REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 286 OF 2013

REPUBLIC...APPLICANT

VERSUS

NAIROBI CITY COUNTRY.......................................RESPONDENT

HARDY RESIDENTS ASSOCIATION ....INTERESTED PARTY

EX-PARTE

ANDREW NG'ANG'A

JUDGEMENT

The ex-parte Applicant, Andrew Ng'ang'a is through the notice of motion application dated 20th August, 2013 seeking orders as follows:

> **"1. That an order of certiorari do issue to remove and bring to this Honourable Court for the purposes of quashing the respondent's Enforcement Notice dated 19th February, 2013.**
>
> **2. That an order of prohibition do issue directed against the respondent prohibiting it from acting on the Enforcement Notice dated 19th February, 2013.**

3. That the costs of this application be provided for."

The application is supported by several affidavits among them being the verifying affidavit sworn by Milicent Wambui Mugih on 2nd August 2013. It is also supported by the annexures to the affidavits and the statutory statement filed together with the chamber summons application for leave on 2nd August, 2013.

The Respondent, the Nairobi City County and the Interested Party, Hardy Residents Association filed various affidavits together with the exhibits in opposition to the application.

From the papers filed in Court, the Applicant's case is that he holds L.R. No. 2327/172 upon trust for his mother Millicent Wambui Mugih. The land's change of user from residential to nursery school was approved by the Respondent on 27th February, 1993. This was followed by a change of user from nursery school to catering school which was approved by the Respondent on 30th August, 1995. On the parcel of

land in question stands an office block with classrooms/lecture theatres, a kitchen, a multipurpose hall cum dining hall, dormitories for both male and female students and six cottages which also serve as dormitories.

The Applicant's case is that after the change of user he registered Andrew Hardy Academy and admitted students who study and reside within the institution. Further, that this is not the only education institution in that area as there are many other universities within Karen. The Applicant's case is that from 2002 he started providing catering/hostel services to students from the Catholic University, Kenya School of Law, Kenya Medical Training Centre and Jomo Kenyatta University of Agriculture and Technology.

Around October, 2002 when Andrew Hardy College was providing catering services to students from the Co-operative University College of Kenya, the Interested Party started claiming that the user of the land in question was residential and not a catering school and consequently illegal. The Interested Party went ahead to complain to the Respondent and the National Environment Management Authority (NEMA) about the Applicant's user of the land. Acting on those complaints, the Respondent started harassing the Applicant and even threatened to enter and demolish his property.

On 19th February, 2013 the Respondent issued to the Applicant an Enforcement Notice under the Physical Planning Act. Through the said notice the Applicant was informed that he had carried out illegal construction of hostels and occupation of the same without permission. The Applicant was therefore directed to stop further development and occupation of the premises. He was also ordered to remove the developments within 7 days. It is the Applicant's case that the Enforcement Notice was issued in breach of the rules of natural justice. Further, that since the issuance of the Enforcement Notice the Respondent and the Interested party had harassed his mother culminating in the filing of **Nairobi High Court ELC Civil case No. 214 of 2013 HARDY KAREN ASSOCIATION v ANDREW NG'ANG'A** by the Interested Party. It is the Applicant's case that the Respondent acted in excess of jurisdiction and in breach of Articles 40 and 47 of the Constitution.

The Interested Party opposed the application through the affidavit of Neil Mcrae sworn on 13th August, 2013. Neil Mcrae avers that he has been a resident of Hardy Estate, Karen for many years and that Hardy Estate is zoned by the Respondent for single family and low population housing density. That sometime in September, 2012 he noticed an influx of young people walking about the estate and upon inquiry he learned that a student hostel had opened on L.R. No. 2377/172 along Twiga Hill/Lamwia Road. According to him, the development of a hostel to accommodate 300 students on an acre of land was one out of character with the rest of the estate and such a development could only be allowed upon the participation of the members of the community who are represented by the Interested Party. Upon learning about the hostel the Interested Party lodged complaints with the Respondent and NEMA. In reaction to the complaints, the Applicant applied for change of user of the suit property from residential to student hostel. In a public notice in the Standard newspaper of 2nd November, 2012, the Applicant invited comments and objections to the application for change of user. Through a letter dated 3rd November, 2012, the Interested Party lodged an objection to the application.

In another advertisement in the Standard newspaper of 13th November, 2012 the Applicant applied to extend user of the suit property to include a professional office and this was again objected to by the Interested Party. As at the time of filing these proceedings, the two applications were pending determination. According to the Interested Party, no change of user from residential to student hostel has been granted to the Applicant and that is why the Applicant did not adduce any evidence to show change of user.

At Paragraph 14 of his affidavit Neil Mcrae avers that:

> "**14. <u>THAT</u> since the opening of the hostel, a great deal of upset has been caused due to an increase in noise, inconvenience and insecurity in particular;**
>
> **(a) Early morning and evenings, students walk on the roads causing**

obstruction.

(b) Increase in noise levels particularly in the evening which is disturbing.

(c) On several occasions the students have returned to the hostel late in the evening and banging on the gates loudly to gain access.

(d) On two occasions the students have rioted causing terrifying noise and insecurity propelling the residents to call security.

(e) The students are frequently drunk and behave in a disorderly manner causing public nuisance.

(f) The residents and their families are restricted to pursue recreational activities within the estate as they feel threatened by the intimidating number of students.

(g) The suppliers of bread, milk and other essentials begin to arrive into the Estate as early as 4.00 am on loud motorcycles which wake up the residents.

(h) There are no proper sewage provisions; therefore there are health and safety implications from both residents and students in the area.

(i) The operating hours and the large number of boda boda motorcycles serving the hostel is of great discomfort and contributes to congestion and noise.

(j) There is insufficient water supply to the premises therefore regular supplies of water through the means of bowers which frequently block the road causing dangerous traffic hazard."

It is the Interested Party's case that the Respondent has power to issue an enforcement notice where a development has been carried out without its permission. Further, that the Applicant ought to have filed an appeal with the liaison committee before approaching this Court.

The Interested Party's case is that even though the Enforcement Notice was issued in February, 2013 no action had been taken and that is why the Interested Party approached the Court in **ELC Case No. 214 of 2013.** He avers that it was only after **ELC Case No.214 of 2013** was filed that the Applicant approached the Court in this matter. The Interested Party asserts that the Applicant's decision to file this application is mischievous.

In response to the replying affidavit of Neil Mcrae, Millicent Wambui Mugih swore a further affidavit on 14th August, 2013. She averred that Neil Mcrae has no land in Karen as he lives on the land of his father, Ian Mcrae who has had no problem with the catering school since 1986. She avers that about 100 metres from the Applicant's college is a kindergarten and it is false to say that the area has been zoned for residential houses. She deposed that within a 500 metre radius are several public universities. She averred that the application for change of user made in November, 2012 was only done to avoid harassment by the Respondent. Further, that the application for change of user for a professional office block was mischievously made by a person unknown to her. She insisted that change of user was granted by the Respondent way back in 1995. It is the Applicant's case that the availability of an alternative remedy is no bar to the issuance of judicial review orders. Further that the appellate process under the Physical Planning Act does not provide the Applicant with interlocutory reliefs.

J. K. Barreh swore a replying affidavit on 19th September, 2013 in which he identified himself as the deputy director in the Respondent's planning department. Through the said affidavit it is revealed that the Respondent did indeed approve change of user of the suit property from residential to nursery school then

from nursery school to catering school but the Applicant did not comply with the conditions that would have resulted in the final approval. The Respondent denies nearly all the other contents of the Applicant's application and contends that this application is premature as the Applicant had not followed the process laid down in the Physical Planning Act before instituting these judicial review proceedings. The Respondent asserts that it was carrying out its statutory duty when issuing the Enforcement Notice.

In response to the Respondent's replying affidavit, Millicent Wambui Mugih swore a replying affidavit on 14th October, 2013. It is the Applicant's assertion that Mr. J. K. Barreh's affidavit is full of falsehoods. Ms Mugih avers that the conditions attached to the change of user were fully complied with. She then proceeds to state in detail how the Applicant had complied with the conditions attached to the change of user.

More affidavits were sworn in this matter and they only serve to demonstrate the hostile relationship between the Applicant and the members of the Interested Party.

The reach of judicial review is limited to the examination of the process under which a decision has been arrived at. Lord Diplock in **COUNCIL OF CIVIL SERVICE UNIONS v MINISTER FOR THE CIVIL SERVICE [1984] 3 ALL ER 935** stated that:

> **"Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety."……..**
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> **By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.**
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> **By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness"**
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> **(Associated Provincial Picture Houses Ltd, v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system.**
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> **I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."**

In summary the members of the Interested Party are opposed to the use of the Applicant's land in a given manner. They have not been shy about this and they have been ready to go to all lengths in order to protect their interests. As such they approached the Court in **Nairobi H.C. ELC Suit No. 214 of 2013** and in a ruling delivered 29th October, 2013, P. Nyamweya, J ordered that **"with effect from 1st January 2014 the Defendant by himself, his workers, servants, agents, and tenants shall be and are hereby restrained from carrying on business or activities of a student hostel on L.R. No. 2327/172 in Hardy Estate, Langata, pending the hearing and determination of the suit herein or until further orders."**

The Applicant appealed against the said order vide **Court of Appeal Civil Application No. NAI 332 of 2013 (UR 245/2013), Andrew Nganga-v-Hardy Residents Association (suing through its officials Wainaina Kenyanjui, Karen Mclean and Neil Mcrae).** Refusing to stay the decision of the learned Judge, the Court of Appeal observed that:

> **"The applicant has disclosed in the affidavits filed in this Court that the planning authority has now issued enforcement notice requiring the applicant to demolish the buildings which it considers were constructed without development permission and has, in addition, instituted criminal proceedings against the applicant. The applicant has further disclosed that she has instituted judicial review proceedings to quash the enforcement notice. It is apparent that whether or not the applicant required development permission and permission of environmental authority is a highly contested issue…….**
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> **The change of user to students' hostel was found by the learned Judge to be *prima facie* illegal. The planning authority also considers the development illegal and has initiated enforcement proceedings which have however been stayed by the judicial review court. Thus, the grant of an injunction would allow the applicant to operate the students' hostel and would perpetuate what is *prima facie* an illegal development. That would be contrary to the policy of the law. Furthermore, as the learned Judge held, the injury likely to be suffered by the residents of the estate is of a continuing nature which cannot be adequately compensated by damages. On the other hand, the loss that the applicant is likely to suffer is financial which can be quantified and compensated by an award of damages.**
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> **The High Court did not issue a mandatory injunction and the premises, subject to decision of the planning and environmental authorities, can be put to lawful use. If the appeal succeeds, the injunction will be lifted and the business of students' hostel will resume. It has been admitted that the applicant and his mother (Millicent) do not reside in the estate."**

Nyamweya, J had in her ruling of 29th October, 2013 clearly demonstrated that the issues in that matter touch on the development of the property by the Applicant. She also indicated that **"demolishing the said buildings is not an appropriate remedy at this stage."** The Enforcement Notice on the contrary is aimed at demolishing the premises.

Although the said ruling came after the filing of these proceedings, I find that it serves to protect the interests of both the Applicant and the Interested Party.

It is very clear that the Interested Party was getting impatient with the Respondent's failure to act on its complaint about the user of the Applicant's land. That is why the Interested Party approached the Environment and Land Court. Nyamweya, J correctly identified the matter as falling under the Physical Planning Act and stated that:

> **"I have read and carefully considered the pleadings, evidence and submissions provided by the parties. I will start by addressing two preliminary issues raised by the Defendant. The first is that of jurisdiction, and the Defendant argued that since the Plaintiff has already lodged an objection with the City Council of Nairobi, it should exhaust all the remedies available as prescribed in the Physical Planning Act, before invoking the jurisdiction of this Court.**
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> **This Court has exclusive jurisdiction in matters relating to the use, occupation and title to land and the environment under Article 162(2) (b) of the Constitution. However, despite this exclusive jurisdiction, this Court will defer to statutory provisions which provide effective remedies and procedures to a dispute that is before it, and may require that such remedies and procedures be exhausted first in appropriate circumstances. The Physical**

> **Planning Act in this regard in sections 7 to 10 establishes municipal, district and national liaison committees, which are empowered to hear and determine appeals lodged by persons aggrieved by decisions made by local authorities under the Act.**
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> **Likewise under section 129 of the Environmental Management and Co-ordination Act, the National Environment Tribunal is set up to hear and determine appeals arising from the decisions made by authorities given powers under the Act.**
>
> **However, in the present case no decision has been made by the named authorities that can be the subject of an appeal and the application of the procedures laid down in the two statutes. Arising from the perceived inaction by the concerned authorities, the Plaintiff has opted come to this court for relief, and rightly so, as section 13 (7) of the Environment and Land Court Act specifies that interim or permanent preservation orders including injunctions can be given by this court in the exercise of its jurisdiction. It is thus the finding of this Court that the Plaintiff has properly invoked the jurisdiction of this court."**

It is noted that the Enforcement Notice was issued on 19th February, 2013 almost two weeks after the Interested Party had filed **ELC No. 214 of 2013.** In light of the ruling of Nyamweya, J and its affirmation by the Court of Appeal, and without going into the merits of the judicial review proceedings, I find that the Enforcement Notice does not serve any useful purpose at the moment. It only serves to harass and persecute the Applicant over an issue that is already before the Court. In the circumstances of this case, I find that the issuance of the Enforcement Notice during the subsistence of court proceedings related to the same parcel of land and its user amounts to an abuse of the Respondent's power.

The issuance of the Enforcement Notice by the Respondent was an afterthought and may even amount to an attempt to derail the Interested Party's quest of finding a lasting solution to its problem. The big question as to whether the Applicant's development was authorised has now been submitted to the jurisdiction of the Court and it is only fair that the Court should be left to address the issue. Allowing the Enforcement Notice to remain in force may result in the destruction of the Applicant's property before he has had his day in Court. The Enforcement Notice seeks to achieve what the Interested Party has asked for through the court case. The Applicant is therefore being subjected to parallel processes aimed at the same purpose. An enforcement notice can always be issued in future if it becomes necessary. For that reason, I issue an order of certiorari calling into this Court the Enforcement Notice issued by the Respondent on 19th February, 2013 and quashing it. An order of prohibition will not serve any useful purpose and it will not issue. The parties can now concentrate their energies on the ELC matter. Each party will meet own costs of these proceedings.

Dated, signed and delivered at Nairobi this 30th day of October, 2014

W. KORIR,

<u>JUDGE OF THE HIGH COURT</u>