



REPUBLIC OF KENYA

High Court at Mombasa

Miscellaneous Civil Application 93 of 2012

IN THE MATTER OF: THE PHYSICAL PLANNING ACT, CHAPTER 286 LAWS OF KENYA

AND

IN TH MATTER OF: THE LOCAL GOVERNMENT ACT CHAPTER 265 LAWS OF KENYA

AND

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN

REPUBLIC..... APPLICANT

AND

MUNICIPAL COUNCIL OF MOMBASA.....RESPONDENT

THE TOWN CLERK MUNICIPAL COUNCIL OF MOMBASA.....INTERESTED PARTY

AND

JUDGMENT

(1) The Applicant who is the registered proprietor of certain parcels of land for which he sought from the Respondent development approval pursuant to the provisions of the Physical Planning Act seeks Judicial Review order of Mandamus in the following terms:

“That this Honourable Court be pleased to grant orders of mandamus directed to the Respondents herein compelling them to issue an approval and or reasons for refusal to approve development applications Nos. 1043 of 2011 under P/146/2009 for Plot No. 8005/1/MN and Application No. P/1184/11 to p/1188/11 for Plot Nos. 8006/I/MN to 8010/1/MN”

The application was supported by the affidavit of the Applicant and based on the grounds set out in the application dated 6th July 2012 and the statement dated 9th May 2012. The Respondent is the Municipal Council of Mombasa where the properties are situate and the Interested Party is its Chief Executive Officer.

(2) Despite Notice of Appointment filed by M/s L.N. Momanyi & Co. Advocates for the Respondent, and despite opportunity granted by adjournment to do so, no replying affidavit to the application was filed and the matter proceeded to hearing, by consent of the parties, on the basis of written submissions, the filing of which the Respondent again defaulted. Ruling was reserved.

(3) The Applicant's case is set out in the written submissions as follows:

“The Respondent is by law vested with the statutory power, both under the Local Government Act and the Physical Planning Act, to oversee necessary housing and infrastructural development within its jurisdiction.

In a bid to obtain the Respondent's approval to commence development on the said properties, the ex parte Applicant wrote to the Respondent, who responded on the 8th September 2011 to the effect that the application had been found to be in order and was to proceed for the Town Planning Committee for approval. The Applicant was further advised to get prepared for the main works. (See annexure “KJGN4.” The meeting was apparently stated for 22nd September 2011.

On the 23rd September 2011, without any communication from the Respondent on the position of the development plans as provided under sections 30, 33 and 34 of the Physical Planning Act, the Respondent herein embarked on demolishing the structure under construction by the ex parte Applicant (... its noteworthy that the instructions to commence building pending the outcome of the meeting on 23rd September 2011 was granted to the Ex parte Applicant by the Respondents).” (sic)

(4) In demonstrating the Respondent's public duty in order to give rise to the cause of action for the judicial review order of Mandamus, the Ex parte Applicant's counsel submitted as follows:

“The Ex parte Applicant humbly submits that by tendering its final applications for approval by the Respondent the Ex parte Applicant acted in good faith and in compliance with the express provision of section 31 of the Physical Planning Act. The Respondents were then mandated under section 32 thereof to refer the same to the Director for comments within 30 days... . The Respondent has not exhibited to court that it was done.

The Director who is vested with power to either grant or refuse to grant the said approval, gives his

comment on the application under section 33 of the Act and the Respondent, upon receipt of such reasons, then proceeds to inform the Applicant in writing within 30 days of receipt of the Director's comments as stipulated under section 33 (2) of the Act. The Interested Party, where it deems it fit to defer such application it ought to issue a deferment notice to the Applicant informing him or her of such intention to defer and giving reasons for the said reasons as stipulated under section 34 of the Act.” Sic

The Respondent, it was contended, had the duty to **“inform the public of the status and or approve/disapprove the applications to commence and/or continue with developments on the property in their jurisdiction.”** Counsel cited case law authorities in support of his case.

(5) I have considered the application and I find that the issue to be determined is whether the respondent Municipal Council against which the order for mandamus is sought has a public duty to perform in relation to the process of applications for development approvals, which it had failed to perform giving rise to the cause of action in mandamus.

(6) Section 33 of the Physical Planning Act is, so far as material, in the following terms:

“33(1) Subject to such comments as the Director [Director of Physical Planning] may make on a development application referred to him under section 32, a local authority may in respect of such development application

(a) grant the Applicant a development permission in the form prescribed in the Fifth Schedule, with or without conditions or

(b) refuse to grant the Applicant such development permission stating the grounds of refusal.

(2) The local authority shall notify the Applicant in writing of its decision within thirty days of the decision being made by it and shall specify the conditions, if any, attached to the development permission granted, or in the case of refusal to grant the permission, the grounds for refusal.

(3) Any person who is aggrieved by the decision of the local authority refusing his application for development permission may appeal against such decision to the relevant liaison committee under section 13.”

(7) It is clear that the Respondent has a duty to consider and grant or refuse applications for development approvals in accordance with comments of the Director of Physical Planning. An aggrieved Applicant whose development application has been refused may appeal to the relevant liaison committee under the Act. However, before the right to appeal to such relevant committee can crystallize, the Respondent must have made a decision refusing the development approval. Where the Respondent refuses or neglects to process an Applicant's development application through the Director's comments to the grant or refusal by itself, for a period of over 1 year, as in this case, the Respondent, while remaining in breach of the statutory provisions of the Physical Planning Act, is clearly also in breach of the Applicant's constitutional right to fair administrative action under Article 47 (1) of the Constitution, which provides that:

“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”

(8) Accordingly, for the reasons set out above, I find that the Applicant is entitled to an order of Mandamus to compel the Respondent to perform its public duty to process and consider the Applicant's applications for development approval with respect to the parcels of land herein.

(9) I therefore grant the Ex parte Applicant's Notice of Motion dated 6th July 2012 with costs to the Ex parte Applicant to be paid by the Respondent.

Dated and delivered this 26th day of February 2013.

**EDWARD M. MURIITHI
JUDGE**

In the presence of:

Miss Mango for the Applicant

N/A for the Respondents

N/A for the Interested Party

Miss Linda Osundwa - Court Clerk