



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JR MISC. APPLICATION NO. 195 OF 2014

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

AND

**IN THE MATTER FOR THE LOCAL GOVERNMENT ACT (ADOPTIVE BY-LAW
(BUILDING) ORDER 1968 L.N.15/1969**

AND

IN THE MATTER OF CITY OF NAIROBI (BUILDING) BY-LAWS 1948 G.N 313/1939

AND

**IN THE MATTER OF THE DECISION MADE BY THE NAIROBI CITY COUNTY ON THE
13TH OF MARCH 2014 DISAPPROVING AND/OR CANCELLING THE APPLICANT'S
APPROVED BUILDING PLANS REG. NO. CPF-AF 487**

AND

**IN THE MATTER OF THE DECISION MADE BY THE NAIROBI CITY COUNTY
PURPORTING THAT L.R NO. 1159/365 BELONGS TO THE NAIROBI CITY COUNTY AND
HENCE CANCELLING OR REJECTING THE BUILDING PLANS OF THE APPLICANT REG.
NO. CPF-AF 487**

REPUBLIC.....APPLICANT

VERSUS

THE NAIROBI CITY COUNTY.....RESPONDENT

***EX PARTE:* THE PRESBYTERIAN FOUNDATION**

JUDGEMENT

Introduction

1. By a Notice of Motion dated 4th June, 2014, the ex parte applicant herein, **The Presbyterian Foundation** seeks the following orders:

1 An order of certiorari to remove into the High Court and to quash the entire decision of the Respondent dated the 13th of March 2014 to disallow, disapprove and/or cancel the building plans Reg. No. CPF-AF487 approval on L.R No. 1159/365 (hereinafter referred to as “the suit premises”) and a further disapproval and/or cancellation in an undated decision by the Respondent soon thereafter.

2 An order of Mandamus directed to the Respondent to forthwith issue the building plan approvals Reg. No. CPF-AF 487 in respect of the suit premises, which were submitted to the Respondent for approval.

3 Costs of this application be provided for.

4 Any other order the Honourable Court may deem fit and just to grant.

Ex Parte Applicant’s Case

2. The application was supported by a verifying affidavit sworn by **Rev. Festus K. Gitonga**, one of the Directors of the applicant on 26th May, 2014.

3. According to the deponent, the applicant is the registered owner of the parcel of land known as L.R No. 1159/365 situated at Karen, in Nairobi. (hereinafter referred to as the “suit premises”) which was a subject of ownership dispute between **Nancy Cheroni Koros and 2 others vs. the Applicant and 2 Others in Civil Suit No. 1681 of 2002.**

4. It was deposed that on the 4th March 2014, **(Hon.) Justice Pauline Nyamweya** delivered judgment in the said case whereat she issued a declaration that the premises belonged to the Applicant which decision according to the applicant was a right in rem. According to the deponent, for the 12 years the case was in court, the Respondent did not bother to be enjoined in the suit as an Interested Party.

5. According to the deponent, on 12th September 2013, their client made an application for the construction of a guardhouse, a perimeter wall and a domestic building which application was approved on the 12th of September 2013, vide a letter reference CPD/DC/L.R. No. 1159/MIN1 and the building plans were similarly approved in respect of the suit premises and the Applicant embarked on construction of a perimeter wall, a guardhouse and a domestic building. However, on the 13th of March 2014, the Applicant received a letter disapproving the earlier approved plans from the Nairobi City County on the ground that the suit premises was involved in ownership dispute. The said letter however, did not mention the parties in the dispute nor the nature of the dispute.

6. It was contended by the deponent that the applicant’s advocates responded to the letter disapproving the said approvals on the 17th of March which was delivered and stamped by the responded. However, on the 2nd April 2014, and without notice to the Applicant save for the letter disapproving the approval, the Respondent moved into the Applicant’s premises and demolished the construction that was ongoing pursuant to the approval issued by the Respondent.

7. Thereafter, the applicant instructed Camp Valuers Ltd to carry out an inspection and valuation of the damage occasioned on the property and the estimated damage was to the tune of Kenya Shillings Eight Million One Hundred and Fifty Three Thousand Three Hundred (Kshs 8,153,300/=).

8. It was deposed that the applicant submitted plans for the construction of a church on the suit premises through its architects Messer’s Arplad Architects Ltd and even paid the requisite fees of Kshs 164,400/= which plans were approved under plan registration number CPF-AF-487. However, in an undated correspondence to the applicant’s said architects, the plans were declined on the ground that the suit premises belonged to the Respondent and the Respondent again embarked on demolishing the applicant’s property and instructed a contractor known as Compton Limited to dig

trenches and construct a perimeter wall on the suit premises despite several assurances by the Governor and officials of the Nairobi County Government that investigations were on going and the Respondent was to communicate with the Applicant.

9. It was averred that the applicant received a letter from the chief of Karen a **Mr. F.J.O Waneno** who wrote to the applicant's client on the 17th of October 2013 whereat he alleged that an amorphous body known as Karen Locational Development Committee had mandated him to review the status of all public utility plots, including the suit premises with a view of determining the acquisition and ownership, a letter to which the applicant's advocates responded vide a letter dated the 19th of January 2014.

10. It was the applicant's case that:

- i. The Respondent did not give it a hearing at all before disapproving or cancelling the Applicant's building plans approval contrary to the principles of natural justice
- ii. The Respondent does not have any right to claim ownership of the property as the Applicant already has title to the property.
- iii. The High Court having made a declaration that the suit premises belonged to the Applicant, that declaration is a right in rem.
- iv. The Respondent is violating the constitutional right of the Applicant with regard to property ownership.

11. Though served with the application the Respondent chose not to respond to the allegations made by the ex parte applicant. Accordingly the factual allegations made by the *ex parte* applicant were uncontroverted.

12. I have considered the foregoing. The purview of judicial review was clearly set by **Lord Diplock** in the case of **Council for Civil Service Unions vs. Minister for Civil Service [1985] A.C. 374, at 401D** when he stated that:-

“Judicial review has I think developed to a stage today when.....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’.....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 itBy ‘irrationality’ I mean what can now be succinctly referred to as “Wednesbury unreasonableness’.....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 itI 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.”

13. Article 47 of the Constitution provides:

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

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

14. The cancellation of the approval letter for the applicant's building plans was clearly an administrative action which enjoined the Respondent to ensure that its action was expeditious,

efficient, lawful, reasonable and procedurally fair. To be procedurally fair, it is a requirement that persons who are likely to be affected by the decision in contemplation be afforded an opportunity of being heard before the decision is taken. Further, it is a Constitutional requirement that that person be given written reasons for the action.

15. The Applicant's contention that it was neither heard nor afforded an opportunity of being heard before the approval of its development plans were allegedly rescinded by the Respondent have not been controverted.

16. It is therefore my view and I so hold that the action by the Respondent of cancelling or rescinding the said approvals was contrary to the rules of natural justice was hence tainted with procedural impropriety and fell foul of the provisions of Article 47 of the Constitution. Further the said action was contrary to the *ex parte* applicant's legitimate expectations that before any adverse action was taken he would be afforded an opportunity of presenting his case and challenging the said decision. It is settled law that a benefit cannot be withdrawn until the reason for withdrawal has been given and the person concerned has been given an opportunity to comment on the reason. As was held in **Republic vs. Kenya National Examinations Council ex parte Geoffrey Gathenji and 9 Others Civil Appeal No. 266 of 1996:**

“the remedies of certiorari and prohibition are tools that this court uses to supervise public bodies and inferior tribunals to ensure that they do not make decisions or undertake activities which are ultra vires their statutory mandate or which are irrational or otherwise illegal. They are meant to keep public authorities in check to prevent them from abusing their statutory powers or subjecting citizens to unfair treatment.”

17. Apart from the foregoing, it is clear from the decree given in Nairobi ELC Civil Case No. 1681 of 2012 on 14th March, 2014, the Court declared that the 1st Defendant therein, The Presbyterian Foundation, which is the *ex parte* applicant herein was the legal owner and proprietor of the properly known as LR No. 1159/365 situated in Nairobi which is the suit premises. There is no evidence that that decree was set aside.

18. It follows that the grounds relied upon by the Respondent to rescind the *ex parte* applicant's approval being that there was a dispute in respect of the same parcel and that the suit parcel belongs to the Respondent is untenable as it amounts to overturning a lawful court decision.

15. It is therefore clear that the Respondent's action was clearly unlawful hence a candidate for challenge by way of judicial review. Consequently the prayer for certiorari must succeed. With respect to *mandamus*, in **Kenya National Examinations Council vs. Republic Ex Parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 [1997] eKLR** it was held by the Court of Appeal that:

“The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way.”

16. It follows that this Court cannot compel the Respondent to issue the building plan

approvals as sought as to do so would amount to this Court compelling the Respondent to exercise the discretion given to it in a specific way. However this Court can compel the Respondent to consider the application for approval taking into account the relevant material.

17. This Court wishes to express its concern on the regularity with which the Respondent seems to be breaking the law. The Respondent seems to be still living in the old constitutional order. It appears that it has never dawned on it that the new Constitutional order came with values and principles of governance in article 10 which enjoins it whenever it enacts, applies or interprets any law to adhere to the national values and principles of governance which include equality, human rights, non-discrimination, good governance, integrity, transparency and accountability, the rule of law, democracy and participation of the people.

18. I wish to reiterate for the benefit of the Respondent and paraphrase the sentiments made by **Warsame, J** (as he then was) in **Mohamed Aktar Kana vs. Attorney General Nairobi HCCP No. 544 of 2010** that the Respondent has not tried to understand and appreciate the provisions of the new Bill of Rights and that the yester years impunity are still thriving in that arm of the government.

Order

19. Consequently, I find merit in the Notice of Motion dated 4th June, 2014, and grant the following orders:

1 An Order of Certiorari is hereby issued bringing into this Court for the purposes of being quashed the entire decision of the Respondent dated the 13th of March 2014 to disallow, disapprove and/or cancel the building plans Reg. No. CPF-AF487 approval on L.R No. 1159/365 and a further disapproval and/or cancellation in an undated decision by the Respondent soon thereafter which decisions are hereby quashed.

2 An Order of mandamus is hereby issued compelling the Respondent to consider the applicant's application building plan approvals Reg. No. CPF-AF 487 in respect of the suit premises lawfully.

3 The applicant will have the costs of this application.

Dated at Nairobi this day 27th day of October, 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Olewe for the Applicant

Cc Florence