REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPEAL 563 OF 2006

IN THE MATTER OF: AN APPLICATION SEEKING JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

AND

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

AND

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

BETWEEN

REPUBLIC...APPLICANT

-VERSUS-

MURANG'A MUNICIPAL COUNCIL.........................RESPONDENT

DIRECTOR OF PHYSICAL PLANNING............INTERESTED PARTY

EX-PARTE JAMES MUCHINA WANDUTU

J U D G M E N T

Pursuant to grant of leave to commence Judicial Review proceedings on 4th October 2006, the Exparte Applicant herein James Muchina Wandutu filed a Notice of Motion on 16th October 2006 seeking the following orders:

(i) An Order of certiorari to remove to the High Court for purposes of quashing the decision to pull down the fence on all that land known as Murang'a Municipality/Block 2/463 made by the Respondent on 26th September 2006.

(ii) An order of prohibition stopping the respondent by itself and or its agents and or its servants and or its employees from pulling down the applicant's hoarding fence and any other approved development carried out on that property known as Murang'a Municipality/Block 2/463.

The Notice of Motion is supported by the statutory statement dated 2nd October 2006 and the verifying affidavit and a further affidavit sworn by the Exparte Applicant on 2nd October 2006 and 30th November 2006 respectively.

The Application is opposed vide a replying affidavit sworn by F.K. Rimberia, Clerk of the Respondent on 30th October 2006.

Though the application was duly served on the Interested Party the Director of Physical Planning, the Interested Party did not file any response to the application and chose not to participate in these proceedings.

The background against which the Notice of Motion seeking orders of certiorari and prohibition against the Respondent was filed is that on 24th April 1991 vide letter of allotment dated the same day, the Exparte Applicant was allocated a leasehold interest for a period of 99 years over all that piece of land known as Murang'a/Municipality/Block 2/463 ***(hereinafter referred to as the suit premises)*** which was undeveloped. A lease agreement was executed to that effect by the Commissioner of Lands as the duly authorized Agent of Murang'a County Council and the Exparte Applicant on 8th January 1998. The lease was duly registered by the Land Registrar Murang'a District on 14th January 1998.

Having secured the aforesaid leasehold interest in the suit premises, on 29th November 2002, the Exparte Applicant applied for approval of architectural and structural plans for proposed development on the suit property. In the said application exhibited as annexture marked JMW3A attached to the Exparte Applicant's verifying affidavit, the Exparte Applicant ***(hereinafter referred to simply as the Applicant)*** appears to have applied for inspection of the suit property and erection of a hoarding fence since fees payable for the two items had been included in the computation of total fees payable for approval of the architectural and building plans proposed to be erected on the suit premises. The said fees amounting to ***Kshs.18,720/-*** were subsequently paid to the Respondent on 2nd December 2002 as evidenced by annexture marked JMW3B. On the same date the application was approved by the Respondent's Municipal Engineer and on an undisclosed date by the Murang'a District Physical Planning Officer **– See annexture marked JMW3A.**

On 26th September 2006, the Respondent through its Town Clerk wrote to the Applicant giving him 7 days notice to demolish the hoarding fence he had put up on the suit premises in readiness for the proposed development whose architectural and structural plans the Respondent had already approved. The Respondent threatened to pull down the said hoarding fence if the Applicant failed to do so voluntarily within 7 days. The Applicant was aggrieved by the decision of the Respondent contained in the notice dated 26th September 2006 and this is what triggered the commencement of the instant judicial review proceedings.

In the replying affidavit sworn on 30th October 2006 and filed in court on 2nd November 2006, the Respondent opposed the Applicant's Notice of Motion on grounds that the Applicant has not exhibited any decision capable of being quashed by the court allegedly because all decisions by the Respondent are made through meetings under Part V of the Local Government Act and such decisions are expressed by way of minutes of the meetings in which the decisions were made and not by way of correspondence as the one dated 26th September 2006 exhibited by the Applicant herein. The Respondent also contends that the notice to demolish the hoarding fence erected on the suit property was legally and procedurally issued under Section 30 of the Physical Planning Act ***(hereinafter referred to as the Act)*** because the Applicant had not obtained development permission from the Respondent to erect the said fence under Section 33 of the Act and that in any event, the notice was issued to protect public interest as the suit premises was a public utility plot owned by the Respondent which had been illegally and unprocedurally allocated to the Applicant by the Murang'a County Council without its authority.

To advance their respective positions, Counsels for the Applicant and the Respondent filed written submissions which they chose not to highlight before the court. They invited the court to consider the said written submissions as filed in making its judgment in this matter.

Having carefully considered the Applicant's Notice of Motion, the response thereto by the Respondent and the parties written submissions, I find that it is not disputed that the Respondent is a Local Authority established under the provisions of the Local Government Act, Cap.265 Laws of Kenya to carry out

public functions and to render services to persons within its area of jurisdiction. The Respondent is therefore a statutory body which is amenable to judicial review.

In its skeletal arguments filed on 12th August 2008, the Respondent raises two preliminary issues regarding the validity of the further affidavit filed by the Applicant herein sworn on 30th November 2006 and the validity or competence of the Applicant's Notice of Motion which in my view ought to be determined first before going into the merits or otherwise of the said application.

On the first preliminary issue, the Respondent prays that the aforesaid further affidavit be struck out as it was filed in contravention of Order 53 Rule 4(2) of the Civil Procedure Rules allegedly without leave of the court.

I with much respect to Counsel for the Respondent find no substance in his submission that the said further affidavit was filed without leave of the court. The court proceedings of 23rd November 2006 clearly show that the Applicant was granted leave by Emukule, J to file a further affidavit to respond to new issues raised in the replying affidavit filed on behalf of the Respondent. The said further affidavit is therefore properly on record and cannot be struck out as prayed.

On the 2nd issue, the Respondent claims that the Applicant's Notice of Motion is incurably defective as it is expressed to be brought under Order 53 of the Civil Procedure Rules only without invoking the provision of Section 8(2) of the Law Reform Act which is the substantive law donating to the High Court the special jurisdiction to issue the prerogative writs of certiorari, mandamus and prohibition. It is the Respondent's contention that failure to cite Section 8(2) as the basis of the Notice of Motion was tantamount to seeking prerogative writs under Section 8(1) of the Law Reform Act which specifically prohibits the court from issuing such writs as the court is entitled to treat the Notice of Motion as filed as a civil application.

Secondly, the Respondent claimed that the Notice of Motion was defective for having violated Order 53 Rule 7(1) of the Civil Procedure Rules which requires that the decision, record, proceedings etc being challenged be availed to the court verified by affidavit before hearing of the Notice of Motion or an account be given by the Applicant for such failure.

The Respondent claims that what was annexed to the Applicant's verifying affidavit was just a letter which was not proof of a decision made by the Respondent. According to the Respondent, to comply with Order 53 Rule 7(1) of the Civil Procedure Rules, the Applicant should have attached or availed to the court through the Registrar a proper record of the Respondent in the form of Council minutes evidencing decisions made in Council matters.

At the outset, I wish to record my finding that the Applicant's Notice of Motion is not incompetent or incurably defective as alleged by the Respondent. It is valid and competent and is properly before the court for the following reasons;

To start with, I find that failure to specifically cite Section 8(2) of the Law Reform Act as part of the Law under which the Notice of Motion was brought did not render the motion incompetent or defective. In my view citing Order 53 of the Civil Procedure Rules was sufficient to invoke this court's judicial review jurisdiction which is a special jurisdiction donated to the High Court by virtue of Section 8(2) of the Law Reform Act since Order 53 of the Civil Procedure Rules is promulgated under Section 9 of the Law Reform Act not under Section 81 of the Civil Procedure Act.

I therefore do not see how a Notice of Motion expressly made under Order 53 of the Civil Procedure Rules can be deemed to be an ordinary Civil Application made under the Civil Procedure Act or Rules made under it in which case the issuance of the judicial review remedies of certiorari, mandamus or prohibition would not issue in view of the provisions of Section 8(1) of the Law Reform Act which prohibits issuance of the said remedies in the exercise of the Court's Civil or Criminal jurisdiction. Unlike in the case of <u>Ndete –Vs- Chairman of the Land Disputes Tribunal & Another [2002] IKLR 392</u> relied on by the Respondent in this case where the Notice of Motion had been expressed to be brought under

Section 3A of the Civil Procedure Act and Order 53 of the Civil Procedure Rules, in the instant case, the Applicant did not cite any provisions of the Civil Procedure Act or Rules except Order 53 of the Civil Procedure Rules and looking at the Notice of Motion herein on the face of it, there is nothing to suggest that the court's civil jurisdiction was being invoked or implied. I therefore find no basis for the submission that this court's judicial review jurisdiction was not properly invoked by the Applicant's Notice of Motion.

On the claim that the Notice of Motion was defective for having failed to comply with the requirements of Order 53 Rule 7(1) of the Civil Procedure Rules, I find no merit in the Respondent's submission that for proper compliance of this rule, the Applicant should have attached or availed minutes of meetings of the Respondent evidencing its decision to pull down the Applicant's hoarding fence not the letter dated 26th September 2006.

In my view, the letter dated 26th September 2006 was not just mere correspondence as alleged by the Respondent but was communication to the Applicant of the Respondent's decision expressed as an order requiring the Applicant to remove an allegedly illegal fence erected on Block 2/463 (Central Business District) within 7 days with a threat that failure to do so will empower the Respondent to remove the said fence at the Applicant's own cost. The letter was on the Respondent's bold letter heads and was signed by F.K. Rimberia the Respondent's Town Clerk. It is the notice and order of the Respondent expressed in that letter that aggrieved the Applicant making him commence the instant judicial review proceedings not any decision carried in minutes of any meeting of the Respondent.

It is the same order that is the target of the prayers for orders of certiorari and prohibition sought by the Applicant in this case and in the circumstances I find that the Applicant fully complied with Order 53 Rule 7(1) when he attached the said letter conveying the impugned decision of the Respondent to his verifying affidavit.

Consequently, the Applicant's Notice of Motion is not defective as alleged. I am satisfied that it is competent and properly before the court.

Having resolved the preliminary issues raised by the Respondent, let me now turn to a consideration of the merits of the Applicant's Notice of Motion. The Respondent has claimed that it issued the notice and order contained in letter dated 26th September 2006 lawfully in accordance with ***Section 29(a); 30(1) and (2)*** and ***Section 33*** of the Physical Planning Act. It was further argued on behalf of the Respondent that the order was aimed at restoring the suit premises to its original state before erection of the fence which was done without permission from the Respondent.

It was also claimed by the Respondent that it issued the order in its duty to protect the public interest as the suit premises was a public utility plot in its jurisdiction which had allegedly been illegally allocated to the Applicant by a third party.

Though it is true that a Local Authority like the Respondent was mandated by Section 29(a) of the Physical Planning Act, Cap.286 Laws of Kenya ***(the Planning Act)*** to prohibit or control the use and development of land and buildings in the interest of proper and orderly development of the area in its jurisdiction, it could only do so by exercising its power under Section 33 by either granting or refusing development permission.

Section 30(1) of the Planning Act makes it an offence for any person to carry out development within the area of Local Authority without development permission issued under Section 33 and where no development permission had been issued, the Local Authority concerned is empowered by Section 30(4)(a) to require the developer to restore the land on which development has taken place without permission to its original condition within a period of not more than 90 days.

In view of the foregoing and considering the grounds upon which the Applicant's Notice of Motion is premised, I find that the only issue that arises for determination by this court is whether or not the Respondent's approval of the Applicant's proposed development in the suit premises as evidenced by the

annexture marked JMW3A and the stamped approval on the structural plans submitted with the application for approval of proposed development to the Respondent by the Respondent's Municipal Engineer on 2nd December 2002 amounted to development permission by the Respondent within the meaning of Section 33 of the Planning Act and if so, whether the impugned order was illegal, issued in bad faith and in violation of the Applicant's legitimate expectations.

In order to resolve this issue, I think it is important to understand whether the Applicant's proposed development amounted to development which required permission of the Respondent under Section 33 of the Planning Act.

According to Section 2 of the Planning Act development is defined as:

(a) the making of any material change in the use or density of any buildings or land or the subdivision of any land which for the purpose of this Act is classified as Class "A" development; and

(b) the erection of such buildings or works and the carrying out of such building operations, as the Minister may from time to time determine, which for the purposes of this Act is classified as Class "B" development.

Given the above description of what constitutes development under the Act, it is clear that the buildings proposed to be erected on the suit premises as shown in the architectural and structural plans submitted to the Respondent together with the application for approval dated 29th November 2002 amounted to development and the application for approval for proposed development in my opinion amounted to application for development permission.

The Respondent has admitted that it approved the proposed development when its Counsel stated on page 3 of its written submission "**JMW3(a) is approval of building and structural plan not a development permission".**

In my considered view, approval of the building and structural plans which evidenced the Applicant's proposed development on the suit premises amounted to approval of the proposed development which translated to development permission.

Approval of the proposed development and development permission is one and the same thing and in my opinion the different terminologies used is a matter of semantics.

In the absence of evidence to support the Respondent's allegation that it had not issued the Applicant with development permission/approval as contended by the Applicant, I am satisfied that the Applicant has proved that it had been granted permission/ approval to commence the proposed development in the suit premises which included the erection of a hoarding fence.

As noted earlier, the Respondent had computed fees payable by the Applicant for erection of hoarding fence which the Applicant paid together with payment for approval of the entire proposed development. If the Respondent had not allowed the Applicant to erect the said fence, it should not have charged or accepted any fee for its erection and should have communicated to the Applicant specifically that approval of the building plans for proposed development excluded erection of a hoarding fence which it did not do.

In any case, since the proposed development had been approved/permitted, it was only logical for the Applicant to erect a fence around the suit premises before commencing actual construction to protect members of the public from the risk of injury likely to be caused by activities associated with construction e.g. being hit by falling debris or construction materials.

For all the foregoing reasons, I am satisfied and I so find that the Respondent had given the Applicant development permission for the Applicant's proposed development as sought in the application dated 29th November 2002 within the meaning of Section 33 of the Planning Act which permission by implication

included permission to erect a hoarding fence as claimed by the Applicant in this case.

Having made this finding, it follows that having given its development permission under Section 33 of the Act, the Respondent did not have any jurisdiction to issue a restoration order under Section 30(4)(a) of the Act which is what the Respondent purported to do in issuing the order communicated to the Applicant in letter dated 26th September 2006.

The said restoration order and notice evidenced by letter dated 26th September 2006 was therefore illegal ***ab initio*** and cannot be allowed to stand. It was issued arbitrarily and in utter violation of the Applicant's legitimate expectation that being the holder of a leasehold interest in the suit premises who had obtained permission/approval to develop suit premises as proposed that he will be allowed by the Respondent to carry out the said development to its logical conclusion without interruption for his benefit unless the said permission was revoked. The Respondent has not exhibited any evidence to show that prior to 26th June 2010, it had revoked the Applicant's aforesaid development approval/permission.

In this case I am satisfied that the Respondent in issuing the said restoration orders and threat to demolish the hoarding fence after 7 days as shown in the letter dated 26th September 2006 did not only act ***ultra vires*** its mandate under Section 30 of the Planning Act but also abused the powers bestowed on Local Authorities by Section 30 of the said Act.

Judicial review is designed to prevent the excess and abuse of power by public authorities like the Respondent or other public bodies or officers to ensure that citizens like the Applicant herein are not subjected to unfair administrative action.

The claim by the Respondent that it had issued the said notice and restoration order being conscientious of its public duty to protect the public interest as the suit property was allegedly a public utility plot in its jurisdiction which had been irregularly and illegally allocated to the Applicant is misplaced and mischievous in the context of this case because if this were the position, it is difficult to understand on what basis the Respondent demanded for and received money for land rates for the suit premises and fees for application for approval/permission of proposed development in the suit premises from the Applicant.

If in fact the Respondent was minded to protect the public interest in the said property, it ought to have challenged the Applicant's proprietory interest in the said property by instituting proceedings in the right forum for the revocation of the lease granted to the Applicant on 8th January 1998 on grounds that it had been illegally acquired.

The law does not allow the Respondent to abuse its powers under Section 30 of the Planning Act by issuing illegal orders under the guise of protecting the public interest.

In view of the foregoing, I am satisfied that the Applicant has ably demonstrated that it is deserving of the orders of Certiorari and Prohibition sought in this case.

The submission by the Respondent that the order of prohibition is not available to the Applicant allegedly because the Respondent's decision to demolish the said fence had already been made and prohibition looks into the future not past events is in my view devoid of any merit since it has not been claimed or demonstrated by evidence that the said fence has already been demolished.

In the absence of such claims or evidence by either of the parties herein, the court can only conclude that the said fence is still standing on the suit property and since the Applicant has demonstrated that the Respondent had illegally threatened to demolish the same, it is my finding that the order of prohibition is available to the Applicant as sought.

In the end, I find that the Applicant's Notice of Motion dated 16th October 2006 is merited and it is hereby accordingly allowed in terms

of Prayers (I) and (II). Since no prayer was made by the Applicant for the provision of costs, I will not make any order as to costs though given the circumstances giving rise to this application, the Respondent ought ideally to have borne the costs of the instant Notice of Motion.

Dated, **Signed**and**Delivered** by me at Nairobi this 28th day of March, 2012.

C. W. GITHUA
JUDGE
In the presence of:

Florence – Court Clerk

Mr. Githinji for Applicant
Mr. Kandie holding brief Gicheru for Respondent
N/A for the Interested Party