REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR ELC CASE NO. 102 OF 2011

REPUBLIC .....APPLICANT

VERSUS

THE DIRECTOR OF PLANNING

CITY COUNCIL OF NAIROBI.....RESPONDENT

WELLINGTON OMODHO .....1ST INTERESTED PARTY

DR. ROBIN MOGERE.....2ND INTERESTED PARTY

HON. JOSEPH NKAISSERY .....3RD INTERESTED PARTY

ERASTUS MWONGERA .....4TH INTERESTED PARTY

JOHN LOKORIO .....5TH INTERESTED PARTY

HON KIEMO KILONZO .....6TH INTERESTED PARTY

DR. JOSEPH NGOK .....7TH INTERESTED PARTY

EX-PARTE

FREDRICK N WAMALWA

DR. TIMONA OBURA

DR. JOSEPHAT KYALO SAMMY

DR. KIGEN BARTILOL

HARRIGAN MUKHONGO

JUDGEMENT

The subject matter of this litigation is a road registered as L.R.No.1160/452/1. The said road came into

being in the circumstances briefly outlined hereunder. The 1st ex-parte Applicant, Fredrick N Wamalwa was initially the registered owner of a parcel of land known as L.R. No. 1160/89. He later sought and obtained the consent of the Planning Department of the City Council of Nairobi to sub-divide the said parcel of land into three pieces namely L.R. No. 1160/450, 1160/451 and 1160/452.

Thereafter he sold L.R. No. 1160/452 to Kenya Reinsurance Corporation which in turn sub-divided the plot and sold the sub-plots as follows:-

1. L.R. No. 1160/609 - Wellington Omodho (1st Interested Party)
2. L.R. No. 1160/611 - Dr. Robin Mogere (2nd Interested Party)
3. L.R. No. 1160/610 - Hon Joseph Nkaissery (3rd Interested Party)
4. L.R. No. 1160/607 - Erastus Mwongera

   (4th Interested Party)
5. L.R. No. 1160/608 - John Lokorio (5th Interested Party)
6. L.R. No. 1160/612 - Hon. Kiema Kilonzo

   (6th Interested Party)
7. L.R. No. 1160/613 - Dr. Joseph Ngok

   (7th Interested Party)

A cul-de-sac road being L.R. No. 1160/452/1 was carved out of the said parcel to enable the purchasers to access their plots.

Subsequently the 1st Applicant applied for sub-division of L.R. No. 1160/451 and the Planning Committee of the City Council of Nairobi approved the said request and parcels Nos. 1160/965, 1160/966, 1160/967, 1160/968 and 1160/969 were thereby created. In the application for sub-division the 1st Applicant had indicated that parcels Nos. 1160/965, 1160/966, 1160/967 and 1160/969 were to be accessed using the road registered as L.R. No. 1160/452/1. The 1st Applicant then sold the said parcels of land as follows:-

1. L.R. No. 1160/695

   & L.R. No.1160/696 - Dr. Hezron Nyangito
2. L.R. No. 1160/967 - Dr. Timona Obura

   (2nd Applicant) & Dr. Josephat Kyalo Sammy

   (3rd Applicant)
3. L.R. No. 1160/969 - Mr. Harrigan H Mukhongo

   (4th Applicant) & Dr. Kigen Barmasai Bartilol

(5th Applicant)

The 2nd to 5th applicants and Dr. Hezron Nyangito were denied use of the road by the 1st to 7th interested parties. Dr. Hezron Nyangito is now deceased. His wife and the administrator of his estate Mary Omare joined these proceedings as the 8th Interested Party. They presented their dispute to the City Council of Nairobi and through a letter dated 27th April, 2011 and copied to the 1st Applicant one J. K. Karreh writing on behalf of the Director of City Planning communicated thus:-

> **"RE: SUBDIVISION OF L.R NO. 1160/451 ADJACENT TO L.R. NO 1160 /452, OFF NDEGE ROAD, KAREN**
>
> **Your letter of December, 2010, regarding development on L.R. No. 1160/451, refers.**
>
> **Kindly receive our sincere apology for this late reply.**
>
> **Please note that the approval of L.R. No. 1160/451 into 5 No. subplots whereby subplots A to C are provided with access vide the 12m cul-de-sac meant for use by developments on L. R. No. 1160/452 appears to have been permitted inadvertently.**
>
> **In principle all the subplots from L. R. No. 1160/451 should be served from the approved 9m access neck.**
>
> **Attached herewith, please find our letter Ref. CPD/PIS/002045/1160/451 of 11th March, 2011, advising the developer to amend their approved subdivision scheme to reflect the approval of the original property L.R. No. 1160/89.**
>
> **To-date we have not received any response."**

This letter was replied to by the 1st Applicant through a letter dated 24th May, 2011. In the said letter the 1st Applicant pointed out to the Respondent that he had no jurisdiction to cancel the approval given to him by the City Planning Committee. He also indicated to the Respondent that sub-plots numbers 965 and 966 which he had sold to the late Dr. Hezron Nyangito had been transferred and it was no longer possible to re-plan the development as suggested by the Respondent. The Town Clerk replied to the 1st Applicant's letter on 15th June, 2011 and explained his decision as follows:

> **RE L.R. 1160/89 KWARARA ROAD, KAREN**
>
> **Your letter dated 24th May, 2011 refers.**
>
> **It is noted that the issues you have raised through the referred letter relate to development of L.R. Nos. 1160/451 and 1160/452 (Orig. L.R. 1160/89 – subplots B & C respectively).**
>
> **Further, it is true that subdivision of L.R. No 1160/89 resulted into L.R. Nos. 1160/450, 1160/451 and 1160/452. However, L.R. No. 1160/451, measuring 2.0 hectares was approved with a 9 meter access-neck; while L.R. Nos. 1160/450 and 1160/452 measuring 2.0 and 4.0 hectares respectively were approved with respective accesses through Ndege and/or Kwarara road(s).**
>
> **Therefore, from a development planning and policy perspective any further subdivision of L.R. Nos. 1160/450 and 1160/452 to minimum plot sizes, would require provision of an internal road network to serve its subplots planned from Ndege and Kwarara road that are through and/or structure plan roads. Whereas, further subdivision of L.R. No 1160/451 to minimum zoned plot size of 0.4 ha would be limited to accessibility vide the**

earlier approved 9 meter access-neck, which would act as cul-de-sac from Kwarara road to serve the resultant properties.

Nonetheless, it appears that further subdivision of L.R. No. 1160/451 was preceded by subdivision of adjacent L.R. No. 1160/452 with provision of a 12 meter cul-de-sac to serve its 9 No. subplots namely L.R. Nos. 1160/605 to L.R. No. 1160/613, all inclusive. In principle, the said 12m cul-de-sac was surrendered as a public road reserve and developed to adoptive standards to serve the foregoing 9 No. plots.

From a planning policy and/or traffic and transportation planning perspective; a cul-de-sac primarily functions as a non-through road. In the event that it is derived from a public road reserve then in normative terms it has a limited length and its use is particularly restricted to accessing the properties for which it is planned as a 'dead-end road'.

Therefore, L.R. 1160/965 to 1160/969 have to be served vide a cul-de-sac road originating from the access-neck approved in 1979 to serve the original L.R. No. 1160/451; plus its subsequent subplots.

Accordingly, this is to reiterate the earlier position in our letter ref. CPD/PIS/002045/1160/451 of 11/3/2011, stating that L.R. Nos. 1160/967, 965 and 1160/969 have to be served through the originally planned access-neck L.R. NO. 1160/451. You should appreciate that the subdivision approval of L.R. No. 1160/451 granted on 21/7/2008, inadvertently permitted the above subdivision scheme to be erroneously accessed through a cul-de-sac meant for a 'gated community' property, whereby a through road cannot be achieved.

This therefore is to advise you to either seek an amendment to the yet to be finalized sub-division scheme of the said plot to use the originally planned access-neck to serve the same or consider the feasibility of establishing a 'right of way' vide the cul-de-sac serving L.R. NOS. 1160/605 to 1160/614, all inclusive."

The applicants subsequently sought and obtained leave from this court to commence these proceedings. By the notice of motion application dated 6th December, 2011 the applicants pray for orders that:-

"1. That pursuant to leave granted on the 29th day of November, 2011 a writ of Mandamus directed to the Respondent do issue compelling the Respondent to issue forthwith to the applicants a certificate of subdivision of plots Land Reference Number 1160/967, L.R. No. 1160/968 and 1160/969 being subdivisions of Land Reference No. 1160/451 and the Respondent to withdraw authorization for interested parties' barrier erected on L.R. No. 1160/452/1 on subservient public road of access to plots L.R. Nos. 1160/965, L.R. No. 1160/966, L .R. No 1160/967 and I.R. No. 1160/969.

2. The Honourable court be pleased to make further or other orders within its inherent jurisdiction.

3. Costs occasioned hereby he in the cause."

The application is supported by grounds on its face; a statutory statement and the 1st Applicant's verifying affidavit filed together with the chamber summons application for leave on 28th November, 2011; the 1st Applicant's replying affidavit sworn on 25th April, 2012 and all the annexures to the affidavits.

According to the statutory statement dated 18th November, 2011 the grounds upon which the relief is sought are:-

"(a) That the Honourable Director of Planning the 1st Respondent lacked jurisdiction in his administrative capacity to overrule, set aside, vary, review the decision of the Planning Committee or delay or frustrate implementation of Planning permission or to delegate statutory duties or incidents thereof to the Interested parties.

(b) The decision of the Respondent mandating the interested parties to authorize access as a condition precedent to implementation of condition is irrational and is calculated to frustrate implementation and issuance of certificate of subdivision.

(c) That the Interested parties cannot sit as prosecutor and Judge in their own cause.

(d) That the decision and actions and or inaction by the Respondents are for the reasons above in excess of and without any jurisdiction to do so, and are arbitrary, irrational and an abuse of statutory powers and natural justice."

The 8th Interested Party supported the application through her replying affidavit sworn on 23rd April, 2012. She reiterates the arguments of the applicants.

The Respondent opposed the application through a replying affidavit sworn on 19th April, 2012 by the Director of City Planning Department Mr. Patrick Tom Odongo. The Respondent's case is that the application is defective in that the Respondent being a department of the City Council of Nairobi, a local authority, is not an independent entity capable of suing or being sued. It is also the Respondent's case that the issues raised by the applicants are technical in nature and the applicants ought to have exhausted the dispute resolution process provided by Section 8(2) of the Physical Planning Act Cap 286 before instituting these proceedings.

On the facts of the case, Patrick Tom Odongo averred that the 1st Applicant being the original owner of Plot Number 1160/451 applied for subdivision of the said land into five sub-plots namely 1160/965, 1160/966, 1160/967, 1160/968 and 1160/969. The Planning Committee inadvertently approved the said sub-division which indicated that the plots would be accessed through the road (L.R. No. 1160/452/1) which was adjacent to the plots. Subsequent to the approval of the said sub-divisions the 1st Applicant sold the parcels to various individuals. It is the Respondent's case that the road was surrendered as a public road and reserve and developed to adoptive standards to serve the sub-divisions of a different plot namely No. 1160/452. It is therefore the Respondent's case that the road was meant to only serve the sub-divisions from plot No. 1160/452.

It is further the Respondent's case that it has never asked the applicants to seek the consent of any of the interested parties and neither has it delegated its role to any other person. The Respondent stated that after it discovered the inadvertence in approving the sub-divisions of plot No. 1160/451 with the access road being L. R No. 1160/452/1 it gave consent to the interested parties to erect a barrier at the entrance of the road. The Respondent stated that the consent to erect the barrier was not given under the influence of the interested parties. The Respondent averred that it will grant development permission to the applicants once they amend their application as directed.

The 1st to 7th interested parties opposed the application through the replying affidavits of Wellington Omodho (the 1st Interested Party) and James Kamwere sworn on 17th January, 2012 and 24th April, 2012 respectively. The interested parties averred that the 1st Applicant has no locus standi in this matter since L.R. No. 1160/89 which he allegedly owns was subdivided and the sub-plots transferred to other parties. It is the interested parties' case that the 1st Applicant no longer has any interest in the properties in question and he therefore has no locus standi to file these proceedings. They aver that the approval of the subdivision of L.R. No 1160/452 by the City Council of Nairobi on 9th January, 1992 clearly provided that the sub-division was approved subject to a cul-de-sac road serving the development being constructed to adoptive standards. They assert that the planning permission did not refer to any sub-division arising from L.R. 1160/89 or any other plot. It is the interested parties' averment that theirs is a

gated community development and the road in question can only be used to access the houses within that gated community and not as a road to access neighbouring plots.

The interested parties further submitted that the Respondent has powers to vary, set aside or delay implementation of any planning permission and it acted within its powers when it set aside the planning permission granted to the 1st Applicant. It is their case that the 1st Applicant ought to have appealed to the liaison committee if he felt aggrieved by the decision of the Respondent. The interested parties asserted that the Respondent had authority to grant them consent to construct a barrier on the road and the Respondent cannot therefore be faulted for granting them the consent to construct the barrier.

Looking at the submissions made in this matter, I conclude that the issues for my consideration are:-

1. Whether the Respondent has power to set aside a planning permission granted by the City Planning Committee;
2. Whether the Respondent has power to authorize any person to construct a barrier on a road;
3. What conditions must a party meet for the grant of an order of mandamus?
4. Are the applicants deserving of the orders sought?
5. Who should meet the costs of this application?

Although the parties herein filed lengthy affidavits to make the facts of this matter appear contentious, I must state that the facts are straight forward. The applicants and the 8th Interested Party seek to use a road carved out of plot No. 1160/452 which is the mother title for the plots of the 1st to 7th interested parties. The applicants argue that the said road is a public road and they are entitled to use it to access their plots. On their part the 1st to 7th interested parties argue that the road in question was only meant to be used to access their plots.

The starting point would be to find out whether these proceedings are properly before this court. The Respondent submitted that it is just but a department of the City Council of Nairobi and it is not capable of suing or being sued. The matter before me is a judicial review application and such an application need not strictly adhere to the rules of civil procedure. If this was an ordinary civil case, the applicants ought to have filed this matter against the City Council of Nairobi and not a department of the Council. In my view, the applicants have sufficiently pleaded their case and the respondents cannot claim not to know what the applicants seek from this court.

What is the jurisdiction of the Respondent in granting development permission? The jurisdiction is found in the Physical Planning Act Cap 286 (the Act). Under Section 29 of the Act, the City Council of Nairobi being a local authority is given power to grant development permission. No development of land can take place without such permission-see Section 30.

In respect to the 1st Applicant's application for sub-division, it is noted that the same is governed by the provisions of Section 41 of the Act which provides as follows:-

> **"41. (1) No private land within the area of authority of a local authority may be subdivided except in accordance with the requirements of a local physical development plan approved in relation to that area under this Act and upon application made in the form prescribed in the Fourth Schedule to the local authority.**
>
> **(2) The subdivision and land use plans in relation to any private land shall be prepared by a registered physical planner and such plans shall be subject to the approval of the Director.**
>
> **(3) Where in the opinion of a local authority an application in respect of development, change of user or subdivision has important impact on contiguous land or does not conform to any conditions registered against the title deed of property, the local authority shall, at the expense of the applicant, publish the notice of the application in the Gazette**

or in such other manner as it deems expedient, and shall serve copies of the application on every owner or occupier of the property adjacent to the land to which the application relates and to such other persons as the local authority may deem fit.

(4) If the local authority receives any objection to, or representation in connection with, an application made under subsection (1) the local authority shall notify the applicant of such objections or representations and shall before the application is determined by it afford the applicant an opportunity to make representations in response to such objections or representations.

(5) A local authority may approve with or without such modifications and subject to such conditions as it may deem fit, or refuse to approve, an application made under subsection (1).

(6) Any person aggrieved by a decision of the local authority under subsection (5) may appeal against such decision to the respective liaison committee:

Provided that if such person is aggrieved by a decision of the liaison committee he may appeal against such decision to the National Liaison Committee in writing stating the grounds of his appeal: Provided further that the appeal against a decision of the National Liaison Committee may be made to the High Court in accordance with the rules of procedure for the time being applicable to the High Court."

The applicants have contended that the Respondent had no powers to cancel permission already granted by the City Planning Committee. The **PHYSICAL PLANNING (SUBDIVISION) REGULATIONS, 1998 (**the Regulations) deals with subdivision of land in urban areas and Regulation 17 states that:
"A local authority may on the recommendations of the Director of Physical Planning or respective authorities cancel the whole or any scheme of division or subdivision which has not been carried into effect provided reasons thereof are given to the affected party."

Looking at the said Regulation, it is clear that a local authority can reverse a decision to grant development permission. It can also defer approval of development permission-see Section 34 of the Act. There is no distinction between the City Planning Committee and the Respondent. The powers are granted to a local authority and the City Planning Committee and the Respondent are agents of a local authority namely the City Council of Nairobi. Therefore, it cannot be said that the Respondent exceeded his jurisdiction by reversing the decision to grant the 1st Applicant permission to subdivide his parcel of land.

The Respondent has made a decision to deny the 1st Applicant permission unless he amends his development plan to include provision of a road of access for the developments within plot No. 1160/451. As provided by Section 10 of the Act, the 1st Applicant is entitled to appeal to the local liaison committee against the decision of the Respondent. Judicial review is a weapon of last resort which can only be used where illegality, irrationality and procedural unfairness can be established. The Act clearly provides the procedure for seeking redress where one is aggrieved by the decision of a local authority.

The proposition that judicial review cannot oust the clear provisions of statute was stated by the Court of Appeal in **SPEAKER OF THE NATIONAL ASSEMBLY v KARUME (2008) IKLR (EP) 425** when it observed that:-

"In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear

constitutional and statutory provisions."

The Court of Appeal was only stating a well-established principle of judicial review. I must hasten to add that where an applicant can establish that a public body is acting unlawfully, unreasonably and in disregard of the rules of natural justice, he/she can approach a judicial review court for an appropriate remedy.

From the facts placed before this court it is clear that the Respondent had the mandate to reverse its decision after discovering that permission was erroneously granted to the 1st Applicant to subdivide his land. The 1st Applicant was asked to amend his plan before his application could be considered afresh. He, however, opted to institute these proceedings. The reasons for denying him permission were given to him in writing. The rules of natural justice were complied with. The Respondent acted within the law and the only avenue open to the 1st Applicant is to file an appeal before the local liaison committee. He cannot therefore complain of having been subjected to an unfair procedure.

The Respondent informed the 1st Applicant that the road carved out of the mother title which gave rise to the plots of the 1st to 7th interested parties was not a through road and it was only meant to serve the said interested parties' plots. It is clear from the facts placed before the court that the 1st Applicant's plot No. 1160/451 had its own access road and the 1st Applicant ought to have provided for a road when subdividing his plot. Plot No. 1160/452 was sold long before the subdivision of plot No. 1160/451 and the 1st Applicant had no control over the subplots created as a result of the subdivision of plot No. 1160/452. The Respondent therefore made a rational decision by asking the 1st Applicant to amend his plan so as to provide an access road for some of the plots. The Respondent cannot therefore be accused of acting irrationally or unreasonably.

The applicants appear to say that the Respondent had no power to grant permission to the 1st to 7th interested parties to erect a barrier on the road leading to their estate. The Respondent has clearly indicated that the road in question was a private road and it had authority to give the interested parties permission to erect the barrier. There is nothing placed before this court by the applicants to make me fault the Respondent's decision.

Another issue is the applicants' prayer for an order of mandamus. An order of mandamus will issue to compel a public body to execute a statutory obligation where it has refused to do so. An order of mandamus will not issue to direct a public body to do something in a particular manner where it is given discretion while exercising its powers. The applicants have asked this court to order the Respondent to remove a road barrier. The Respondent has the discretion to grant or not to grant permission to anybody to erect a road barrier on a private road. This court would exceed its jurisdiction if it directs the Respondent on how to discharge its mandate.

Considering the material placed before this court, I find that the applicants have not established grounds for the grant of the orders sought. Their application therefore fails and the same is dismissed. The applicants and the interested parties are neighbours and will continue being so notwithstanding this litigation. For this reason, I will make no orders as to costs.

Dated, signed and delivered at Nairobi this 7th day of August , 2013

W. K. KORIR,

JUDGE