REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 69 OF 2012

REPUBLIC .....APPLICANT

VERSUS

CITY COUNCIL OF NAIROBI .....RESPONDENT

IVYLAND PARK LTD.....INTERESTED PARTY

EX-PARTE

INDERPAL SINGH,

FRANCIS N. NEBE &

JAMES KISA

(Suing as officials of Convent Drive South Residents' Association)

JUDGEMENT

The notice of motion application dated 23rd March, 2012 prays for orders as follows:-

1. An Order of Certiorari to remove into the High Court the approval by the City Council of Nairobi on 6th September, 2011 of the Building Plans Registration Number FC 410 for construction of five (5) Town Houses on LR 3734/299, Lavington Nairobi.

2. Such other, further and/or consequential orders that this Honourable Court may deem fit to grant.

3. Costs of this Application be in the cause.

The application which was brought by Inderpal Singh, Francis Nnebe and James Kisa in their capacity as officials of Convent Drive South Residents Association is supported by grounds on its face; and a statutory statement and the verifying affidavit of James Kisa in support of the chamber summons application for leave dated 5th March, 2011.

In brief, the applicants' case is that on 6th September, 2011 the City Council of Nairobi (the respondent) approved Building Plans No. FC 410 for the construction of five units of town houses on LR No.

3734/299. The plot measures 0.3 hectares. The applicants argue that the said approval contravenes the respondent's zoning policy for Lavington area which requires that one house be constructed on a minimum of 0.1. HA. Further, the applicants argue that the said approval contravened the conditions imposed by the respondent on 19th May, 2011 when granting change of user of the said property from Single dwelling to Multi-dwelling (town houses) which provided inter alia that the approval for change of user was **"subject to .....compliance with the approved zoning policy, (density, skyline character and amenity) of the area"** and **"each unit being limited to minimum plot size of 0.1 Ha."** The applicants finally submitted that in approving the said building plans the respondent ignored the applicants' concerns that the said development ought to be in conformity with the zoning policy since contravening the zoning policy would directly affect the character of the area. It is the applicants' view therefore that the respondent's approval of the said building plans was ultra vires Section 32(3) of the Physical Planning Act, Cap. 286 which provides that the respondent should observe the regional and local development plans i.e. the zoning policies before approving any development plan.

The respondent opposed the application through a replying affidavit sworn on 31st August, 2012 by Mr. P.T. Odongo, the Director of City Planning. The respondent's answer to the application is found in paragraphs 6-14 of the said affidavit which provides as follows:-

6. THAT the Applicants have only relied on one condition of the approval of the change of user i.e. the zoning policy for Lavington area which allows development of Single Dwelling Town Houses on each a minimum plot size of 0.1 Ha notwithstanding the fact that the said approval has several conditions to wit, provision of functional adequate on-site parking, ppropriate set-backs, zoning density in terms of skyline and residential character.

7. THAT I aver that the condition of each unit being limited to a minimum plot size of 0.1 Ha presupposes sub-division of the plot. However, the interested party was not intending to sub-divide the plot but to develop the plot on a comprehensive scheme (gated-community concept) with the plot ratios of thirty five (35) percent ground coverage and seventy five percent plot ratio which are within the obtaining zoning policy of the area.

8. THAT I further aver that the totality of the town houses covers 839m2 of ground coverage against permitted 1015m2 (35%) and the 2016m2 against permitted 2175m2 (75% plot ratio) out of the 2900m2 plot size.

9. THAT a site visit revealed that the project is nearing completion as evident in the annexed and marked PTO "2" photos and the said development of five town houses is similar in character and skyline as the others in the neighbourhood.

10. THAT the Respondent acted within its mandate in approving the change of user of LR No. 3734/299 from single dwelling to multi-dwelling units.

11. THAT the said development is in character with the emerging development trend in the neighourbood. In fact an adjacent plot LR. No. 3734/285 which measures 0.316 Ha has an approved and implementation development of six town houses which is within the same density consideration as in this case.

12. THAT the Applicants have delayed in filing this application in that development by the interested parties is almost complete and it will cause irreparable loss and damage if orders sought are granted.

13. THAT the Respondent has acted within the provisions of Section 32(3) of the Physical Planning Act in approving the said building plans.

14. THAT I am advised by our Advocates on record which information I verily believe to be true that the application is defective, unprocedural and does not meet the requirements of the law.

Ivyland Park Ltd, an interested party by virtue of being the developer of the plot in question, opposed the application through the replying affidavit of its Managing Director Zhang Xu Ling. It is the interested party's case that the applicants ought to have exhausted the appeal mechanism provided by the Physical Planning Act before filing this matter. It is the interested party's case therefore that judicial review is not an efficacious remedy in this matter. The interested party also argues that the applicants' case is in the realm of a representative suit and since the applicants did not obtain the leave of the court before filing the matter as required by Order 1 Rule 8 of the Civil Procedure Rules (CPR) then the same ought to be struck out.

After going through the positions taken by the parties in this matter, I have come to the conclusion that the issues for determination by this court are:-

(1) Whether these proceedings are properly before this court;

(2) Whether the respondent acted unlawfully and unreasonably in granting the interested party permission to carry out development; and

(3) Who will meet the costs of this application?

Several arguments were taken up as to whether these proceedings are properly before this court. The interested party argued that the applicants' matter is a representative cause and Order 1 Rule 8 of the Civil Procedure Rules provides that the leave of the court must be sought before such proceedings are commenced and after granting leave the court would then direct that all other interested parties be notified so that they can be enjoined. The interested party submitted that the applicants did not comply with the said rule before coming to court and these proceedings are defective and should be struck out. I will start by noting that the interested party has misconstrued the provisions of Order 1 Rule 8 of the Civil Procedure Rules in that there is no need to seek the leave of the court before commencing a representative suit. However, that misconstruction of the rule is of no relevance to these proceedings. These are judicial review proceedings brought under the provisions of Sections 8 & 9 of the Law Reform Act Cap 26 and Order 53 of the Civil Procedure Rules. The law under which the application is brought is self-contained and there is no need for invoking the other provisions of the Civil Procedure Rules. The applicants' matter is therefore properly before this court.

The second argument as to whether these proceedings are properly before this court was taken up both by the respondent and the interested party. They argued that the Physical Planning Act provides an appeal mechanism which the applicants ought to have resorted to instead of rushing for judicial review orders. In their view, judicial review is not available to the applicants. The respondent and interested party therefore submitted that the applicants ought to have filed an appeal instead of challenging the merits of the respondent's decision by way of judicial review.

In response to these submissions, the applicants argued that the appeal mechanism provided by Section 13(1) of the Physical Planning Act relates to the decisions of the Director of Physical Planning as defined by Section 3 of the same Act. The applicants therefore submit that they could not appeal to the liaison committee since the decision they are challenging is that of the City Council of Nairobi and not the Director of Physical Planning. Secondly, the applicants argued that even if an alternative remedy of appeal was available, then that is not a bar to their filing judicial review proceedings. In support of this argument the applicants cited the decision of E.M. Muriithi, J in **REPUBLIC V NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY EX-PARTE CORAL DRIVE LUXURY HOMES LTD [2012] eKLR** in which he quoted, with approval, H.W.R Wade and C.F. Forsyth the authors of **Administrative Law, 9th Edition, 2008** at Page 703 where they stated thus:-

"In principle there ought to be no categorical rule requiring the exhaustion of administrative remedies before judicial review can be granted. A vital aspect of the rule of law is that illegal administrative action can be challenged in the court as soon as it is taken or threatened. There should be no need first to pursue any administrative procedure or appeal to see whether the action will in the end be taken or not. An administrative appeal on merits of the case is something quite

different from judicial determination of the legality of the whole matter. This is merely to restate the essential difference between review and appeal which has already been emphasized. The only qualification is that there may occasionally be special reasons which induce the court to withhold discretionary remedies where the more suitable procedure is appeal."

I find nothing wrong with the observation of the said authors. In fact they have correctly stated the law. The availability of an alternative remedy is not a bar to the commencement of judicial review proceedings. Judicial review proceedings are more often than not aimed at correcting defects in the decision making process whereas an appeal is directed at the merits of a decision. In my view, the court can only determine whether an appeal was the more efficacious remedy after considering the facts and the circumstances surrounding each particular case.

In **CIVIL APPEAL NO. 234 OF 1995, THE COMMISSIONER OF LANDS V KUNSTE HOTEL LIMITED,** the Court of Appeal defined the scope of judicial review thus:-

"But it must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority which he has been subjected."

Having understood the purpose of judicial review, it must then be decided whether the applicants' case is one fit for litigation in the judicial review arena. The applicants' main complaint is that the respondent approved building plans which contravened the zoning policy of the place where the development was to be done. There is no dispute as to what the development policy is. It clearly provides that one house is to be constructed on a minimum of 0.1. Ha. The respondent gave its own interpretation of this policy through the already reproduced affidavit of the Director of Physical Planning. The applicants were dissatisfied with this interpretation. This is not one case where the court can clearly say that there was indeed a contravention of the zoning policy. This is a case in which the expertise available to the liaison committee may have be useful. This court cannot say that the respondent's interpretation of the zoning policy is illegal or unreasonable. The best body to interrogate the respondent's interpretation is the liaison committee. The applicants have argued that they had no right of appeal since their appeal was not against the decision of the Director of Physical Planning. This is a strange argument. The Director of Physical Planning is an agent of the City Council of Nairobi. The applicants cannot therefore argue that these proceedings are against the City Council of Nairobi and not the Director of Physical Planning. They indeed had a right to appeal to the liaison committee but they opted not to do so. Where there is a clear appeal mechanism, the court will be reluctant to grant judicial review remedies. An applicant must satisfy the court that there is good reason for abandoning the statutory procedure for challenging a decision. In my view, if an applicant establishes that the decision of a tribunal is unlawful, in excess of jurisdiction, contrary to the rules of natural justice and/or irrational, then that would be enough reason for commencing judicial review proceedings. However, where the issues raised are on the merits of the decision, then the appeal process should be resorted to.

In the case before me, it is clear that the applicants are challenging the merits of the decision of the respondent. Had they indeed established that the respondent had acted in clear contravention of its zoning policy, then the court would have found that there was an error of law and fact. That has not been done. The end result is that judicial review is not available in the circumstances of this case. The applicants ought to have filed an appeal to the liaison committee as provided by the Physical Planning Act. I find their application has no merits and the same is dismissed with costs to the respondent and the interested party.

Dated, signed and delivered at Nairobi this 16th day April , 2013

W. K. KORIR,

JUDGE