



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND JUDICIAL REVIEW AT NAIROBI
MISC APPLICATION NO.373 OF 2012

THE REPUBLICAPPLICANT

VERSUS

THE CITY COUNCIL OF NAIROBIRESPONDENT

EX-PARTE

SIMON MUIGAI MWANGI

JUDGEMENT

INTRODUCTION

1. By a Notice of Motion dated 22nd October 2012, the ex parte applicant herein, **Simon Muigai Mwangi** seeks the following orders:
 1. **An Order of Certiorari to call up unto the High Court and quash the proceedings and decision made by the City Council of Nairobi cancelling plan Reg No. EY 737 being letter dated 5th October 2012.**
 2. **An Order of Prohibition to Prohibit the City Council of Nairobi, its officers from demolishing/interfering with the Boundary wall and domestic building in Plot Nos I & L of Kinyanjui Road Ziwani.**
 3. **An order in respect of the costs of the Application.**

EX PARTE APPLICANT'S CASE

2. The application is based on the following grounds:
 - a) **THAT disapproval of Plan REG. EY 737 Proposed Boundary wall and domestic building house on plots nos. I & L off Kinyanjui road Ziwani given to the Applicant has condemned him unheard which is contrary to the rules of Natural Justice and giving him**

only 24 hours is malicious.

b) THAT Applicant applied and obtained approval of the City Council of Nairobi to construct the fence and paid for it.

c) THAT Applicant is the genuine allottee of Plots nos. I&L – off Kinyanjui Road Ziwani, having been allotted the same in the year 1999 and beacon certificates issued to him on the 16th September 2010 after having paid all the requisite fees to the City Council of Nairobi and complied with the conditions of the allotment.

d) THAT the Applicant has paid all the rents due to the Respondent.

e) The decision to demolish is contrary to the Applicant's constitutional rights to quiet enjoyment of his property and if the Respondent has to demolish then it should offer adequate compensation to the Applicant.

3. The application was supported by the affidavit verifying facts sworn by the applicant on 10th October 2012
4. According to the applicant, on or around the year 1999 he applied to be allotted two plots by the City Council of Nairobi namely Plot No. I & L – off Kinyanjui Road Ziwani Nairobi and by letters of allotment dated 25th February 1999 he was allotted the two plots. After he accepted the allotment he followed up the matter and was advised to pay for stand premium, ground rent, survey fees, beacon certificate fees and Application fee which he complied with and paid on the 16th March 2010 and 16th September 2010. He was thereafter issued with a copy of the part development plan confirming that the City Council had approved the sub-division and allotment of the plot. According to the applicant he has thereafter continued to occupy and pay the ground rents for the plots and on or around October he caused his Architect to draw for him the plan for the fence of the said plots which was done and he submitted the same to the Council of approval and paid for the same which plans were duly approved and he commenced and completed the construction of the perimeter wall. The applicant deposes that during the period of the construction the officers from the City Council would visit the suit premises and did not interfere with the progress nor raise any objection to the construction. However on the 9th day October 2012 despite having completed the perimeter wall officers of the City Council served upon the applicant's worker the Disapproval notice giving the applicant 24 hours to demolish the perimeter fence dated 5th October 2012. It is the applicant's contention that he has not been given an opportunity to challenge the said Disapproval notice and the time given is too short for any Appeal hence this Application for Judicial Review orders. The applicant avers that he spent a colossal amount of money in erecting the perimeter wall and the Respondent having all along been aware of what he was doing and having allowed it should have given him an opportunity to be heard before condemning him as he stands to suffer irreparably if the said Disapproval notice is carried out.
5. In his submissions, the ex parte applicant contended that he was not availed any opportunity to respond and that the Respondent did not give him sufficient reason for its decision to cancel the approval letter for his building plan.
6. 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.
7. 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.”

8. 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.

9. That the cancellation of the approval letter for the applicant’s building plans 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.
10. It has not been contended that the *ex parte* applicant herein was ever afforded an opportunity to be heard since the Respondent has chosen not to respond to the applicant’s allegations.
11. It is therefore my view and I so hold that the action by the Respondent of cancelling the said approval 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. It is my view and I so hold that the decision taken by the Respondent 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.”

12. It is therefore clear that the Respondent’s action was clearly unlawful hence a candidate for challenge by way of judicial review.

Consequently, I find merit in the Notice of Motion dated 22nd October 2012, and issue the following orders:

1. An Order of Certiorari is hereby issued calling into the High Court for the purposes of being quashed the proceedings and decision made by the City Council of Nairobi cancelling plan Reg No. EY 737 being letter dated 5th October 2012 which proceedings and decision are hereby quashed.

2. An Order of Prohibition is hereby issued restraining the Respondent, its officers from demolishing/interfering with the Boundary wall and domestic building in Plot Nos I & L of Kinyanjui Road Ziواني based on the said decision.

3. As the application was not opposed there will be no order as to costs.

Dated at Nairobi this day 11th day of December 2013

G V ODUNGA

JUDGE

Delivered in the presence of Mr Kimani for Mr Irungu for the applicant