**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**JR.ELC.CIVIL APP. NO. 2 OF 2012**

**IN THE MATTER OF: AN APPLICATION BY HARVINDER SINGH THETHY FOR LEAVE FOR JUDICIAL REVIEW**

***AND***

**IN THE MATTER OF: STOP ORDER FOR CONSTRUCTION AND DEVELOPMENT ON L.R. NO.3734/285, LOIYANGALANI DRIVE, LAVINGTONG, NAIROBI**

***AND***

**IN THE MATTER OF: L.R. NO.3734/285 LOIYANGALANI DRIVEK, LAVINGTONG, NAIROBI AND THE CITY COUNCIL OF NAIROBI**

***BETWEEN***

**HARVINDER SINGH THETHY…….....……APPLICANT**

***VERSUS***

**CITY COUNCIL OF NAIROBI…….....…… RESPONDENT**

**R U L I N G**

The Applicant herein Harvinder Singh Thethy filed a Chamber Summons application under Certificate of Urgency on 26th January, 2012 seeking the following orders:

1) THAT this Honourable Court do certify the application as urgent.

2) THAT Applicant be granted leave to apply for an Order of Prohibition directed to the Respondent and the Town Clerk and Director of Physical Planning both servants or agents of the Respondent, City Council of Nairobi, from interfering or stopping construction and development on L.R. No.3734/285, Loiyangalani drive, Lavington Nairobi.

3) THAT the applicant be granted leave to apply for an Order of Certiorari to compel the Respondent and or the Town Clerk and or the Director of Physical Planning both servants or agent of the Respondent,

City Council of Nairobi, to call in and quash/revoke stop Order dated 4th November, 2011.

4) THAT the grant of leave to apply for an Order of Certiorari and Prohibition aforesaid do operate as a stay of the stop Order dated 4th November, 2011 on L.R. No.3734/285 Loiyangalani drive, Lavington, Nairobi, pending the hearing and determination of this application.

5) Any other Order or relief this Honourable Court may deem necessary and just to grant in interest of justice.

6) Costs be provided for.

The application was supported by a statutory statement dated 25th January, 2012 and a verifying affidavit sworn by the applicant on the same date and annextures thereto.

The application is premised on the following grounds:

1. The Respondent or its servant or agent has acted in excess of jurisdiction by stopping construction or development.

2. The Respondent or its servant or agent acted in breach of Rules of Natural Justice.

3. THAT the Respondent or its servant or agent acted illegally to deliberately stop construction and development.

4. THAT, the Respondent or its servant or agent have abused their powers by issuing the stop Order.

5. THAT the alternative remedy is not just and expedient and will be costly.

The application was placed before Hon. Warsame, J on 26th January, 2012 who granted leave as sought but directed that the application be served for hearing interpartes on the prayer that leave granted operates as stay of the stop order dated 4th November, 2011 on L.R. No.3734/285 Loiyangalani Drive, Lavington Nairobi pending hearing and determination of the application.

The Respondent has opposed the applicant's prayer that leave granted operates as stay in the aforesaid terms through grounds of opposition filed on 2nd February, 2012.

In the grounds of opposition, the Respondent has raised six grounds on the basis of which it urges the Court to find that the application is incompetent, bad in law, misconceived and is an abuse of the court process and that therefore stay orders should not be granted. They are the following:

1. THAT the Application does not disclose a *prima facie* case to warrant stay.

2. THAT the Applicant has not disclosed the alternative remedy available to him pursuant to the Provisions of the Physical Planning Act.

3. THAT the Applicant has otherwise not disclosed/demonstrated how and why the alternative remedy would be costly or non-expedient;

4. THAT the Judicial Review proceedings herein have been brought with an intention to circumvent the express limitations under Section 13 of the Physical Planning Act.

5. THAT *prima facie*, no evidence of possible breach of rules of natural justice, action beyond jurisdiction, illegality or abuse of power has been tendered.

6. THAT the Application is otherwise fatally defective for breach of mandatory and fundamental provisions of Order 53 of the Civil Procedure Rules.

The application was argued before me on 8th February, 2012 with Mr. Biling for the Applicant and Mr. Ataka for the Respondent advancing their clients different positions on the matter.

In support of the application, Mr. Biling urged the court to allow the application as the applicant had demonstrated at the leave stage that he had an arguable case mainly because he had shown that the Respondent breached the rules of natural justice in issuing an enforcement notice which did not specify which safety measures the applicant had breached to warrant stoppage of his construction. He submitted that though as a general rule where alternative remedies exist they should be exhausted first before a litigant approaches the court for judicial review, there are exceptions to that rule and that the applicant falls within those exceptions. Mr. Biling argued that if the applicant was to follow the three tier appeal process provided for under Section 13 of the Physical Planning Act, ***(hereinafter referred to as the Act)*** given the large composition of the Nairobi Physical Planning liaison Committee and the National Physical Planning liaison Committee, it would be costly and time consuming to assemble the members of those committees and have the appeal heard. If the applicant's appeal before those two committees did not succeed, an appeal to the High Court would involve an additional expense. In response to the Respondent's claim that the alternative remedy of appeals under the Physical Planning Act was most suitable in this case given the technical composition of the liaison committees *visa vis* the court which may not have the depth of technical knowledge required to properly adjudicate on the issues raised in the dispute, Mr. Biling contended that nothing technical arises for determination in this case as the enforcement notice did not raise any technical issues. It was silent on what safety measures had been breached and that in any case, the applicant's main complaint against the respondent concerns issues of law – breach of the rules of natural justice and abuse of power which can only be competently dealt with by the court.

Mr. Ataka on his part opposed the application and claimed that it was an abuse of the court process as it was allegedly meant to circumvent the 60 day period given by Section 13 of the Act within which to appeal against the enforcement notice for the liaison committee which the applicant did not comply with.

Mr. Ataka submitted that the applicant should have utilized the alternative remedy of appealing to the liaison committee as the liaison committee was technically constituted and was more suitable to deal with the issues raised in the dispute in this matter more than the court.
He argued that the claim by the applicant that it approached the court instead of using the appeal mechanism under the Act because it was time consuming and costly to assemble the committees was irrelevant since it was the duty of the Respondent not the applicant to convene the committees for purposes of appeals lodged under Section 13 of the Act.

Another argument advanced by the Respondent is that the applicant had not established a ***prima facie*** case as the Respondent was empowered by law ***(Section 38 of the Act)*** to issue enforcement notices for failure to comply with safety measures or building regulations and that therefore it cannot be said that in issuing the enforcement notice being challenged by the applicant in this case, the Respondent had acted without jurisdiction, or illegally or had abused its powers.

Lastly, it was the Respondent's case that the application by the Applicant was incompetent for failure to comply with Order 53 Rule 4 of the Civil Procedure Rules in that the verifying affidavit filed herein instead of verifying the statement of facts as required verifies the grounds supporting the application.

Having considered the application before the court, the verifying affidavit and annextures thereto, the grounds filed by the Respondent in opposition thereto and the submissions by counsel for the respective parties as summarized above, I find that the only issue that this court is called upon to determine at this stage is whether or not leave granted herein should operate as stay as sought in Prayer 4 pending the

hearing and determination of the substantive motion.

It is my view that in order to make that determination, it is not required of me to consider in depth the merits or otherwise of the applicant's case as doing so might compromise the hearing of the substantive motion yet to be filed in this case. Suffice it to say that leave to institute judicial review proceedings has already been granted which in itself means that the court has already established that the applicant has ***prima facie*** an arguable case.

This now brings me to a consideration of the arguments advanced by Mr. Ataka concerning the validity or competence of the application for alleged failure to comply with Order 53 Rule 4 of the Civil Procedure Rules and the claim that the applicant has failed to demonstrate that he approached the court by way of judicial review since it was more efficacious and convenient than the alternative remedy provided for by Section 13 of the Act.

In my considered view, the validity or otherwise of the chamber summons application is not a relevant consideration for the prayer of whether or not leave granted should operate as stay since the Judge who granted leave chose not to deal with the issue at the leave stage or may have overlooked the same. In any event, I find that the issue raised on the validity of the chamber summons would only have been relevant if the court was dealing with an application to set aside the leave granted herein.

On the issue of whether the applicant has sufficiently demonstrated that it falls within the exception to the general rule that where there are alternative remedies prescribed by statute they should be exhausted first before the judicial review jurisdiction of the court is invoked unless it is more efficient and convenient – see the holding of the **Court of Appeal in R –Vs- National Environment & Management Authority C/A 84/2011**. It is my considered view that this issue should be dealt with at the main hearing of the judicial review application as it might be prejudicial for this court to make a final finding on the matter at this preliminary stage.

On the other issues raised by the parties herein, I find that it is not disputed that the applicant had obtained all necessary building approvals and licences from the Respondent and the National Environment Management Authority (NEMA) for the construction of six housing units on L.R. No.3734/285 Loiyangalani drive, Lavington Nairobi as can be seen from the annextures to the verifying affidavit.

It is also not disputed that on 4th November 2011, the applicant was served with an enforcement notice by the Respondent which required him to stop further construction of building structures in the aforesaid premises immediately. On the face of the enforcement notice, it is clear that the same was issued under Section 30(1) of the Act for failure to observe safety measures though it ought to have been issued under Section 38 of the Act.
I agree with the applicant that the enforcement notice does not specify
which safety measures the applicant had allegedly failed to comply with.

Given the above undisputed facts, ***is the applicant deserving of the orders of stay as prayed?***

Before I answer this question, let me examine the principles which should guide a court in deciding whether or not to grant stay in judicial review proceedings.

I am in agreement with J. Maraga when he expounded on the said principles in the case of **Taib A. Taib – Vs- The Minister for Local Government Misc. Civil App. No.158/2006**when he stated as follows:

"I also want to state that in judicial review applications like this one the court should always ensure that the Ex-parte applicant's application is not rendered nugatory by the acts of the respondent during the pendency of the application. Therefore where the order of stay is efficacious the court should not hesitate to grant it. Even with that in mind, however, it should never be forgotten that stay orders are discretionary and their scope and purpose is limited. ***What then is the scope and purpose of stay orders in the judicial review jurisdiction*****?**

The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made. It is not limited to judicial or quasi-judicial proceedings as some think. It also encompasses the administration decision making process (if it has not yet been completed) being undertaken by a public body such as a local authority or minister and the implementation of the decision of such body if it has been taken."

In view of the foregoing, ***would it then be just and efficacious to order stay in this case?***

In my opinion, the answer to that question is in the affirmative since if stay is not granted, the enforcement notice will continue to be in force meaning that the applicant will be forced to stop construction of the housing units whose development has already started which will in turn result into heavy financial losses amounting to millions of shillings despite having obtained all the necessary building approvals and licences from the Respondent and other relevant agencies permitting the construction. This in my view would not be in the interest of justice considering that the said enforcement notice did not specify which safety measures the applicant had allegedly violated. Despite having been served with the application in good time, the Respondent did not file a Replying affidavit before hearing on Prayer 4 commenced to explain the background against which the enforcement notice was issued and to specify the safety measures the applicant had violated to warrant the order to stop construction immediately. It is clear from the enforcement notice that it was to take effect immediately on the date it was served ***(4th November 2011)*** which means that the applicant was not given any notice to rectify what may have been wrong with the construction if any and was not given any opportunity to say anything on the notice before it took effect though it had grave financial implications on him.

Though it is true that the Respondent had the authority and power to issue enforcement notices under Section 38 of the Act, this does not mean that the Respondent was allowed to use such powers arbitrarily without giving good reasons for the exercise of such drastic powers and without exercising the principles of fair play to the detriment of citizens like the applicant in this case. The rule of law demands that such power is exercised justly, rationally and fairly.

In the circumstances of this case, I am of the view that it would be both efficacious and in the interest of justice to grant the applicant the prayer that leave granted herein does operate as stay in terms of Prayer 4 of chamber summons dated 25th January, 2012 till the substantive motion is heard and determined or until further orders by the court.

Having made my finding on the issue of stay, this court is alive to the fact that though the safety measures allegedly breached by the applicant have not been specified, there is a possibility that there may be safety issues in the applicant's construction site that may need to be addressed and there is therefore need to expedite the hearing of the judicial review application which is yet to be filed.

In the circumstances and in order to facilitate the speedy hearing of the substantive motion, I direct the applicant to file and serve the Notice of Motion within the next 5 days and the Respondent should file its reply thereto within 7 days of service.

Case to be mentioned on 8th March, 2012 for further directions.

**DATED** and **DELIVERED** at Nairobi this **21st** day of **February**, 2012

C. W. GITHUA

JUDGE

**In the presence of:**

Court Clerk - Florence

Mr. Biling for Applicant

Mr. Ataka for Respondent