notification of Approval.
24. On 21<sup>st</sup> January, 2014 the Respondent communicated to the Applicants herein vide letter reference CCN/CPD/DC/L/0318/yctrl its position in regard to the 18 mere road land or public utility between plot LR. 195/44 and 195/45.
25. To the Respondent, Equity demands that he who comes to Equity must do Equity such that he who comes to Honourable Court must come with clean hands.

**Interested Party's Case**

26. According to the interested party, the registered owner of Land Reference No. 195/44, the Respondent did on 2<sup>nd</sup> July, 2008, approve a proposed amendment of subdivision of its L.R. No. 195/44 wherein it surrendered 9 meters along the South western boundary for the proposed 18 meter road reserve.
27. According to the interested party, as all the other owners of the properties including 192/7, 192/8, 159/2 and 159/69 have all surrendered 9 meters from both sides of their properties in order to accommodate the said road reserve, it is therefore obvious that there was an error in the Respondent not demanding the surrender of the said 9 meters.
28. According to the interested party the said notification of approval was subject to the plot not constituting part of the disputed public/private utility land allocations; compliance with Sections 36, 41 and 52 of the **Physical Planning Act**; and compliance with the approved zoning policy

- (Density, Character, Skyline and amenity of the area) which conditions were not adhered to by the Applicant's hence there is no case for Judicial review in this matter and accordingly the Applicants must provide a 9 meter surrender from L.R. No. 164/45 Karen aforesaid so as to make a provision for the 18 meters road reserve.
29. When in August, 2013 the interested party learnt that that the Applicants had their development scheme approved without making a provision for a 9 metre surrender as per the Respondents Structure plans and proceeded with the developments, the interested party wrote to the Respondent bringing to their attention the issue of failure to provide for the stipulated 9 metres surrender. However the Respondent failed to respond to the same thereto prompting the interested party to instruct its advocates to pursue the issue of the surrender on with the Respondent. Despite this there was no response until 21<sup>st</sup> January, 2014 when the interested party received a copy of the letter directing the Applicants to stop further construction until they provide a 9 meter surrender along their boundary for the said road reserve.
  30. According to the interested party, the Applicant is building town houses on subdivisions of 0.5 acres which is illegal in Karen while the Respondent approved subdivision on the interested party's suit properties at 1.0 acres and in its view, it is futile for the Applicant to proceed with Judicial Review since when it comes to the construction of the road reserve whatever will be found on the 9 meters of his part of the property will obviously be pulled down.
  31. To the interested party, the applicants herein are misusing the courts by way of judicial review and in any event they were advised in good time before they started construction yet they proceeded to do so despite the interested party's intervention hence they cannot be heard to say that the Respondents is in gross violation of the Rules of natural justice. In any event, it is common sense that the Applicant must surrender the 9 metre road reserve on its part for the ends of justice on behalf of the interested party and other neighbours to be met. In its view, the circumstances under which the Applicant obtained the change of user without surrendering the 9 metre road reserve are suspect in addition NEMA is not involved in the issue of boundary and it is the responsibility of the Respondents to make sure that land owners abide to the laid down procedure in developments such as this and under obligation to issue amendments where it is obvious that there was an error in the first instance.
  32. According to the interested party the applicant has made overtures to it with a view to acquiring the interested party's portion of land which the interested party has declined to dispose of. To the interested party, the Applicants have not come to court with clean hands and are well aware that this matter has no leg to stand on and are bent on using underhand tactics which should not be welcomed in the corridors of justice
  33. With respect to the amount of investments by the Applicant in the project totalling over Kshs. 400,000,000/=, it was contended that the Applicants are attempting to throw crocodile tears in the matter since the surrender does not affect the whole project but only the houses that are next to the road reserve being surrendered and the Applicant has held on to developing those four town houses in view of this pending suit in addition to the fact that the Applicant has also provided for appropriate setback as required by zoning plans hence this court should not be blinded by alleged large figures as they have no relevance to this application.
  34. On behalf of the interested party, it was submitted that the respondent acted within its statutory limits and its actions were authorised by law since any approvals made by the Respondents were clearly subject to condition that the plot must not constitute part of the utility land allocation hence the applicant was obliged to provide the 9 metre surrender like the rest of the landowners in the area.
  35. Since the Act provides an avenue for appeal, it was submitted that the applicants acted prematurely in moving this Court instead of opting for the procedure provided under section 38(4) of the Act. It was submitted that the failure by the applicants to disclose the existence of an avenue for appeal was in bad faith.
  36. According to the interested party the enforcement notice was not a decision but a process and was therefore not actionable. On estoppel it was submitted that the same is inapplicable to the instant circumstances and in any case estoppel does not operate against clear provisions of the law. With respect to prejudice, since the Respondent acted within its mandate, the issue of the applicants' expenditures is irrelevant.
  37. On behalf of the interested party **Mr Mereka**, learned counsel submitted that the Respondent has

- statutory mandate to regulate and monitor development plans. He reiterated that by not following the appeal process and not disclosing the availability thereof, the applicants were in error.
38. In support of its submissions the interested party relied on **Republic vs. Chief Land Registrar & 2 Others ex parte John Karuga Wahinya Misc. Appl. No. 5 of 2012**, **Republic vs. City Council of Nairobi ex parte Leah Aida Wambete [2010] eKLR**, **Republic vs. Attorney General & 4 Others ex parte Peter Gathecha & Another [2014] eKLR**, **Republic vs. National Environment Management Authority ex parte Sound Equipment Limited Miscellaneous Application ELC 7 of 2009**, **Phenom Limited vs. National Environment Authority [2005] eKLR**, **Republic vs. National Environment Management Authority Civil Appeal No. 84 of 2010 [2011] eKLR**.

### **Determinations**

39. Having considered the foregoing, it is my view that the plank of the applicants' case is the respondent had no powers in the circumstances to in effect cancel development approval and issue the enforcement notice.
40. It is important to remember that Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the judge disagrees with what the public body has done, but whether there is some recognisable public law wrong that has been committed. Whereas private law proceedings involve the claimant asserting rights, judicial review represents the claimant invoking supervisory jurisdiction of the Court through proceedings brought nominally by the Republic. See **R vs. Traffic Commissioner for North Western Traffic Area ex parte Brake [1996] COD 248**.
41. The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilised governance, by holding the public authority to the limit defined by the law. Judicial review is therefore an important control, ventilating a host of varied types of problems. The focus of cases may range from matters of grave public concern to those of acute personal interest; from general policy to individualised discretion; from social controversy to commercial self-interest; and anything in between. As a result, judicial review has significantly improved the quality of decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint it is a sufficient tool in causing the body in question to remain accountable.
42. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through the taking into account of an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See **Reid vs. Secretary of State for Scotland [1999] 2 AC 512**.
43. In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** 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.”**

44. 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.***
45. Judicial review, it has been held time and again, 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.***
46. The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court. See ***Chief Constable of the North Wales Police vs. Evans (1982) 1 WLR 1155.***
47. Article 47 of the Constitution provides as follows:

***(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***

***(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.***

48. That the Respondents action was an administrative one is not in dispute. The Respondent was therefore under a duty to ensure that its action was expeditious, efficient, lawful, reasonable and procedurally fair.
49. Article 47 of the Constitution in my view does not only deal with decision but also encompasses processes of arriving at decisions. As was stated by **Nyamu, J** (as he then was) in **Republic vs. The Commissioner of Lands Ex parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998:**

**“Availability of other remedies is no bar to the granting of the judicial review relief but can however be an important factor in exercising the discretion whether or not to grant the relief.....The High Court has the same power as the High Court in England up to 1977 and much more because it has the exceptional heritage of a written Constitution and the doctrines of the common law and equity in so far as they are applicable and the Courts must resist the temptation to try and contain judicial review in a straight jacket.....Although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been extended using the principle of proportionality.....The court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectations.....Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to**

**the past defined situations of standing and look at the nature of the matter before them.....Judicial review is a tool of justice, which can be made to serve the needs of a growing society on a case-to-case basis.....The court envisions a future growth of judicial review in the human rights arena where it is becoming crystal clear that human rights will evolve and grow with the society.”**

50. In the current Constitutional dispensation I with due respect disagree with the position adopted by the interested party that an administrative process cannot be challenged. Where the process is being undertaken for example in breach of the rules of natural justice I do not see why prohibition cannot issue to restrain further proceedings and certiorari to quash the proceedings which have been undertaken.

51. With respect to procedural fairness, it was held in **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300** that procedural impropriety is one of the grounds upon which a Court would be entitled to grant judicial review orders and according to the court:

**“Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”**

52. Therefore the 1<sup>st</sup> respondent was obliged to afford the applicant a hearing before it made its decision which decision, undoubtedly, affected the interest of the applicant by depriving it of its rights to the enjoyment of a property to which it lay claim by developing the same. As was held by the Court of Appeal in **Onyango Oloo vs. Attorney General [1986-1989] EA 456** the Court of Appeal expressed itself as follows:

**“The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice.....A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone’s advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...Denial of the right to be heard renders any decision made null and void *ab initio*.”**

53. However, as was held in **Republic vs. The Commissioner of Lands Ex parte Lake Flowers Limited** (supra) availability of other remedies can be an important factor in exercising the discretion whether or not to grant the relief. In **The Republic vs. The Rent Restriction Tribunal and Z. N. Shah & S M Shah Ex Parte M M Butt Civil Appeal No. 47 of 1980** the Court of Appeal held that if there is an equally convenient, beneficial and effective remedy available a Court will generally decline to exercise its discretion in favour of an applicant for a prerogative order. The rationale for this position was stated by **Ochieng, J** in **John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003**, in which the learned Judge held that for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate.
54. Where a party has not been heard, to contend that the applicant could appeal the decision of the 1<sup>st</sup> respondent is to miss the point by a wide margin. It is the body making the adverse decision which is obliged to afford the party to be affected an opportunity of being heard and not the appellate body
55. Section 38 of the ***Physical Planning Act***, Cap 286 Laws of Kenya provided as follows:
- (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.***
56. In the instant case, it has not been contended that the applicants were not granted development permission. To the contrary the Respondent expressly admits that it granted the applicants the said permission. The Respondent's issues with the applicants were that the Respondent in approving the Change of User on the Applicant's application did not realize that there was non-disclosure of material facts in that the Applicants did not surrender 9 metre wide Road as was required to do; the Applicants failed to submit on its Change of User that there was an 18 metre wide public utility Road Reserve to be used between neighbouring property L.R. No. 195/44 and 195/45; the Applicant failed to disclose that the neighbouring plot L.R. No. 195/44 had already surrendered a 9 metre wide Road and applicants were required to do the same; the Applicants were in breach of conditions iv, vi and vii of Notification of Approval of Development dated 19<sup>th</sup> March, 2012; the Applicants were also in breach of Respondent's (Adoptive by Law) (Building) Order 1968 legal Notice No. 15 of 1969 and Building Code.
57. In this case Section 38(2) of the Act mandated that the enforcement notice specifies 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 for securing compliance with those conditions. However the impugned notice was issued on the basis of an illegal development. It is clear that the enforcement notice did not allude to breach of any conditions. In fact going by the letter dated 21<sup>st</sup> February, 2014, in which the Respondent expressly admitted that the plan was approved without the provision of surrender of the 9 meter road reserve, it is clear that the said surrender was not one of the conditions for the approval. Where an Act of Parliament expressly provides for a procedure to be followed and where the failure to follow the same may adversely affect a party's accrued rights or lead to penal consequences such procedure ought to be strictly

adhered to. In cases involving closure of premises due to health reasons, it is a requirement that the notice or summons do specify particulars of the nuisance and orders proposed to be made. Consequently in **Republic vs. Kigera [2006] 1 KLR (E&L) 132**, Mbaluto and Bosire, JJ (as they were) expressed themselves *inter alia* as follows:

**“For a court to be satisfied as to the existence of nuisance, it must act on evidence and that evidence must be tested by cross-examination before being acted upon or at least persons against whom it is given must be given an opportunity to challenge it if only to demonstrate that justice has been done. No person should be made to feel that his interests have not been safeguarded or at least not been borne in mind by the Court in arriving at a decision which affects him... Upon receipt of a complaint under section 120(1) of the Public Health Act, the court should deal with the criminal matter in the normal manner until completion as provided under the Criminal Procedure Code. If the Court is, *prima facie*, satisfied that a nuisance has been proved to exist such as renders the premises unfit for human habitation, whether or not there is a conviction, it should adjourn further proceedings so as to summon before it all persons who are reasonably likely to be affected by an order of closure or demolition, if made. The summons or notice should give particulars of the nuisance, the orders proposed to be made, the date they are required to appear and, of course, require them appear to show cause why the order proposed should not be made. On the appointed time the court will then hear all those who have responded to the court’s summons or notice and who wish to be heard and if, upon conclusion of the proceedings, the court is satisfied, on a balance of probabilities, that a nuisance does exist as renders the premise or dwelling unfit for human habitation, it should record such finding and proceed to declare them as such and make the necessary orders as provided under the Public Health Act. Although the Court is aware that the said procedures are likely to greatly prolong proceedings and delay the abatement of nuisances, it considers it ideal to meet the ends of justice, and at the same time reduce the number of applications similar to the present one, which may be made by the court.”**

58. Therefore before the Respondent can determine whether a person to whom an approval has been granted has failed to adhere to the conditions specified in the approval, it is my view and I so hold that in order that the action be deemed to be fair such a person ought to be afforded an opportunity of being heard thereon.
59. The applicants have contended that once the approval is given the Respondent has no power to revoke the same by issuance of enforcement notice. That the Respondent has power to issue enforcement notice in appropriate case is not in doubt. Accordingly I am unable to hold that the Respondent had no power to put into a motion a process through which the approval could be rescinded.
60. With respect to the availability of the alternative appellate avenue, reliance was placed on section 38(4) of the Act which provides:

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

61. Therefore for a person to avail himself or herself of the appellate process under section 38(4) the notice must have been given pursuant to section 38(1) thereof. In this case the notice which was purportedly given alleged that the development was illegal. It is however clear that that ground was erroneous. In my view without a valid notice having been given pursuant to section 38(1) of the Act, the provisions of section 38(4) cannot be said to have been triggered. To make matters worse the notice which on the face of it was served on 6<sup>th</sup> November 2013 was indicated to take effect on the same day. I am therefore not satisfied that the notice which was served was in accord with section 38(1) of the Act in order to properly trigger the appeal process. In other words I am not satisfied that the alternative appellate process was an equally convenient, beneficial and effective remedy.
62. In these proceedings, I must however emphasise that the Court is not concerned about the merits

of the decision and whether or not the applicant ought to have surrendered 9 metres as a road reserve. The Court's concern in this case is whether the correct process was followed. Whether or not the applicants ought to have surrendered a portion of their plot towards a road reserve is beyond the scope of this application. Once the Court finds that the proper procedure was not followed the Court's duty is to simply nullify the process or the decision and leave the parties to take proper steps.

63. Having considered the application herein, I find that the 1<sup>st</sup> respondent acted un-procedurally hence its decision was tainted by procedural impropriety and the same cannot stand.

### **Order**

64. In the result while I am unable to grant an order of prohibition in the manner sought herein, the order which commends itself to me and which I hereby grant is an order of Certiorari removing to this Court for the purposes of being quashed the decision of Nairobi City County, communicated to the Applicants vide enforcement Notice Serial No. 65134 dated 6<sup>th</sup> November, 2013 requiring the Applicants to stop further construction on the property known as Land Reference No. 195/45 forthwith and avail the plans for evaluation and a letter Reference CCN/CPD/DC/L/03131/YC/tlr, dated 21<sup>st</sup> January, 2014 issued by Nairobi City County, requiring the Applicants to stop construction on the Ex-parte applicants land, Land Reference Number 195/45-Three Dee Lane, Karen and the same are hereby quashed. I also award the applicants the costs of the application to be borne by the Respondent.

65. It is so ordered

**Dated at Nairobi this day 19<sup>th</sup> day of September, 2014**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Mr Kiprop for the applicant***

***Mr Ouma for the Interested Party***

***Cc Patricia***