REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 328 OF 2012

REPUBLIC.....APPLICANT

VERSUS

CITY COUNCIL OF NAIROBI.....RESPONDENT

EX-PARTE

RAJIN VELJI SHAH

JUDGEMENT

Through the notice of motion application dated 13th September, 2012, Rajin Velji Shah, the ex-parte Applicant prays for:

> **"1 An order of certiorari be and is hereby issued to remove and bring into the High Court for the purposes of being quashed, the Enforcement Notice dated 30th July 2012 issued by the Respondent against the Applicant herein.**
>
> **2. An order of prohibition be and is hereby issued directed at the Respondent prohibiting it through their servants and/or agents from proceedings with the execution of the Enforcement Notice dated 30th July 2012 against the applicant herein.**
>
> **3. The costs be provided for."**

The application is supported by the affidavit of Velji Narshi Shah and the statutory statement filed together with the application for leave on 22nd August, 2012.

According to the papers filed in Court, the Applicant is the sole legal registered owner of a flat known as B/2/0 vide lease dated 27th July, 2007 having acquired 125 shares in Pride Power Properties Limited, the owner of L.R. No. 209/104/6, Parklands. In order to erect and complete the unit, the Applicant sought and obtained permission from the National Environment Management Authority (NEMA) and the Respondent's Department of City Planning. Upon obtaining the approvals, the Applicant proceeded to carry out construction in completion of his unit.

However, on 30th July, 2014 the Applicant was served with an enforcement notice issued by the Respondent's Department of City Planning alleging that the alterations and additions being carried out at the Applicant's premises were illegal and without approval. The Applicant wrote to the Respondent

demanding that the enforcement notice be withdrawn but the Respondent did not reply to the Applicant's letter.

The Applicant contends that it was never accorded a hearing before the enforcement notice was issued. The Applicant asserts that the construction work undertaken on his premises was duly approved by all the relevant authorities including the Respondent and he is therefore surprised at the belated attempt to stop him. The Applicant submits that the Respondent is acting at the behest of third parties.

The Applicant asserts that the enforcement notice was issued on the basis of an apparent error of fact as he had permission from all the relevant authorities, the Respondent included, to carry out the construction works.

Through a further affidavit sworn on 24th May, 2013 Velji Narshi Shah the authorised representative and attorney of the Applicant, informed the Court that the Applicant's advocates had received a letter dated 17th August, 2012 from the Respondent intimating that the enforcement notice had been suspended and that the same would be withdrawn after verification of the Applicant's construction work vis-à-vis the approvals. According to the Applicant, this was a tacit acceptance by the Respondent that the enforcement notice had been wrongly issued. The Applicant contends that eight months after suspending the enforcement notice, the Respondent has not carried out inspection nor withdrawn the enforcement notice.

The Respondent, the City Council of Nairobi opposed the application through grounds of opposition filed in Court on 21st September, 2012. The Respondent's case is that the application is premature, misconceived and bad in law as the Applicant has not exhausted the appeal mechanism provided by Section 13 of the Physical Planning Act. It is the Respondent's case that the Applicant is before the wrong forum. The Respondent contends that the Applicant is in breach of Order 53 Rule 3(2) of the Civil Procedure Rules, 2010 which requires an applicant to serve all the parties who are likely to be affected by judicial review proceedings. The Respondent submits that the Applicant failed to serve the proprietors of the other apartments and yet those proprietors will be affected by the outcome of these proceedings.

On the approval granted to the Applicant, the Respondent states that the same was for the construction of a domestic building on the land in question but did not include construction, alteration and addition of a new flat.

It is the Respondent's case that it has power under Section 38 of the Physical Planning Act to issue enforcement notices where permission has not been granted under Section 33. The Respondent submits that no permission was sought nor granted for the construction of an additional flat by the Applicant on L.R. No. 209/104/6. Further, that the lease clearly provided that no additions or alternations would be made to the building without the consent of the Respondent being the lessor and the lessees of the other flats in the estate.

The starting point would be to establish whether this Court has jurisdiction to entertain this matter. The Respondent argues that the Applicant ought to have exhausted the other available remedies before approaching this Court for judicial review orders. The Applicant submits that this Court has jurisdiction as he is challenging the process used to arrive at the decision and not the merits of that decision.

In **BAHJAJJ HOLDINGS LTD v. ABDO MOHAMMED AND COMPANY LTD & ANOTHER, CIVIL APPLICATION NO. NAI 97 OF 1998**, the Court of Appeal stated that:

> **"Without saying anything more, we would point out that this court has, as recently as on 22nd day of April, 1998 held in the case of David Mugo t/a Manyatta Auctioneers v Republic, Civil Appeal No. 265 of 1997 (unreported) that the remedy of judicial review is available, in appropriate cases, even where there is an alternative legal or equitable remedy."**

On the discretionary nature of judicial review orders, my brother Justice J.V. Odunga stated in the case of **REPUBLIC v MINISTER OF AGRICULTURE & 2 OTHERS EX-PARTE EQUITORIAL NUTS PROCESSORS LIMITED & 3 OTHERS [2013] eKLR** that:

> **"Accordingly, even if I were to find that the application was merited the law is that the decision whether or not to grant the remedy of judicial review is discretionary. In Republic vs. Judicial Service Commission *ex parte* Pareno [2004] 1 KLR 203-209 it was held that judicial review orders are discretionary and are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders and hence the Court will refuse to grant judicial review remedy when it is no longer necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance. Since the court exercises a discretionary jurisdiction in granting prerogative orders, it can withhold the gravity of the order where among other reasons there has been delay and where a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised. See Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 of 2000."**

I will add that the court will not exercise its discretion in favour of an applicant where it is clear that the judicial review orders are being sought for an ulterior purpose. Orders of judicial review are meant to assist in the enforcement of the rule of law.

In my view, an applicant can only be allowed to approach a judicial review court, despite the existence of an alternative remedy, where there is clear lack of jurisdiction, breach of the rules of natural justice or unreasonableness by a public body. The court will therefore have to review the facts of each case before deciding whether judicial review is the most efficacious remedy.

The Applicant claims that the Respondent acted erroneously by issuing the enforcement notice, despite the fact that it had granted approval for construction. The Applicant also asserted that the enforcement notice was issued without a hearing.

The Respondent has explained that the Applicant carried out works beyond what was approved. The Respondent also gave the Applicant an opportunity to be heard. A few days before this matter was filed on 22nd August, 2012, the Respondent had through a letter dated 17th August, 2012 communicated to the Applicant's counsel thus:

> **"RE: STAY OF ENFORCEMENT NOTICE SERIAL NO.10179 – L.R. NO. 209/104/6 PARKLANDS**
>
> **The subject matter and your letter of 9th august, 2012 ref V13/001/1/10G refers.**
>
> **The said enforcement notice was prompted by a complaint by residents of the subject development. At the material time of issuing the referenced notice, no evidence was availed to support the on-going construction work as required by law.**
>
> **Given that copies of approved plans (Plan Reg. No. FA 701) have been availed, the said enforcement notice is suspended. Withdrawal of the notice shall await verification of the work vis-à-vis the approvals by way of statutory inspection by the City Council of Nairobi."**

Through the said letter, the Respondent had given the way forward in this matter. The Applicant, however, persisted in prosecuting this matter.

In my view, the Respondent is correct when it claims that this application is premature. The Respondent had the mandate to issue the enforcement notice if the works carried out by the Applicant were outside the approval.

In my view, if the Applicant was unhappy with the enforcement notice, then he ought to have appealed to the liaison committee as provided by the Physical Planning Act. The Applicant has not established grounds for grant of judicial review orders and for him the most efficacious remedy was to pursue the statutory appeal mechanism. The Applicant also ought to have served the proprietors of the other flats as interested parties in these proceedings. The other proprietors were likely to be affected by the outcome of these proceedings.

I find that the Applicant has not established grounds for issuance of judicial review orders. Fortunately for the Applicant, the Respondent has suspended the enforcement notice pending a statutory inspection. The Applicant should pursue this option.

The end result is that the application is dismissed with no order as to costs.

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

W. KORIR,

JUDGE OF THE HIGH COURT