REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Judicial Review 80 of 2011

REPUBLIC……1ST APPLICANT

VERSUS

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

EX-PARTE

NAFTAL MASARA OKWANYO &
JANE MASARA

JUDGMENT

What is before the court is the notice of motion dated 20th October, 2011 brought by Naftal Masara Okwanyo and Jane Masara (the ex-parte applicants) seeking the following orders:-

1. THAT an Order of Certiorari do issue to remove to this court and quash the respondent's Enforcement Notice dated 15th day of September 2011.

2. THAT an Order of Prohibition do issue prohibiting the respondent either by itself or whomsoever to restraining them from enforcing the Enforcement Notice issued in respect of developments on house No .17 off Matundu road, Matundu Villa and dated 15th September 2011.

3. THAT costs of this application be provided for.

The application is premised on the following grounds:-

1. **The notice as issued is in violation of an existing court order made in respect of the subject property in ELC civil suit No. 205 of 2010: Naftal Okwanyo Masara –vs- the City Council of Nairobi & 3 others.**

2. The respondent has acted in bad faith in issuing the Enforcement Notice and contrary to the law and more particularly to the rules of natural justice.

3. The applicants have a legitimate expectation that the respondents should act judiciously and within the law and they are entitled to a fair administrative action.

It is the applicants' case that they are jointly registered as the proprietors of L.R. No. 1870/111/530within Nairobi on which their matrimonial home better known as House No. 17 stands. Sometimes in early 2010 they sought approval from the City Council of Nairobi (respondent) to make alterations to their house by

putting up servants' quarters and a boundary wall.

The 1st applicant through the verifying affidavit he swore on 20th September, 2011 avers that the application for permission to make the alterations was approved by the respondent on 2nd March, 2010. Upon obtaining all the necessary approvals they thereafter commenced construction. It is the applicants' case that in the month of April, 2010 the respondent's officers started harassing their workers claiming that the construction was being carried out without approval. They later descended upon the property and caused substantial damage.

As a result of the harassment the applicants filed Nairobi H. C. ELC No. 205 of 2010 and on 4th October, 2010 orders were issued restraining the respondent and its officers from interfering with the applicants' construction. The defendants, who include the respondent herein, in the ELC matter applied for the order to be set aside but as the application was awaiting the decision of Justice Mbogholi Msagha the respondent issued the Enforcement Notice which is the subject of these judicial review proceedings.

Through a further affidavit sworn on 20th April, 2012 the 1st applicant informed the court that the respondent's attempt to set aside the injunction issued against it was dismissed by Justice Mbogholi Msagha on 21st September, 2011 and the order restraining the respondent from interfering with the construction therefore remains in force.

The application was opposed by way of a replying affidavit sworn by Tom Odongo the Director of City Planning Department on 17th April, 2012. Through the said affidavit the application is opposed on the ground that the same was brought in bad faith since the material fact that there was a pending case between the parties over the same cause of action had not been disclosed to the court by the applicants.

It was further contended that when the applicants applied for the approval of the building plan they did not disclose the fact that the house was located in a gated residential unit comprising of a scheme of single dwelling units which is a controlled development. The applicants were also putting up an additional unit without adhering to the development policy of the area. The respondent therefore faults the applicants for obtaining development consent by failing to disclose material facts.

Finally the respondent contended that the orders obtained by the applicants in the ELC case were for the maintenance of the status quo but the applicants had violated the said orders by continuing the construction.

When the application came up for hearing, Mr. Nyamu for the respondent submitted that it was wrong for the applicants to file these proceedings in light of the existence of the ELC matter which involved the same parties and arose out of the same cause of action. He argued that there was no need for the applicants to file these judicial review proceedings while the ELC matter was in existence. He further submitted that if the orders in the ELC case had been violated then the applicants ought to have instituted contempt of court proceedings in the same case. He was therefore of the view that these proceedings amounts to an abuse of the court process.

On another issue the respondent's counsel argued that these proceedings are fatally defective and they ought to be struck out. He pointed out to the court that the applicant's notice of motion is dated 20th October, 2011 whereas the court stamp on its face indicates that the same was filed on 11th October, 2011 thereby calling into question the authenticity of the application. He submitted that the applicants had not offered any explanation for this anomaly and that a notice of motion signed after the date of filing puts the court in an awkward position. He stated that although the issue had been brought to the applicants' attention the applicants had not offered any explanation. He told the court that even the affidavit sworn in support of the said notice of motion had the same anomaly.

On the same issue of the defectiveness of the application, the respondent submitted that the same offends the provisions of Order 53 Rule 4(1) of the Civil Procedure Rules, 2010. In support of this argument he pointed to the affidavit sworn in support of the substantive notice of motion and invited the court to find

the same ought not to have been filed and the application should thus be struck out for that reason.

Still on the issue of the defectiveness of the application the respondent's counsel further submitted that judicial review proceedings are filed pursuant to special jurisdiction of the court and the Civil Procedure Act (CPA) does not apply hence the citation of sections 3, 3A and 63(e) of the Civil Procedure Act renders the application fatally defective. He submitted that the applicable law is the Law Reform Act cap 26 and Order 53 of Civil Procedure Rules and that it is important to cite the rules by which the jurisdiction of the court is invoked. He argued that Article 159(2)(d) of the Constitution cannot come to the aid of the applicants on this issue.

Counsel for the respondent finally argued that judicial review remedies are granted at the court's discretion and this court should not exercise its discretion in favour of the applicants since they did not exhaust the other available remedies before invoking the jurisdiction of the court. He submitted that Section 38 of the Physical Planning Act provides for an appeal mechanism and the applicants ought to have resorted to the said mechanism instead of filing these proceedings.

Looking at the arguments before the court, it is clear that the issues for determination are whether the application is properly before the court and whether the applicants are deserving of the orders sought. The court also has to determine the issue of costs.

It is not in dispute that there is a pending ELC matter between the applicants and the respondent herein. The subject matter of both cases is the alterations in respect of the applicants' house on L.R. No. 1870/111/530.

I will first address the issue of the legality of the application before deciding whether the orders should be granted. The respondent submitted that the applicants did not disclose to this court the existence of Nairobi H.C. ELC No. 205 of 2010. This submission has no basis since the applicants clearly stated in the statutory statement dated 20th September, 2011 and in the verifying affidavit sworn by the 1st applicant on the same date that there was a case between the parties in the Land and Environment Division. The applicants cannot therefore be accused of failing to disclose material facts to this court.

Then there is the issue of the dating of the substantive notice of motion. The respondent submitted that the fact that the filing date predates the date of the application means that the same is not a proper application. This anomaly was not explained by way of an affidavit by the applicants. I have given thought to this issue and I think the interests of justice will not be served if the application is dismissed because of what clearly appears to be a mistake. Article 159(2)(d) of the Constitution now calls upon the courts to do justice without undue regard to technicalities. I therefore reject the respondent's submission on this issue.

Another point of opposition raised by the respondent is that the application is defective for citing the provisions of the Civil Procedure Act. It is noted that the substantive notice of motion is brought under Order 53 of the Civil Procedure Rules and sections 3, 3A and 63(e) of the Civil Procedure Act. This should not have been the case since judicial review proceedings are brought under the special jurisdiction of the court as provided by the Law Reform Act and Order 53 of the Civil Procedure Rules. The mistake has however not occasioned any prejudice to the respondent and is a mere technicality which should not hinder the delivery of substantive justice. Once again, I reject the invitation by the respondent's counsel to strike out the application for being defective.

Should the orders sought by the applicants be granted? This matter is unique in that the applicants seem to be asking this court to protect the orders issued by a court of similar jurisdiction. The applicants argue that the respondent acted illegally by issuing the Enforcement Notice despite the fact that the court had issued an order restraining it from interfering with their construction. The respondent's reply is that the applicants should be denied the orders sought because they did not exhaust the appeal mechanism provided by the Physical Planning Act. In my view the respondent clearly indicated its disrespect for the rule of law by issuing the notice despite the existence of an injunction in the ELC matter. The applicants were therefore entitled to seek the protection of the court. In such a situation it would be unjust to tell the

applicants that they should have exhausted the appeal mechanism before coming to this court.

Judicial review remedies are discretionary in nature. Before issuing the orders the court must consider several factors. In the case before me the applicants' interests are already taken care of by the ELC case. Granting orders in these proceedings will pass the wrong message that parties can file several suits over the same matter. It is against judicial policy to file a multiplicity of suits involving the same parties over the same cause of action. The court hearing the ELC matter is of equivalent jurisdiction to this court and is capable of protecting its orders. For that reason alone the application fails and the same is dismissed.

At the time of filing these proceedings the applicants had a good reason for doing so. As such I direct each party to meet own costs in this application.

Dated and signed at Nairobi this 24th day of October, 2012

W. K. KORIR,
JUDGE