REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPL. NO. 76 OF 2014

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW FOR ORDERS OF CERTIORARI AND MANDAMUS

AND

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

AND

IN THE MATTER OF NAIROBI CITY COUNTY

AND

IN THE MATTER OF NOTIFICATION OF APPROVAL OF DEVELOPMENT PERMISSION FOR CHANGE OF USER ON L.R. NO. 3734/619 GRANTED ON 23RD MARCH, 2011

REPUBLIC…….....…..……..…..…..APPLICANT

VERSUS

NAIROBI CITY COUNTY…….....…….……....…….RESPONDENT

AND

TIARA PROPERTIES LIMITED…….....…INTERESTED PARTY

EXPARTE: MUGUMO VILLAS LIMITED

JUDGEMENT

Introduction

1. By a Notice of Motion dated 26th February, 2014 the *ex parte* applicant herein, **Mugumo Villas Limited,** seeks the following orders:

1. **AN ORDER OF CERTIORARI removing to this Honourable Court for purposes of the same being quashed the decision by the Respondent approving the application for change of user of Land Reference No. 3734/619 situate in Lavington along Mugumo Road from Residential to Commercial and offices.**
2. **AN ORDER OF MANDAMUS do issue directed to the Respondent to undertake afresh the process of considering the application by the Interested Party for Change of User of Land Reference No. 3734/619 situate in Lavington along Mugumo Road from Residential to Commercial and offices.**

***Ex Parte* Applicants' Case**

2. The applicant's case was presented vide affidavits sworn by its director, **Dickson Mukaburu Matu.**

3. According to the deponent, the Applicant is the registered proprietor of the Property known as L.R. No. 3734/618 situate along Mugumo Road in Lavington on which there are residential houses occupied by lease holders.

4. Sometimes in late January, 2014, he received a letter dated 27th January, 2014 from the Interested Party informing him that they wished to start the construction of a commercial office building on their property which is adjacent to the applicant's property known as L.R. No. 3734/619. In the said letter the interested party further informed him that the intended excavation works (of up to ten (10) metres) will necessarily result in the removal of the Applicants boundary wall for a period of approximately six (6) months).

5. Shocked by this information the deponent instructed the firm of Ochieng, Onyango, Kibet & Ohaga to write to the Interested Party and inform them that the Applicant was not aware of the planned development and that they should not undertake any construction on their property. The aforesaid advocate later informed the deponent that they received a Notification of Approval of Development and Notice advertising the application of the Change of User contained in the Standard Newspaper on 3rd February, 2011.

6. The deponent contended that upon seeking legal advise it became very clear that he Respondent did not follow the due procedure as laid down in Section 41 (3), (4) and (5) of the ***Physical Planning Act*** Cap 486 Laws of Kenya (hereinafter referred to as the Act) under which it was mandatory that he application of change of user by the Interested party be served on the Applicant so that it may decide whether to lodge an objection or not. To the deponent, the breach of the requirement denied the Applicant an opportunity to avail itself of the provisions of the Act which allowed it to lodge an objection to the Intended Change of User by the Interested Party. As a result, the Applicant was denied an opportunity to be heard before the Change of User was granted in favour of the Interested Party.

7. It was deposed that the Change of User now in possession of the Interested Party does not include or protect the Applicant's property and yet it is adjacent to the Interested Party's property and there is grave danger that the Applicant and the Leaseholders living on its property will suffer serious damage because the intended excavation of up to ten (10) metres may weaken the foundation of their houses leading to their collapse.

8. The applicant's case was further that the lease holders will be left insecure and vulnerable to criminal attacks if the boundary wall is brought down. To the applicant, all the noted dangers of loss and insecurity would have been taken into account if the Applicant had been given an opportunity to be heard when the Interested Party applied for the change of user.

9. The applicant's view was that section 41(3) of the ***Physical Planning Act***, Cap 286, Laws of Kenya (hereinafter referred to as the Act) requires the Respondent to not only advertise the Application for Change of User as they did but they were also required to serve the ex parte applicant which they did not hence they breached the same. As a result the applicant was not made aware of the Application by the interested party in order to object thereto.

10. The deponent therefore urged the Court to step in protect the Applicant's right to peaceful and quiet enjoyment of their property.

11. On behalf of the applicant it was submitted while reiterating the averments in the supporting affidavit that the six (6) months limitation period only applies to formal orders.

12. It was submitted that in the circumstances of this cvase the Respondent had no discretion when it came to the issue of service on the applicant. According to the applicant the use of the word "shall" in this case was mandatory and not merely directory and a practice cannot override express statutory provisions.

13. In support of the submissions the applicant relied on **Republic vs. Chief Magistrate Milimani Commercial Court and 2 Others ex parte Violet Ndanu Mutinda & 5 Others [2014] eKLR**; **Republic vs. City Council of Nairobi and 2 Others [2014] eKLR**; **Joseph Mbalu Mutava vs. Attorney General & Another [2014] eKLR**; **Mount Kenya Bottlers Limited & 3 Others vs. Attorney General & 3 Others [2012] eKLR**; **Republic vs. Judicial Service Commission ex parte Pareno [2004] KLR**; and **Republic vs. Town Planning Committee of City Council of Nairobi [2012] eKLR**.

Respondent's Case.

14. The Respondent's position was that the property known as L.R. NO. 3734/619 user was initially residential which was since been changed to commercial upon approval of the development being granted by then CITY Council of Nairobi (City County of Nairobi) and upon certain requirements set out being met by the applicant.

15. In its view, the Respondent followed due process in granting the change of user to the Interested Party herein by advertising the Notice for change of user in the ***Standard Newspaper*** on Thursday 3rd February, 2011 and invited the public to give their objections in writing within (14) days if any in conformity with Section 41 (3), (4) & (5) of the Act and the practice and upon the expiry of the 14 days from the date of gazettement of the notice the respondent erected a site board notice at the gate of the property in question conspicuously for all and especially the neighbours to see and raise objection thereto (if any) which is actually the practice by the Respondent in conformity with Section 41(3) of the Act.

16. Its position was that the Interested Party's approval for change of user was based on the review of the housing zoning policy to expand Lavington Green Shopping centre as a designated commercial zone, following the resolutions of City Planning Committee meeting dated 7th July, 2006 so as to adequately serve the residents whose population has since risen and the Interested Party's property in question is within the expansion limits.

17. It was contended that plot L.R. No. 3734/619 and the Applicant's plot No. 3734/618 are appurtenant to each other and actually adjacent to the Lavington Green shopping centre which is earmarked for extension hence the granting of the approvals for the change of user of which the applicant is also a beneficiary.

18. Its position was that the provisions of Section 41(3) of the Act gives discretion on the part of the respondent to serve the notice of change of user where in its opinion regarding the development, change of user or sub-division has important impact on the contiguous land or does not conform to any conditions registered against the title deed of the property and that the stakeholders/residents of Lavington were widely consulted and encouraged to raise objections (if any) to the City Council of Nairobi during the launching of the revised zoning policy of zone 5 Lavington in a meeting held at Lavington Primary School on 22nd March, 2006, from which recommendations thereof were accordingly adopted by the Authority vide Town Planning Committee meeting dated 7th July, 2006. In its view, the Applicant ought to have taken advantage of the said consultative forum to raise its objections against the proposed revised policy from which it also benefited and should therefore be stopped from hindering others from the enjoying the same benefit.

19. The Respondent averred that no representation against, or objection to the change of user of the revised policy was ever received by the respondent even upon the residents including the applicant herein being made aware accorded ample opportunity to raise the same.

20. To the Respondent, the Applicant's application is premature as the same has been brought to court without preferring an appeal the decision of the concerned Director in writing to the liaison committee contrary to Section 13(1) of the Act.

21. Further, the process being challenged herein was also followed when the applicants change User was approved from residential to multi-dwelling user on 0.1 ha per unit as per the guidelines of the revised Zoning Policy and equally practiced in many other areas within the County as a whole and section 41(3), (4) & (5) of the Act has provided clear guidelines for change of user which have not been breached at all by the Respondent.

22. It was therefore the Respondent's position that the Applicants application is bad in law and an abuse of the Court process.

Interested Party's Case

23. According to the interested party, it is the registered owner of LR No. 3734/619 situate on Mugumo Road, Nairobi which it acquired lawfully on 11th September, 2008.

24. Thereafter in exercise of its constitutional rights it applied for a Change of User in respect thereof from the Director of City Planning, Nairobi City County and upon request by the later the interested party caused an advertisement to be published in the Standard Newspaper on 3rd February, 2011 inviting objections from the members of the public. However the Respondent did not receive any such objections and the interested party made the requisite payments and by a Notification of Approval of Development Permission number 001855, it was advised that the change of user had been approved by the Town Planning Committee by proceedings held on 23rd March, 2013 subject to the conditions set out thereunder.

25. The interested party also sought and was granted a conditional Environmental Impact Assessment Licence by the Director of the National Environmental Management Authority (NEMA) on 14th November 2012.

26. After complying with all the positive obligations placed on the interested party, it commenced the development of the commercial building thereon and given a shared wall with the applicant, advised the latter of the possibility of the same being tampered with at the excavation stage which according to the interested party is a common feature in all developments and ordinarily requires good neighbourliness in order to secure the properties during the excavation works. However despite the approaches made by the interested party to the applicant, no positive response was received from the applicant save for a demand letter dated 3rd February, 2014 raising the issue of change of user and want of sanction by NEMA which issues the interested party addressed.

27. According to the interested party, it complied with all that it was required to do and in its view since the development has commenced the stay granted herein is a disguised injunction application by one private person against another and that there are no pending proceedings before the Respondent capable of being stayed.

28. To the interested party the applicant has not appealed against the decision granting the change of user to the Liaison Committee as contemplated under the Act. Further the use of the word "shall" does not necessarily impose a mandatory discharge of the duty placed on the public body but substantial compliance thereof especially when it is directory in nature.

29. Apart from that there was a Bill Board erected on the suit property before the change of user

application was considered and the Lavington residents were involved and did participate in deliberations that led to the zoning policies by the Respondent and save for the director of the ex-parte Applicant, who previously owned the property where on the units erected on the said property have been built, the interested party has had no issue with its neighbours as they undertake the development.

30. According to the interested party and based on a file respecting the change of user application by the ex-parte applicant to the Respondent in respect ALL THAT PROPERTY KNOWN AS 3734/618, Mugumo Road, Lavington Area, Nairobi, it was contended that the Public Notice in respect thereof was effected through a newspaper advertisement; in his application, he noted the rapid transformation of the area from single residential building to multiple high density; his advertisement was in fact ran in the ***Kenya Times Newspaper*** on 10th September, 2005; the Approval was made pursuant to a meeting held on 16th July, 2003 and contained in a Notification dated 25th August, 2003; the neighbours seem not to have been served with the Approval Application; the only letter sent to neighbours was the one dated 12th June, 2006, close to THREE years after the change of user was granted.

31. In the interested party's view it is evident that the ex-parte Applicant's development is a result of the process that it now challenges and having benefited from the exercise of discretion by the Respondent, he ought not to insist on a particular mode of exercising such discretion. Since the Interested Party has since acted on the approval by entering into contracts with Third Parties it would not be efficacious to grant the relief sought since the effect of the Orders sought is likely to affect all approvals for Change of User granted by the Respondent to property owners within the county and thus expose all development carried out pursuant to this Change of User to potential risk of demolition, the development on the ex-parte Applicant's a property inclusive. Apart from that the orders sought if granted may have drastic effects on the public and thus cause chaos within the stable property market.

32. In the interested party's view, the ex-parte Applicant has no just objection that would have influence the approval sought which was in terms of the Respondent's zoning policy guidelines but its concern with respect to the wall can be amicably conclusively addressed without the recourse to judicial review proceedings which are not efficacious and it would be in any event a dispute between two property owners.

33. The interested party asserted that the ex-parte orders issued on 26th February, 2014 were irregular to the extent that the proceedings sought be quashed were concluded over thirty five months ago of the one part and the stay sought is in the form of an injunction as against a public citizen against acts which are not proceedings in term of Order 53 Rule 1(4) of the ***Civil Procedure Rules***, 2010.

34. According to the interested party the filing of this case is motivated by a desire by the ex parte applicant to frustrate the lawfully user of the interested party's property.

35. The interested party also took issue with the fact that the applicant had instituted proceedings which according to it were parallel to these proceedings with NEMA.

36. On behalf of the interested party it was submitted that the interested party is an innocent benefactor of the approval and has not breached any law or regulation.

37. After submitting on the processes and the rationale for the approval of change of user, it was submitted that since the recital of section 41 of the Act talks of "Subdivision of Land", the primary legislative intent in this section was to deal with subdivision of land, an application for Development Permission having been addressed at section 33.

38. It was submitted that the interested party complied with the statutory obligations and that there is no obligation on the Respondent to advertise a Development Application made pursuant to section 31 and that section 32(4) of the Act only requires referral to the Land Control Board when the application is in respect of an agricultural land. According to the interested party section 32 is exhaustive with respect to Development Application and Notification to an adjacent land user is not duty imposed hence no such duty was imposed to warrant judicial review.

39. It was further submitted that what section 41 stipulates is notification and not a hearing and the Act does not provide for the effect of failure to fully comply with the Act and only provides for a remedy. It was submitted that in the instant case there was substantial compliance with the Act in that there was newspaper advertisement and display of a notice on the property which the applicant has not contended it never saw. It was therefore submitted that the notification is merely directory hence the Court ought not to be too rigid in its application of the provision, especially when the application affects accrued rights of third parties.

40. It was submitted that by the use of the word "opinion" in the section, the local authority is granted discretion in exercising the duty under section 41(3) hence mandamus would not lie. Since the proceedings complained of were concluded on 23rd March, 2011 the application was brought way out of time. Apart from that section 41(6) exhaustively provides for a procedure for challenging the Respondent's decision by an appeal to the Liaison Committee.

41. Since the applicant has not shown the grounds on which it intends to object, it was submitted that it would be an act in vain for the Respondent to be asked to start the process a fresh when there is no objection to be lodged. Further where the rights of a third party is involved, it was submitted that the applicant is faced with a higher duty in law and since the interested party is not accused of violating the law, it would not be just for the Court to exercise its jurisdiction in the manner sought by the applicant.

42. With respect to mandamus, it was submitted that since the applicant seeks that the Court compels the Respondent to act in a particular manner, the order sought cannot be granted.

43. By failing to serve the application on all the parties affected by the orders sought herein, i.e. the owners of adjacent properties, it was submitted that the application violated Order 53 rule 3 of the ***Civil Procedure Rules***.

44. According to the interested party since the development of the property in question is at an advanced stage involving massive financial commitment, it is not efficacious to grant he orders sought herein. Since the applicant itself failed to adhere to the provisions of the law it now wants to be enforced, the interested party contended that the order sought ought not to be granted.

Determinations

45. I have considered the foregoing as well as the submissions of the parties herein.

46. The first issue for determination is whether the instant application was filed outside the statutory period. Sections 9(2) and (3) of the ***Law Reform Act*** provides as follows:

> ***(2) Subject to the provisions of subsection (3), rules made under subsection (1) may prescribe that applications for an order of mandamus, prohibition or certiorari shall, in specified proceedings, be made within six months, or such shorter period as may be prescribed, after the act or omission to which the application for leave relates.***
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> ***(3) In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.***

47. In **R. vs. The Judicial Inquiry Into The Goldernberg Affair Ex Parte Hon Mwalulu & Others HCMA No. 1279 of 2004 [2004] eKLR** as well as **Republic vs. The Commissioner of Lands Ex Parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998,** it was held that the 6 months

limitation period set out in Order 53 rules 2 & 7 only applies to the specific formal orders mentioned in Order 53 rules 2 and 7 and to nothing else and a decision to alienate or to allocate land, it was held, is not formal because the commissioner may in most cases issue titles without necessarily identifying the decision and the date he made the decision formal and therefore the time limitation would not apply to such a decision and the question of attacking it under order 53 rule 7 would not arise and there is nothing capable of being exhibited under Order 53 rule 7. Further Order 53 rule 2 and 7 only applies to the formal orders and proceedings mentioned therein and matters not mentioned are not barred by the 6 months limitation.

48. In **Republic vs. Kajiado Lands Disputes Tribunal & Others Ex Parte Joyce Wambui & Another Nairobi HCMA. No. 689 of 2001 [2006] 1 EA 318,** the Court found that despite the irregularities the Court cannot countenance nullities under any guise since the High Court has a supervisory role to play over inferior tribunals and courts and it would not be fit to abdicate its supervisory role and it has powers to strike out nullities.

49. The phrase "or other proceedings" for the purposes of judicial review has been considered by the Tanzania Court of Appeal in **Mobrama Gold Corporation Ltd vs. Minister for Water, Energy and Minerals & Others Dar-Es-Salaam Civil Appeal No. 31 of 1999 [1995-1998] 1 EA 199,** in which case the said Court held that the phrase "or other proceedings" has to be construed *ejusdem generis* with judgement, order or decree, and conviction as having reference to a judicial or quasi judicial proceedings as distinct from acts and omissions for which *certiorari* may be applied for.

50. However, it is clear that where the remedy sought is not just limited to an order of certiorari, even if the application was not commenced within the said 6 months period, the whole application cannot be said to be incompetent by that mere fact. The 6 months limitation only applies to application for certiorari for the simple reason that in cases where an order for prohibition is sought it means that the action sought to be prohibited is still continuing while mandamus applies to situations where a public authority has declined to carry out a duty imposed on it.

51. In the premises it is my view at this stage that the six months limitation period may not be invoked to bar the applicants from bringing the present proceedings.

52. However, it must be noted that the nature of judicial review requires parties to approach the Court expeditiously. Expedition in my view is the hallmark of judicial review proceedings and where the Court finds that an applicant has approached the Court after an inordinate delay the Court would still be entitled to decline to grant the orders sought time bar or otherwise not withstanding. The rational for this is that judicial review deals with administrative actions and such actions ought not to be placed in a status of uncertainty as to whether they would be subject of challenge. I associate myself with the decision in **Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs. Attorney General & 5 Others [2006] 1 KLR 443** where it was held:

"As stated herein it is a requirement of the rule of law that law must be certain and predictable… Thus the advantages of upsetting these ingredients at the altar of individual claims no matter how meritorious are heavily outweighed by the advantages of certainty predictability and stability…I believe one of the pillars of the rule of law which the Court should always uphold is the predictability of law so that individuals and other juristic persons can plan their lives and affairs on the basis of certainty of the applicable law. On this ground also I would not exercise my discretion to grant the relief sought even if it was properly sought and properly grounded because the delay even by the known judicial review standards is inordinate. Limitation in judicial review actions is that of a reasonable time (except as regards *certiorari* orders and proceedings set out in order 53 rule 2, which is six months). Reasonable time will in my view vary depending on the reasons for the delay. Where the decision being impugned has been implemented and third parties have come onto the scene the Court should not intervene because speed and promptness are the hallmarks of judicial review. Hardship to third parties should keep the Court away."

53. The next issue I wish to deal with is the relevance of Order 53 rule 3 to these proceedings and whether

these proceedings are thereby rendered fatally incompetent. I agree that judicial review orders are not available against the 2nd and the 3rd respondents herein. Such persons could only be joined as interested parties under Order 53 rule 3(2) of the ***Civil Procedure Rules***. The said provision provides:

The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings.

54. What the said rule provides is not that all person affected be served but that all persons ***directly*** affected be served. Whereas the people in the neighbourhood may be affected by the putting up of commercial premises therein, I do not hold the view that all the residents of the neighbourhood would be directly affected for the purposes of Order 53 rule 3(2) aforesaid. In this case the only persons who would be directly affected were persons who were beneficiaries of the approval for change of user in question and it is not contended that apart from the interested party there were other persons who would be directly affected if the orders sought herein were granted. Accordingly I do not agree that the application was rendered incompetent by the mere fact that all the persons in the neighbourhood were not served.

55. It is now trite that judicial review does not deal with the merits of the challenged decision but only deals with the decision making process: 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. Once these are complied with an aggrieved person ought to invoke the appellate procedure if an appeal is available but ought not to use judicial review as an avenue of an appeal.

56. Having considered the affidavits and the submissions it is my view that the only issue that falls for determination within the purview of judicial review is whether the law relating to objections under the ***Physical Planning Act*** was adhered to. Section 41(3), (4) and (5) of the said Act provides:

> ***(3) Where in the opinion of a local authority an application in respect of development, change of user or subdivision has important impact on contiguous land or does not conform to any conditions registered against the title deed of property, the local authority shall, at the expense of the applicant, publish the notice of the application in the Gazette or in such other manner as it deems expedient, and shall serve copies of the application on every owner or occupier of the property adjacent to the land to which the application relates and to such other persons as the local authority may deem fit.***
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> ***(4) If the local authority receives any objection to, or representation in connection with, an application made under subsection (1) the local authority shall notify the applicant of such objections or representations and shall before the application is determined by it afford the applicant an opportunity to make representations in response to such objections or representations.***
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> ***(5) A local authority may approve with or without such modifications and subject to such conditions as it may deem fit, or refuse to approve, an application made under subsection (1). (6) Any person aggrieved by a decision of the local authority under subsection (5) may appeal against such decision to the respective liaison committee:***
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> ***Provided that if such person is aggrieved by a decision of the liaison committee he may appeal against such decision to the National Liaison Committee in writing stating the grounds of his appeal: Provided further that the 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.***

57. It is therefore clear that the power to form an opinion that an application in respect of development,

change of user or subdivision has important impact on contiguous land or does not conform to any conditions registered against the title deed of property is given by statute to the local authority. What then is the meaning of "in the opinion"? That phrase in my view falls in the same category as "if it appears" or 'if satisfied". In **Employment Secretary vs. ASLEF [1972] 2 QB 455 at 492-3**, Lord Denning expressed himself as follows:

" 'If it appears to the Secretary of State'? This, in my opinion, does not mean that the Minister's decision is put beyond challenge. The scope available to the challenger depends very much on the subject-matter with which the Minister is dealing. In this case I would think that, if the Minister does not act in good faith, or if he acts on extraneous considerations which ought not to influence him, or if he plainly misdirects himself in fact or in law, it may well be that a court would interfere; but when he honestly takes a view of the facts or the law which could reasonably be entertained, then his decision is not to be set aside simply because thereafter someone thinks that his view was wrong."

58. In **Congreve vs. Home Office [1976] QB 629**, the same Judge expressed himself *inter alia* as follows:

"But now the question comes: can the Minister revoke the overlapping licence which was issued so lawfully? He claims that he can revoke it by virtue of the discretion given to him by section 1(4) of the Act. But I think not. The licensee has paid £12 for the 12 months. If the licence is to be revoked – and his money forfeited – the Minister would have to give good reasons to justify it. Of course, if the licensee had done anything wrong – if he had given a cheque for £12 which was dishonoured, or if he had broken the conditions of the licence – the Minister could revoke it. But when the licensee had done nothing wrong at all, I do not think the Minister can lawfully revoke the licence, at any rate, not without offering him his money back, and not even then except for good cause. If he should revoke it without giving reasons, or for no good reason, the courts can set aside his revocation and restore the licence. It would be a misuse of power conferred on him by Parliament: and these courts have the authority – and I would add, the duty – to correct a misuse of power by the Minister or his department, no matter how much they resent it or warn us of the consequences if we do. *Padfield vs. Minister of Agriculture, Fisheries and Food [1968] AC 997* is proof of what I say. It shows that when a Minister is given a discretion – and exercises it for reasons which are bad in law – the courts can interfere so as to get him back on to the right road."

59. It is now clear that even in the exercise of what may appear to be prima facie absolute discretion conferred on the executive the Court may interfere. The Court can only intervene in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See the decision of **Nyamu, J** (as he then was) in **Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323.**

60. In this case, the position taken by the Respondent is that it followed the due process by advertising the Notice of Change of User. It is therefore clear that the Respondent does not claim that in its opinion the notice was in the circumstances unnecessary. For the Respondent to have given the notice it must have been of the view that the notice was necessary otherwise it would not have made attempts to comply with the provisions relating to notification.

61. The interested party's position however is that the notification was only necessary where what was intended was subdivision and not development application. It is true that section 41 of the Act falls within Part VI of the Act which is headed "Miscellaneous" while the side note to section 41(3) of the Act does not limit itself to subdivision but also deals with development and change of user. In **Waticho Vs. Ndau & Another [2008] 2 KLR (EP) 178** it was held based on ***Maxwell on Interpretation of Statutes,*** 12th Ed

Pp 9 that:

"The notes often found printed at the side of sections in an Act which purport to summarise the effect of the section have sometimes been used as an aid to construction but the weight of the authorities is to the effect that they are not parts of the statute and so should not be considered for they are not inserted by Parliament, nor under the Authority of Parliament, but irresponsible person... They are just side notes or catch words."

62. Therefore considering the provisions of section 41(3) of the Act I am unable to agree with the contention that section 41 of the Act only deals with subdivision and not development and change of user.

63. The next issue for determination is whether the Respondent complied with the law. Section 41(2) required the Respondent**,** *"at the expense of the applicant, publish the notice of the application in the Gazette or in such other manner as it deems expedient, and shall serve copies of the application on every owner or occupier of the property adjacent to the land to which the application relates and to such other persons as the local authority may deem fit."* Prima facie, the only discretion given to the Respondent was with respect to the mode of the publication whether in the Gazette or in any other manner deemed expedient and secondly, and with respect to "such other persons" excluding owners or occupiers of adjacent lands to which the application relates. With respect to the latter the provisions on the face of it is in mandatory terms. The interested party's contention however is that the mere use of the word "shall" is not necessarily mandatory and in this case it was merely directory.

64. This Court is well cognisant of the fact that the use of the word "shall" in a statute only signifies that the matter is *prima facie* mandatory and its use is not conclusive or decisive and it may be shown by a consideration of the object of the enactment and other factors that the word is used in a directory sense only. See **Liverpool Borough Bank vs. Turner [1861] 30 L.J. CH. 379 &** ***Principles of Statutory Interpretation*** by **Justice G. P. Singh** at 242. In **Joseph Mbalu Mutava vs. Attorney General & Another** (supra) the Court expressed itself as follows:

"...while the word *'shall'* is ordinarily interpreted as mandatory, it will be considered as directory depending on the text and context thereof; and that a statute will be deemed as directory or mandatory having regard to the purpose and object it seeks to achieve... Failure to comply with a mandatory requirement invalidates the act done; where it is merely directory, the thing done will be unaffected though there may be sanctions imposed on the person affected."

65. In my view the provisions of section 41(2) of the Act are meant to reinforce the constitutional requirement under Article 47 thereof that a person likely to be adversely affected by an administrative decision ought to be heard before the decision is made. Matters dealing with developments and change of users more often than not affect the environment and those who are likely to be directly affected thereby ought to be heard before such developments are approved. To emphasise the importance which the Constitution attach to environment, the preamble to the Constitution provides that the people of Kenya are "***RESPECTFUL*** *of the environment, which is our heritage, and determined to sustain it for the benefit of future generations*" while Article 42 expressly provides that every person has the right to a clean and healthy environment, which includes the right to have the environment protected for the benefit of present and future generations through legislative and other measures.

66. It is therefore my view that the requirement that persons who own or occupy property adjacent to the land to which the application relate be served is mandatory and not merely directory and failure to serve them would ordinarily justify the Court in interfering with the decision by a local authority approving change of user.

67. The Respondent and interested party however contend that the applicant ought to have appealed to the Liaison Committee instead of commencing these proceedings. 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. In

this case, however, it is contended that the applicant was not served. Where a party is not served and therefore had no opportunity of objecting, it is my view that an appeal would not be equally convenient, beneficial and effective since as rightly submitted by the interested party an appeal must be based on specific and precise grounds. In other words an appeal as opposed to judicial review challenges merits and where only side was considered the issue of merits may not arise since the only merits were what was before the body making the decision. I also associate myself with the decision in **Republic vs. The Commissioner of Lands Ex Parte Lake Flowers Limited** (supra) that:

"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..."

68. It was contended that since the applicant has not disclosed the grounds upon which its objection would have been based, to grant the orders sought herein would be an exercise in vain. However, it is my view that it is not the perceived hopelessness of a person's case that determines whether or not he ought to be heard in a decision likely to adversely affect him. The right to be heard is a fundamental human right that is not given by the State since human rights are generally universal and inalienable rights of human beings. A Constitution simply recognises the natural and original human rights of mankind which any and every human being should have in order to lead a dignified life till his natural death. As was held by **Nyamu, J** (as he then was) in **Kenya Bus Services Ltd & 2 Others vs. Attorney General [2005] 1 KLR 787.**

"The only difference between rights and the restrictions are that the restrictions can be challenged on the grounds of reasonableness, democratic practice, proportionality and the society's values and morals including economic and social conditions etc. whereas rights are to the spiritual, God given, and inalienable and to the non-believers changeless and the eighth wonder of the World."

69. As was held in **Onyango Oloo vs. Attorney General [1986-1989] EA 456**:

"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..... Denial of the right to be heard renders any decision made null and void ab initio."

70. Having considered the foregoing I have no hesitation in holding that that the Respondent's action violated the applicant's right to fair administrative action as envisaged under Article 47 of the Constitution. The said action was clearly tainted with procedural impropriety. The broad grounds on which the Court exercises its judicial review jurisdiction were restated in the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300.** In that case the Court cited with approval **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478** at **479** and held:

"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality....Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...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."

71. However, in **Republic vs. Judicial Service Commission *ex parte* Pareno** (supra) 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. Since the court exercises a discretionary jurisdiction in granting judicial review 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.**

72. In this case it is clear that the applicant did not come to court speedily. As was held in **Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs. Attorney General & 5 Others** (supra) where the decision being impugned has been implemented and third parties have come onto the scene the Court should not intervene because speed and promptness are the hallmarks of judicial review and that hardship to third parties should keep the Court away. It is contended that massive developments have been undertaken and that the applicant itself was a beneficiary of a similar procedure. The decision whether or not to grant judicial review remedies is clearly an exercise of discretion and the supplicant to the same ought to approach the Court with a blemish.

73. Having considered the application, herein whereas I find that the Respondent's action violated the applicant's right to fair administrative action and was tainted with illegality I, in the exercise of my discretion, decline to grant the orders sought herein.

ORDER

74. In the result the Notice of Motion dated 26th February, 2014 fails and is dismissed but with costs to the applicant to be borne by the Respondent.

Dated at Nairobi this day 17th day of September 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mwangi for Mr Burugu for the Applicant

Mr Luseno for the Interested Party

Cc Patricia