



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Miscellaneous Civil Appeal 63 of 2011

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL
REVIEW ORDERS**

AND

IN THE MATTER OF: AN APPLICATION FOR LEAVE BY JIPE HOUSE

KINDERGARTEN LIMITED TO APPLY FOR THE

ORDERS OF CERTIORARI AND PROHIBITION

AGAINST THE RESPONDENTS

AND

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

AND

IN THE MATTER OF: THE LAW REFORM ACT CHAPTER 26, THE LAWS OF KENYA

BETWEEN

JIPE HOUSE KINDERGARTEN

LIMITED.....APPLICANT

-VERSUS-

CITY COUNCIL OF

NAIROBI.....RESPONDENT

AND

MARUTI PLAZA LIMITED.....1ST

INTERESTED PARTY

**JIPE VILLAS LIMITED.....2ND INTERESTED
PARTY**

**ROGRUM LIMITED.....3RD INTERESTED
PARTY**

J U D G M E N T

Following leave granted to commence Judicial Review proceedings on 16th June 2011, the Exparte Applicant herein Jipe House Kindergarten Ltd (*hereinafter referred to as the applicant*) moved this court by way of a Notice of Motion dated 6th July 2011 and filed in court on 7th July 2011 seeking the following orders:

1. THAT this Honourable Court be pleased to grant judicial review orders and specifically:-

THAT AN ORDER OF CERTIORARI do issue for the purposes of removing into the High Court and quashing the respondents purported cancellation of the change of user approvals granted by the respondent to the applicant on L.R.209/5/43.

THAT AN ORDER OF PROHIBITION do issue prohibiting the respondents their agents, servants and/or other persons purportedly authorized by the respondents, from trespassing or in any other way interfering with the applicants quite enjoyment of its premises in execution of the enforcement notice dated 21st March 2011.

2. THAT costs be provided for.

The application is supported by the statutory statement dated 14th June, 2011 and the verifying affidavit sworn on 14th June 2011 by Violet

Awori one of the directors of the Applicant.

The application is opposed by the Respondent the City Council of Nairobi and the three interested parties namely *Maruti Plaza Limited, Jipe Villas Ltd* and *Rogrum Ltd*.

On behalf of the Respondent two replying affidavits were filed both sworn by Aduma J. Owuor on 29th June 2011 and on 26th October 2011. The interested parties opposed the motion through replying affidavits sworn by Kuria Wanjau on behalf of the 1st Interested party, Joseph P. Muga on behalf of the 2nd Interested Party and Agnes Kaleche Murgor on behalf of the 3rd Interested party.

The facts of this case as can be discerned from the pleadings and affidavits filed by the parties herein is that on the basis of a lease executed between the Applicant and the registered owner of plot No.209/5/45 (*hereinafter referred to as the suit premises*) Prof. Norah Olembo, the Applicant took possession of the suit premises for the purpose of establishing a kindergarten.

On 16th March 2010, an application was lodged with the Respondent by a practicing physical planner for change of user of a building standing on the suit premises from residential to educational for use as a kindergarten. It is the Applicant's case that the said application was approved by the Respondent in a meeting held on 18th March 2010 as demonstrated by a notification of approval of development permission annexed to the applicant's verifying affidavit marked VA III. That following that approval the applicant proceeded with arrangements to commence the kindergarten which included renovation of the buildings on the suit premises, hiring of staff and obtaining the necessary licences from the Respondent among others.

However on 21st March 2011 the Respondent served the Applicant with an enforcement notice requiring it to stop further use of the suit property.

The Applicant contends that service of the enforcement notice amounted to an unilateral and informal cancellation of the approval of change of user earlier given by the Respondent which exposed it to substantial loss and damage. The Applicant complains that the said cancellation was irregular and without legal justification as the applicant had complied with all the requirements needed for approval of change of user.

The position advanced by the Applicant was strenuously denied by the Respondent who maintained that no approval for change of user in the suit premises was given by the Respondent as alleged by the Applicant. In her Replying affidavit sworn on 26th October 2011 in response to the Applicant's Notice of Motion which reiterated depositions made in an earlier affidavit sworn on 29th June 2011 in response to the application for leave and prayer that leave granted should operate as stay, Aduma J. Owuor stated that while the Respondent was processing the application for change of user, it received objections to the proposed development on the suit property by residents of that area who included the interested parties herein.

Following the said objections and findings reached as a result of the Respondent's own investigations, the Respondent stopped the process of approval and this position was communicated to the Applicant planner through a letter dated 17th May 2010 exhibited as annexure marked AJO2 to replying affidavit sworn on 26th June 2011.

It is the Respondents contention that no change of user in respect of the suit property was ever obtained from the Respondent City Council and that the document showing that conditional approval had been granted on 18th March 2011 attached to the applicant's verifying affidavit was fraudulent as it was an unauthorized document whose source was unknown – ***see paragraph 15 and 16 of the replying affidavit sworn on 26th October 2011.***

It is important to note at this point that the Applicant did not file a supplementary affidavit to deny the Respondents claim that the said document was fraudulent and to demonstrate that it had obtained it legitimately from the Respondent.

It is also the Respondent's case that though it had issued authority to Prof Norah Olembo through a letter dated 2nd March 2010 to carry out repairs and maintenance works on the suit property, it later discovered that the nature of works carried out in the suit premises went beyond the scope of the authority granted as it included extensive excavations and defacing of the property thereon. Consequently, the authority granted vide letter of 2nd March 2010 was revoked by the Respondent's letter dated 19th April 2011 and as the works carried out were aimed at converting the building on the suit premises from a single dwelling residential house to a kindergarten unlawfully as no change of user had been approved, the Respondent served the owner/occupier of the suit premises with an enforcement notice dated 21st March 2011 directing the applicant to stop further use of the suit property. This is what triggered the instant judicial review proceedings

On their part, the Interested parties through the replying affidavit sworn by Agnes Kaleche Murgor

opposed the Applicant's motion mainly on grounds that the Applicant lacked *locus standi* to institute this suit in its own name as it was not the owner of the suit property and the lease on which it based its claim was unsigned, unregistered and unstamped. Secondly, the application for change of user was made by Prof. Norah Olemba the registered proprietor of the suit premises not the applicant and that the Applicant was just a busy body out to waste courts valuable time.

It is also contended on behalf of the Interested parties that the Applicant is guilty of non disclosure and suppression of material facts and that owing to its conduct of flagrantly violating the provisions of the physical planning Act by converting the suit premises from a dwelling house to an educational institution without approval by the Respondent and despite the Interested parties strong objections, it was not entitled to orders sought. It was the Interested parties prayer as well as that of the Respondent that the applicants Notice of Motion be dismissed with costs.

To advance their respective positions, Advocates on record for the parties herein filed written submissions which they highlighted before me on 16th December 2011.

Having carefully considered the applicant's Notice of Motion alongside the submissions made by the parties herein, I find that five main issues emerge for determination by this court which are as follows:

- 1) Whether the present proceedings are properly before the court
- 2) Whether the applicant has *locus standi* to file and prosecute the instant proceedings in its own name.
- 3) Whether the applicant is guilty of non disclosure and suppression of material facts.
- 4) Whether there was approval of the application for change of user and subsequent unilateral cancellation of the same by the respondent.
- 5) Whether the applicant is entitled to orders sought.

Having stated what I see as the main issues raised by the parties herein, I will now attempt to resolve each of them serially with a view to determining the merits or otherwise of the Applicant's application.

Turning to the first issue, it was submitted by Mr. Murgor for the Interested parties that the proceedings herein are incurably defective as the verifying affidavit sworn by Violet Awori contravenes the express provision of Order 4 Rule 4 of the Civil Procedure Rules 2010 which requires that where the plaintiff is a corporation, the verifying affidavit should be sworn by an officer of the company duly authorized under the seal of the company to do so which the Applicant being a corporation failed to do. Mr. Murgor further submitted that the application contravenes the provisions of order 9 Rule I as read with Rule 2(2) of the Civil Procedure Rules in that though it was not disputed that Violet Owori is a director of the Applicant, she had not been authorized under the applicant's corporate seal to act for or institute the instant proceedings on behalf of the Applicant.

Though this position taken by the Interested parties was not disputed by the Applicants, I with much respect to Mr. Murgor find no merit in the submission that the instant proceedings are incompetent and fatally defective for failure to comply with Order 4 Rule 4 and Order 9 Rule 2(c) of the Civil Procedure Rules 2010. I make this finding because these being judicial review proceedings, the Civil Procedure Act and the Rules made under it are not applicable to the proceedings. In making this finding I am guided by the decision of the Court of Appeal in the case of Commissioner of Lands –Vs- Kuntse Hotel Ltd, Civil Appeal No.234 of 1995 where the Court of Appeal held that in exercising its judicial review jurisdiction, the High Court exercises a special jurisdiction which is neither civil nor criminal. It is a jurisdiction described as *sui generis* in which the Civil Procedure Act or Rules have no application.

In the circumstances, I find that the Applicant did not need to comply with the aforesaid provisions of the Civil Procedure Rules 2010 and therefore the current proceedings are not defective or incompetent as alleged. They are properly before the court.

On the issue of *locus standi*, I find that it is not disputed that the applicant was not the registered proprietor of the suit premises and that the application for change of user in the suit premises from residential to educational (kindergarten) was made to the Respondent by a practicing physical planner on behalf of Prof. Norah Olemba not the applicant. For undisclosed reasons, the said Prof Norah Olemba is not a party in these proceedings.

According to the Applicant, its standing in this matter is based on a lease executed between it and the said Prof. Norah Olemba the proprietor of the suit premises and the fact that it is aggrieved by the Respondent's decision to unilaterally cancel an approval it had earlier issued for change of user after the Applicant had incurred expenses renovating the suit premises and making other arrangements to start a kindergarten based on the Respondent's representation that it had approved the change of user.

Looking at the said lease exhibited as annexure marked VWI attached to verifying affidavit sworn by Violet Awori, on the face of it, I agree with the Respondents and Interested parties' submissions that the said lease is undated, unstamped and unregistered and that therefore it lacks legal validity in view of the provisions of the Registration of Documents Act, Cap.285 of the Laws of Kenya.

Despite these legal defects in the said lease, I note that it is not disputed by the Respondent and the Interested parties that the Applicant was in fact a tenant in the suit premises and that it had started a kindergarten therein before it was served with an enforcement notice.

There is evidence that the Respondent had even issued it with licences to run the kindergarten in the suit premises. The applicant has claimed and this has not been denied by the other parties that it had spent substantial amounts of money in renovating the suit premises and in making other arrangements to start a kindergarten and that the service of the enforcement notice directing it to stop further use of the premises exposed it to the risk of losing its investments. Given that the applicant was a tenant in the suit premises and had already started operating a kindergarten thereon which obviously means it had invested in the suit premises, I find that the Applicant was a person who had substantial interest in the suit premises and was likely to be adversely affected if the enforcement notice was implemented.

As the enforcement notice was directed at the applicant, I find that the applicant had a right to approach the court to challenge the enforcement notice since in its view it was irregularly and unlawfully issued by the Respondent to its detriment. It is therefore my finding that the applicant had *locus standi* to institute and prosecute the application for Judicial Review in this case.

Coming now to the third issue, it was submitted by Mr. Murgor that the Applicant was guilty of non disclosure of material facts. Mr. Murgor referred to correspondences exchanged between the firm of Murgor & Murgor Advocates and the Respondents regarding their objection to the establishment of a kindergarten in the suit premises which correspondence was copied to Prof. Norah Olemba.

The said correspondence was annexed to the replying affidavits sworn by Aduma J. Owuor and Agnes Kaleche Murgor. It was argued by Mr. Murgor that the fact that the said correspondence was not availed to the court by the applicant when it moved the court *ex parte* means that the applicant had deliberately concealed material facts with the aim of misleading the court.

Responding to this submission, Mr. Njugi for the applicant denied that the applicant was guilty of non disclosure of material facts on grounds that the correspondence the applicant is accused of having concealed from the court was not addressed to the applicant. Though this was not expressly stated, I understood Mr. Njugi's submission to mean that as the correspondence was not addressed to the applicant, the applicant was not aware of the same and therefore it was not under any duty to disclose information that was not within its knowledge.

I have perused the said correspondence and has noted that the same was not addressed to the applicant and though on the face of it some of the said correspondence was shown as having been copied to Violet Awori and one of them to the Applicant, no evidence was placed before this court to prove that the said Violet Awori received or was served with copies of the said correspondences on behalf of the

applicant. In the absence of such evidence and in view of the fact that none of the correspondence was addressed to the applicant, I find that it has not been proved that the Applicant was aware of material information contained in the said correspondence which it deliberately failed to disclose to the court when it prosecuted its application for leave exparte. I am therefore not persuaded to find that the applicant is guilty of non disclosure of material facts as claimed by the Interested parties herein.

Lastly, I propose to deal with issues No.4 and 5 together since in my view they are interrelated.

Starting with the 4th issue of whether or not the Respondent had approved the application for change of user which it thereafter arbitrarily cancelled, it was argued on behalf of the applicant that the Respondent had infact approved the said application in its meeting held on 18th March 2010 as evidenced by the document attached to the verifying affidavit sworn by Violet Awori marked VA III. It was the applicant's contention that the said approval was subsequently informally cancelled when it was served with an enforcement notice by the Respondent.

The Respondent on its part maintained the position that no such approval was granted and that the document relied upon by the applicant to show that there was conditional approval was fraudulent as it was not authorized by the Respondent and it did not originate from the Respondent. These claims by the Respondent were contained in the replying affidavits sworn by Aduma J. Owuor. The Applicant though aware of these claims by the Respondent did not file a supplementary affidavit to deny that the document was fraudulent as alleged and to explain its source.

Looking at the said document, I have noted that it is a faint photocopy of some other document which is not signed. Considering that the applicant did not deny the Respondent's claim that the said document was fraudulent and considering that what is not denied is deemed to be admitted and given that no effort was made by the Applicant to file a supplementary affidavit to explain how it had obtained the said document after it was disowned by the Respondent, I am inclined to accept the Respondents assertion that it had not given any approval for the desired change of user and that the document relied upon by the Applicant to prove the contrary may have been fraudulent. This may be the reason why the document is not signed by any of the officers of the Respondent. In the absence of a signature on the document by any officer of the Respondent to authenticate the same, it is difficult to find that the said document was infact authorized by the Respondent as claimed by the Applicant. Besides, the correspondences exchanged between the offices of the firm of Murgor and Murgor Advocates and the Respondent annexed to the replying affidavits sworn by Aduma J Owuor and Agnes Kaleche Murgor most of which was copied to the proprietor of the suit premises and to Violet Awori was to the effect that no change of user had been approved by the Respondent and that the same was not going to be approved until certain conditions had been met. In this regard I specifically refer to letter dated 17th May 2010 marked AJO2, letter dated 23rd February 2011 marked AJO-2a and two letters dated 19th April 2011 marked AJO-3a

In view of my foregoing findings and observations, it is reasonable

to conclude and I so do that the Respondent has managed to demonstrate that no approval for change of user had infact been given for the suit premises as alleged. If no approval had been granted by the Respondent in the first place, then there would have been nothing for the Respondent to cancel as alleged by the Applicant. This may perhaps explain why there was no formal cancellation of the alleged approval. It is important to note that the reason given for the issuance of the enforcement notice dated 21st March 2011 was that the applicant had converted use of the suit premises from residential to a kindergarten without authority from the Respondent thus further cementing the Respondent's position that no change of user approval had been given as alleged by the applicant. In the premises, this court is satisfied that the Applicant has failed to prove by credible and cogent evidence that the Respondent had approved a change of user in the suit premises which it subsequently arbitrarily cancelled to its detriment.

This now brings me to a consideration of the last issue regarding whether the applicant was entitled to the orders sought.

Having found that the Respondent has demonstrated that no approval had been given by the City Council for change of user of the suit premises or rather the Applicant has failed to prove its claim that any such approval for change of user was even given by the Respondent, the court will accept the Respondent's position that it never gave such approval and if no such approval was given, it follows that the Respondent could not have cancelled what never existed in the first place. Consequently, I find that no cancellation exists which can be targeted for quashing by an order of certiorari as prayed by the applicant. In the absence of evidence of such cancellation there is nothing to remove to the High Court for purposes of being quashed. In the circumstances, I find that the Applicant has not proved that it is deserving of orders of certiorari as prayed. Consequently, I find that no orders of certiorari can issue in this case as courts of law do not issue orders in vain.

On the prayer for prohibition, the Applicant prays that the Respondent or any of its authorized agents be prohibited from trespassing or in any other way interfering with the Applicants quite enjoyment of its premises in execution of the enforcement notice dated 21st March 2011.

In view of the Applicant's admission that prior to service of the enforcement notice it had started renovating the suit premises with a view to turning it into a kindergarten and considering that I have now made a finding of fact that the Respondent has proved that it did not approve the application made for change of user in the suit premises, it is my considered view that the applicant was in effect carrying out developments in the suit premises without authority or development permission from the Respondent contrary to **Section 30(1) of the Physical Planning Act, Cap 286 of the Laws of Kenya**. The Respondent was in the circumstances mandated by **Section 38(1)** of the Physical Planning Act to issue an enforcement notice against the applicant which it was by law entitled to execute while of course observing the principles of fairness.

In the premises, I find that the Respondent acted in accordance with the law in issuing the said enforcement notice and it was statutorily mandated to execute the same in accordance with the law.

The law is that the Court cannot issue orders of prohibition to prevent public bodies like the Respondent or inferior tribunals from performing their statutory duties and functions when the same are executed in accordance with the law. The supervisory jurisdiction of the High Court can only be exercised where it is proved that public entities or inferior tribunals have either abused their powers in the exercise of their statutory duties, have acted without or in excess of their jurisdiction or have breached the rules of natural justice *inter alia* occasioning legal injury to the person complaining of the aforesaid acts - the aggrieved party.

In this case, I find that the applicant has failed to prove that the Respondent acted contrary to the law or without jurisdiction in issuing the enforcement notice dated 21st March 2011 or that the Respondent had threatened to execute the enforcement notice contrary to the law.

For all the foregoing reasons and having considered all relevant factors, I am satisfied that the applicant's Notice of Motion dated 6th July 2011 is devoid of merit and it is hereby dismissed with no orders as to costs.

Dated, Signed and Delivered by me at Nairobi this 16th day of March, 2012.

C. W. GITHUA

JUDGE

In the presence of:

Florence – Court Clerk

Mr. Njugi for Applicant

Mr. Ataka for Respondent

Mr. Murgor for Interested parties