REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 122 OF 2011

REPUBLIC.....APPLICANT

VERSUS

MINISTER FOR NAIROBI METROPOLITAN DEVELOPMENT.....1ST RESPONDENT

CITY COUNCIL OF NAIROBI.....2ND RESPONDENT

AND

GICHOCHO BUILDING CONTRACTORS.....INTERESTED PARTY

EX- PARTE

TIMWOOD PRODUCTS LIMITED,

TIMCO CHEMICAL INDUSTRIES LIMITED

METLEX INTERNATIONAL LIMITED

OIL SEALS & BEARINGS CENTRE LIMITED

NITRO CHEMICALS LIMITED

AGRICULTURAL TRACTOR SPARES LIMITED

UNITED ENGINEERING SUPPLIES LIMITED

HEXAGON AGENCIES LIMITED

FLYING HORSE LIMITED

ESSAJEE AMIJEE & SONS (RIVER ROAD) LIMITED

ENGINEERING & HYDRAULICS,

KENPLY TIMER & HARDWARE LIMITED

SUPERIOR CONTSTRUCTION COMPANY LIMITED

STEELVICOM ENTERPRISES (K) LIMITED

JUDGEMENT

The fourteen ex-parte applicants (the applicants) led by Timwood Products Ltd are business entities involved in the manufacture, importation and distribution of various industrial products. They are all situated along Dar es salaam Road in Industrial Area within Nairobi. In 2011 the 1st Respondent, the Minister for Nairobi Metropolitan Development being the Minister in charge of roads within Nairobi city awarded a tender to the Interested Party, Gichobo Building Contractors Limited for the rehabilitation of Dar es salaam Road. The contract was to be supervised by the 2nd Respondent, the City Council of Nairobi.

It is the applicants' case that the repairs that were carried out resulted in the digging up of one side of the road including the access points and parking bays utilized by the applicants and their customers; destruction of the pedestrian pathways; and imposition of barriers to the parking. The applicants assert that the 1st Respondent acted *ultra vires* the Local Government Act by failing to issue notice in the Kenya Gazette at least fourteen days prior to the start of the works as required by Section 182 of the said Act. They submit that failure to issue the notice denied them an opportunity to object to the respondents' administrative action.

The applicants contend that the 2nd Respondent abdicated its mandate and acted *ultra vires* the Local Government Act by taking instructions from the 1st Respondent who has no mandate under any law. Further, that although the action taken directly affected the applicants they were not notified before the administrative action was taken and neither was their recommendation sought before the action was taken.

It is the applicants' case that the actions of the respondents were unreasonable in the *Wednesbury* sense (**Associated Provincial Picture House v. Wednesbury Corporation [1948] 1KB 223)**. In support of this proposition, the applicants contend that the respondents failed to consider relevant facts including loss of business due to failure by themselves and their customers to access their business premises; risk to the employees of the applicants due to the destruction of the foot paths and inability by the applicants to convey raw materials and finished goods to the premises. The applicants also fault the respondents for not according them a hearing before executing the administrative action.

The applicants further assert that the respondents entered their premises without giving them one month's notice as required by Section 184 of the Local Government Act.

The applicants through the notice of motion application dated 13th June, 2011 therefore pray for:

> **"1) An Order of Prohibition to prohibit the MINISTER FOR NAIROBI METRO0POLITAN DEVELOPMENT in conjunction with the CITY COUNCIL OF NAIROBI from continuing with the digging and/or sinking trenches and or hiving of the parking lots and loading zones of the Applicants along the Dar-es-Salaam Road in Industrial Area within Nairobi in a manner likely to deny the Applicants' and their customers' vehicles access to their premises situated along the said road pending compliance with the applicable laws.**
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> **2) An order of Mandamus to command and to compel the MINISTER FOR NAIROBI METROPOLITAN DEVELOPMENT in conjunction with the CITY COUNCIL OF NAIROBI to adopt and follow the required procedure in repairing Dar-es-Salaam Road in Industrial Area within Nairobi.**

3) An order of Mandamus to command and to compel the MINISTER FOR NAIROBI METROPOLITAN DEVELOPMENT in conjunction with the CITY COUNCIL OF NAIROBI to fill in the trenches dug and clear heaps of earth they have to enable the Applicants and their customers access the Applicants' premises. (sic).

4) An order of Mandamus to command and compel the MINISTER FOR NAIROBI METROPOLITAN DEVELOPMENT in conjunction with the CITY COUNCIL OF NAIROBI to restore all parking zones and loading bays for the Applicants' businesses.

5) THAT the costs of this cause be provided for."

The 1st Respondent opposed the application through the replying affidavit of the Permanent Secretary Philip O. Sika sworn on 6th December, 2011. Mr. Sika avers that the applicants' case is bad in law, malicious, lacks merits and is an outright abuse of the process of the law as it contravenes Section 16 of the Government Proceedings Act, cap 40, Laws of Kenya. He avers that the orders sought are vague and would amount to barring the 1st Respondent from performing his duties as mandated by the President's Circular No.1 of May 2008 and the Local Government Act, Cap 265.

Mr. Sika asserts that the 1st Respondent has a duty, mandate and responsibility to undertake, contract, construct, plan and initiate any plan or construction of any road within the city of Nairobi in collaboration with the 2nd Respondent and in entering such collaborations, the 2nd Respondent is guided by the Local Government Act, Cap 265 Laws of Kenya.

The 1st Respondent asserts that the application has been overtaken by events as the road in question has been completed as planned.

The 1st Respondent's Permanent Secretary swore that on 10th June, 2011 a stakeholder meeting was held near Dar es Salaam Road Post Office in which the applicants were asked to bear with the inconvenience of the rehabilitation works as the rehabilitation was scheduled to be completed. He averred that the rehabilitation had been completed and the debris had been cleared and the handing over of the road by the Interested Party to the respondents was done on 15th November, 2011.

It is the 1st Respondent's case that the applicants were given notices of the construction by way of bill boards. The 1st Respondent asserted that the development of the road was in the public interest and was to the benefit of the applicants. The 1st Respondent urged this Court to dismiss the application.

The 2nd Respondent opposed the application through the replying affidavit sworn on 7th December, 2011 by its Director of Legal Services Mr. Joshua Aduma. On the orders sought by the applicants, Mr. Aduma avers that an order of prohibition cannot issue where the act has already been committed whereas an order of mandamus can only issue in the clearest of cases and that the applicants have not met the conditions for the grant of such orders.

Mr. Aduma avers that prior to the commencement of the construction works, notices had been issued through sign posts erected at the site. Further, that the applicants had not raised any issues about the project and that is why the respondents had carried out the rehabilitation works.

It is the 2nd Respondent's case that the application was time barred as the same had been filed over six months from the date of the challenged action. Further, that the rehabilitation is in public good and public interest should not be sacrificed for the benefit of a few individuals. It is the 2nd Respondent's case that the applicants grabbed road reserves and converted them into private use which is illegal and the action of the 2nd Respondent in reclaiming the road reserves and rehabilitating them is for the benefit of the public.

A director of the Interested Party, Mr. Christopher Kanai swore an affidavit on 13th June, 2012 in

opposition to the application. Through the said affidavit, it is the Interested Party's case that the rehabilitation works have been completed and the orders sought cannot be granted. The director denies that the parking lots, loading zones and bays had been demolished and/or closed as alleged by the applicants. The Interested Party contends that this application is aimed at stopping the 2nd Respondent from performing its duty of general control, repair and rehabilitation of public streets.

It is the Interested Party's case that after it was awarded the contract it complied with all the legal requirements including putting up sign posts at the sites indicating that rehabilitation was underway. Further, that the rehabilitation of the road was for public good and that public good cannot be sacrificed to the benefit of a few individuals. The Interested Party therefore prays for the dismissal of the application with costs.

In response to the respondents' and Interested Party's affidavits, Mr. Vallabh Dilip Bakrania swore a further affidavit on 12th March, 2012 and another affidavit sworn in February, 2013 and filed on 10th April, 2013.

He admitted that a stakeholders' meeting was indeed held and on 14th June, 2011 consent was recorded in the following terms:

> a. That the contractors would do away with the proposed flash parking and instead restore the initially existing parking so as to give the parties adequate parking and loading zones; and
>
> b. That the contractor would clear all debris blocking the applicants' premises and would instead deal with each section to completion before moving to another section.

It is the applicants' case that the consent was not complied with as the works had not been completed. They claim that the contractor had left open trenches on the sides of the road. Further, that the parking lots which the applicants had cabro paved were dug out by the contractors who left the parking incomplete and failed to restore the parking lots. It is the applicants' submission that they did not grab the parking lots as they had been paying parking charges to the 2nd Respondent. The applicants submit that the fact that the contractor had left the site was not a good justification for the incomplete works and that the respondents are by law mandated to deliver quality services.

The first question is whether the respondents breached sections 182 and 184 of the Local Government Act. Section 182 provides:

> **"182 (1) Every municipal council or town council shall have the general control and care of all public streets which are situated within its area, and the same are hereby vested in such local authority in trust to keep and maintain the same for the use and benefit of the public.**
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> **(2) A municipal council or town council may make, construct, alter, and repair and for any such purpose temporarily close or divert, any such street, and may make new streets.**
>
> **(3) A municipal council or town council may, subject to any law relating to road traffic, by order, prohibit the driving of vehicles on any specified road otherwise than in a specified direction:**
>
> **Provided that no such order shall be made unless notice of the intention to make the same shall be published in the Gazette at least fourteen days before the date on which it is intended to make such order, and, before making such order, there shall be taken into consideration—**
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> **(i) any objections which may have been made to the making thereof; and**
>
> **(ii) the existence of alternative routes suitable for the traffic which would or might be affected by the order."**

With respect to the applicants' counsel, I find nowhere in the said Section which requires a local authority to issue a notice in the Kenya Gazette before commencing construction, repair or rehabilitation of roads. A notice in the Kenya Gazette is only required by Section 182(3) which deals with closure of roads and diversion of traffic.

The applicants also cited Section 184 and stated that the respondents allowed the Interested Party to enter their premises without notice. The entire Section 184 is premised on Sub-section (1) which states:

> **"184. (1) Subject to the Mining Act, a local authority, by its agents and officers, for the purpose of the construction and maintenance of roads or the carrying out of any works which it is empowered under this Act or under any agreement, direction, delegation or transfer entered into, given or made under this Act to carry out, may enter upon any land within its area and remove therefrom any clay (other than kaolin), country rock, gravel, murram, lime, sand, shale, shingle, slate or surface soil, and may carry across any land, by a route to be agreed between the owner or occupier thereof and the local authority, such material removed from other land, and may provide in connection with such functions labour or other camps, works buildings, access roads, and space for stockpiling, and may erect machinery and other gear for the purpose of quarrying any such material."**

In this case the applicants did not produce evidence of such entry. Secondly, it is clear that the Section applies to excavation of materials for construction of roads. Surely the applicants have no land from which road construction materials could be excavated. In any case the receipts for payment of parking charges, only goes to show that the parking lots belong to the 2nd Respondent. There is therefore no evidence that the respondents breached any of the provisions of the Local Government Act or any other law.

The second question is whether these proceedings have been overtaken by events. The respondents and Interested Party say they have but the applicants think otherwise. In my view, these proceedings have indeed been overtaken by events. They were targeted at the performance of a given contract by the Interested Party. All the parties agree that the Interested Party concluded the work and left the site. Some of the orders the applicants seek are directed to specific actions arising from the performance of that contract. It is too late in the day to issue such orders.

The third question is whether judicial review remedies can issue in circumstances like those prevailing in this case. It has clearly emerged that the applicants' complaints relate to a breach of contract and tortious acts by the respondents. A civil case is the ideal remedy in such circumstances. The facts are also disputed. The applicants claim there are gapping manholes and demolished pavements. The respondents and the Interested Party on the other hand claim the works were completed to the required standards. This therefore calls for the production of evidence and judicial review is not a suitable remedy in such circumstances.

All in all the applicants have failed to convince me that orders should issue. As such their application is dismissed. There will be no order as to costs.

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

W. KORIR,

JUDGE OF THE HIGH COURT