



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**JUDICIAL REVIEW MISC.APPL. NO. 245 OF 2014**

**IN THE MATTER OF THE LAW REFORM ACT CAP 26, LAWS OF KENYA**  
**IN THE MATTER OF THE CONSTITUTION OF KENYA**  
**IN THE MATTER OF PHYSICAL PLANNING ACT, CAP 286 LAWS OF KENYA**  
**IN THE MATTER OF THE ENFORCEMENT NOTICE ISSUED ON 5.6.2014**  
**IN THE MATTER OF AN APPLCIAIOTN FOR JUDICIAL REVIEW ORDERS OF  
PROHIBITION AND CERTIORARI**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE NAIROBI COUNTY.....RESPONDENT**

***EX PARTE:*                   JOYCE WACEKE NGANGA**

**JUDGEMENT**

**Introduction**

1. By a Notice of Motion dated 3<sup>rd</sup> July, 2014, the ex parte applicant herein, **Joyce Waceke Nganga** seeks the following orders:
  - i. **An order of Prohibiting the Respondent from interfering with or demolishing the developments erected on the Applicant's property Land Reference Number Dagoretti/Riruta/508.**
  - ii. **An order of Certiorari to quash and remove into this court hitherto the unreasonable and oppressive act of the Respondent committed vide the Enforcement Notice dated the 5<sup>th</sup> June, 2014 ordering the Applicant to immediately remove the temporary structures erected on Land Reference Number Dagoretti/Riruta/508 and stop further construction without affording the Applicant an opportunity to be heard.**

**iii. The costs of this application be provided in the *Ex-parte* Applicant's favour.**

**Ex Parte Applicant's Case**

2. The application was supported by the affidavit verifying facts sworn by the applicant on 20<sup>th</sup> June, 2014.
3. According to the applicant, she was the legal and bona-fide owner of the property known as LR No. Dagoretti/Riruta/508 and on the strength of which she sought the Respondent's approval to erect temporary structures on the aforementioned property and paid the requisite fees.
4. Despite that on the 5<sup>th</sup> June 2014 the Respondent proceeded to her property and issued an Enforcement Notice under Section 30(1&2) of the ***Physical Planning Act***, Cap 286 Laws of Kenya (hereinafter referred to as the Act), indicating that her development was undertaken without developmental approval and further requiring her to immediately remove the temporary structures and stop any further construction.
5. According to the applicant, the said decision was reached by the Respondent without affording her an opportunity to be heard, contrary to the principles of natural justice which decision was not only unfair but was made in bad faith if not irrationally as the Respondent did not bother to listen to her side of the story.
6. According to the applicant, the developments erected on her property are of a temporary nature and within her long term developmental plans aimed at utilizing the suit property adequately and satisfactorily and were moreover erected in conformity with the specifications for the suit property and have taken into paramount consideration the aesthetics of the surrounding neighbourhood in which they are erected. The applicant contended that she had spent a colossal amount in erecting the developments on her property and had actually relied upon the authority of the Respondent to go ahead with her development and was therefore rather surprised by the belated conduct of the Respondent who by one hand seems to be giving approval and taking it back with the other, which was an outright abuse of mandate.
7. As a result of the foregoing the applicant was very apprehensive that there are some overzealous elements who were in the employ of the Respondents who could go ahead anytime and demolish the developments within her property. According to her, she had tried in vain to have this matter resolved with senior officers in the Respondent's office but from the 16<sup>th</sup> June 2014 some of the Respondent's officers started visiting her property and issued verbal threats that it was just a matter of time before they descended and undertook a demolish exercise on the said property and if these threats of demolition were ignored and left to take their own course and/or crystallize then the Respondent would proceed with their manifest intentions which would ultimately amount to an unlawful demolition.
8. It was therefore the applicant's case that the Respondent's decision was vitiated by self misdirection and/or bias against her and was arrived at by failing to take into account pertinent and relevant factors, or was so manifestly unreasonable that no reasonable authority entrusted with the power in question would have arrived at such a decision.
9. It was her contention that the Respondents in exercising their mandate and in attempting at arriving at sound decisions should always act diligently, in good faith and within their statutory mandate which they should discharge faithfully and in accordance to the law. Further, the Constitution of Kenya stipulates that appropriate procedural protection and due process are essential aspects of all human rights, and the need to have an opportunity for genuine consultation between the parties cannot be gainsaid. In addition, Article 47(1) of the Constitution of Kenya stipulates that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. In the present circumstances, it was her view that the Enforcement Notice issued by the Respondent was not an adequate and reasonable notice as the same was not only too short but further required her to immediately remove the structures erected on her property.
10. To the applicant, the decision made by the Respondent was not only arbitrary and very unfair but is also a decision no reasonable tribunal could have reached in the circumstances. Further, the Respondent failed to render material disclosure of the reasons behind their action to issue the enforcement notice and or reasons for their proposed action. She therefore invited the Court to investigate uncertainty otherwise she risked being condemned unheard contrary to the principles

- of Natural Justices and suffer colossal loss and damage not to mention the violation of her fundamental rights under the Constitution including the right to a fair decision, dignity and protection of her property rights from infringement.
11. The applicant therefore averred that the acts complained were ministerial acts which ought to be brought before the court to be quashed since she had shown good and sufficient cause to warrant this court's intervention and the interests of justice shall be served if this application is allowed.
  12. 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.
  13. 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 it...By ‘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 it...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.”**

14. 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.***

15. That the issuance of the Enforcement Notice was an administrative action by the Respondent is not in dispute. The Respondent was therefore under a duty to ensure that its action was expeditious, efficient, lawful, reasonable and procedurally fair. Procedural fairness necessarily requires that persons who are likely to be affected by the decision 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.

16. Section 38 of the ***Physical Planning Act***, Cap 286 Laws of Kenya provided as follows:

***(1) When it comes to the notice of a local authority that the development of land has been or is being carried out after the commencement of this Act without the required development permission having been obtained, or that any of the conditions of a development permission granted under this Act has not been complied with, the local authority may serve an enforcement notice on the owner, occupier or developer of the land.***

***(2) An enforcement notice shall specify the development alleged to have been carried out without development permission, or the conditions of the development permission alleged to have been contravened and such measures as may be required to be taken within the period specified in the notice to restore the land to its original condition before the development took place, or for securing compliance with those conditions, as the case may be, and in particular such enforcement notice may require the demolition or alteration of any building or works or the discontinuance of any use of land or the construction of any building or the carrying out of any other activities.***

***(3) Unless an appeal has been lodged under subsection (4) an enforcement notice shall take effect after the expiration of such period as may be specified in the notice.***

***(4) If a person on whom an enforcement notice has been served under subsection (1) is aggrieved by the notice the may within the period specified in the notice appeal to the relevant liaison committee under section 13.***

15. In this case, there is no evidence that the applicant's application for approval of her development plan was allowed. The applicant simply contends that she applied for the same. Mere application for approval of a development does not in my view amount to such approval and any developer who commences development before such an application is approved does so at his or her own risk.

16. However, the above provision requires the authority to give the developer a period within which to remove the development. In my view that notice ought to be reasonable and sufficient to enable the developer addresses the issues raised before the Liaison Committee. In this case the date scribbled on the Enforcement Notice is 5<sup>th</sup> June 2014. The said notice required the applicant to remove the structures in question immediately and the notice was indicated to take effect the same day 5<sup>th</sup> June 2014. It was indicated to have been served on 5<sup>th</sup> June, 2014.

17. It is clear that the said notice was mischievously issued in order to render the provisions of section 38 redundant. In my view a decision deliberately taken with a view to render the protective provisions of the applicable legislation superfluous must be clearly unlawful and irrational. Even if the Applicants wished to invoke the provisions of section 38(4) she was not afforded time within which to do so. Accordingly, the Respondent's action was tainted with procedural irregularity and ought not to be allowed to stand.

18. Section 38(4) in my view also implicitly imports a requirement that a reasonable notice be given so as to enable a person appeal to the liaison committee if he or she chooses to. A notice which is worded on such terms as to take effect within such unrealistic period cannot therefore be said to be in compliance with the spirit of section 38(4) of the said Act.

17. Consequently, I find merit in the Notice of Motion dated 3<sup>rd</sup> July, 2014, and issue the following orders:

- 1. An order of Prohibiting the Respondent from interfering with or demolishing the developments erected on the Applicant's property Land Reference Number Dagoretti/Riruta/508 pursuant to the Enforcement Notice dated the 5<sup>th</sup> June, 2014.**
- 2. An order of Certiorari removing into this court the Respondent's made vide the Enforcement Notice dated the 5<sup>th</sup> June, 2014 ordering the Applicant to immediately remove the temporary structures erected on Land Reference Number Dagoretti/Riruta/508 and stop further construction which decision is hereby quashed.**
- 3. The Costs of this application are awarded to the applicant.**

**Dated at Nairobi this day 19<sup>th</sup> day of November, 2014**

**G V ODUNGA**

**JUDGE**

***Delivered in the absence of the parties***

***Cc Patricia***