



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Application 87 of 2012

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW WRITS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF: SECTION 166 OF THE LOCAL GOVERNMENT ACT, CAP 265 OF THE LAWS OF KENYA

AND

IN THE MATTER OF: SECTION 30 OF THE PHYSICAL PLANNING ACT, CAP 286, LAWS OF KENYA AND THE PHYSICAL PLANNING (ENFORCEMENT NOTICES) REGULATIONS, 1998

AND

IN THE MATTER OF: MATHARE NORTH AREA ONE SITE AT SERVICE SCHEME/PROJECT

- 1. EPHANTUS MWANGI RUGURU**
- 2. LELAH WAIRIMU HUSEIN**
- 3. FRANCIS KABUGU MAKU**
- 4. ALICE NJOKI**
- 5. JOSEPH KAMAU RUGURU**
- 6. GLADYCE MORANDE ONKWARE**
- 7. JACKSON NGUNZI MBITHI**
- 8. PRIMROSE WANGUI NYAMU**
- 9. MALUKI KIMOTHO MUMBO**
- 10. ELISHA WEKESA WALUMBE**
- 11. LUCIUS KAMWARIRIE NJAGI**

12. GLADYS WANGUI WAMWEA

13. JOHNSON KIHORO

WAMBUGU.....APPLICANTS

AGAINST

THE DIRECTOR OF CITY PLANNING DEPARTMENT (CITY COUNCIL OF NAIROBI).....1ST RESPONDENT

THE CITY COUNCIL OF NAIROBI.....2ND RESPONDENT

JUDGMENT

The application for determination is the Notice of Motion dated 23rd March 2012 which orders of:

- a) **Certiorari to remove into this court and quash the decisions for the director of City Planning and the City Council of Nairobi to issue Enforcement Notices dated 12th March 2012 and due on 19th March 2012 where by the Applicants have been required to demolish their structures and developments sitting on their respective plots numbers 1-272, 1 -273, 1-274, 1-275, 1-276, 1-277, 1-278, 1-280, 1-281, 1-283, 1-285, 1-287, 1-289, 1-293, 1-451 and within seven days and if in default that the respondents may enter upon the said plots and carry out demolitions at the peril of the Applicants bearing the costs of the Respondents thereof**
- b) **An order of prohibition to prohibit the Director of City Planning Department of the City Council of Nairobi and the City Council of Nairobi either by themselves, employees, servants and or agents from carrying out demolition of the Applicant's structures development sitting on the respective Applicant's plot numbers 1-272, 1 -273, 1-274, 1-275, 1-276, 1-277, 1-278, 1-280, 1-281, 1-283, 1-285, 1-287, 1-289, 1-293, 1-451 by virtue of Enforcement Notices dated 12th March 2012 and due on 19th March 2012 issued to the Applicants by the Respondents.**

The Application is based on grounds on its face and in particular that the Respondent's decision to issue the said Enforcement Notices are erroneous, unwarranted, illegal, unreasonable, oppressive, discriminatory, unjustified and contrary to the rules of natural justice; that the decision of the Respondents to issue the Enforcement Notices is unreasonable; that the decision of the Respondents to issue the said Enforcement Notices is actuated by irrelevant considerations such as malice, ill will and is in the circumstances unreasonable.

The background leading up to these proceedings has been provided by the Applicants in the statement of facts and in the verifying affidavit sworn by Johnson Kihoro Wambugu on 16th March 2012.

Sometimes in the year 1985, the 2nd Respondent in conjunction with the World Bank jointly undertook a project known as the Site at Service Scheme (Mathare North Area One) where the 2nd Respondent was to provide land and the World Bank was to provide finance through loans to successful allottees. The allottees were lent monies by the World Bank through the management of the 2nd Respondent for purposes of developing their respective plots.

Since 1985, the Applicants settled on and developed their respective plots. The developments were done within the surveyed and mapped out the boundaries of the plots as approved by the Respondents. The Applicants stated that they have also been repaying the money lent to them and have been paying land rates to the 2nd Respondent. The area in question is fully demarcated whereby all the road reserves and

public utility areas have been set out and provided for.

On 12th March 2012, the Applicants received Enforcement Notices dated 12th March 2012 and due on 19th March 2012 from the 2nd Respondent and signed by the 1st Respondent. These notices required the Applicants to demolish the structures on their plots within seven days and in default, the Respondent would enter upon the said plots and carry out the demolitions. The notices were issued on the basis that the Applicants have developed structures on a road reserve called a link road.

The Applicants state that the developments on their plots have been carried out within the surveyed and mapped out boundaries as they had been approved by the Respondents. As a result, the Applicants claim that they are oppressed by the said Enforcement notices.

The Applicants also state that the 2nd Respondent has always received and collected land rates due to itself from the applicants, alongside the loan repayments and that the 2nd Respondent has undertaken a massive sewer line construction on the road reserve, and at no time has it ever been alleged that the Applicants have encroached on or built on a road reserve.

The Application is opposed by the 2nd Respondent through the affidavit of A. J. Owuor, who is the Acting Director of Legal Services at the City Council of Nairobi. The salient issues raised in this affidavit are that:

- a) That Applicants have no locus standi to sustain this application which ought to have been brought in the name of the state;
- b) The Respondents earmarked the subject parcel of land for public use, more particularly for the development of a link road and was reserved for that purpose only;
- c) The subject parcels of land were never appropriated to any private individuals;
- d) That the full council did not invite applications for allotment and that therefore there was no proper allotment done at all;
- e) The Applicants herein are trespassers, illegal encroachers and any allotment letters in their possession are fraudulent and not issued in accordance with any resolution of the 2nd Respondent;
- f) The 2nd Respondent intends to construct a link road for which the land was reserved and has made the necessary arrangements for the same to be constructed;
- g) The 2nd Respondent issued the Enforcement Notices in accordance with the provisions of the Physical Planning Act;
- h) The 2nd Respondent is empowered by Section 166 of the Local Government Act to control development and use of land in the interest and orderly development of the area;
- i) The construction of the link road is necessary to open up Mathare North Area to improve accessibility to the area and to promote delivery of basic services to the area.

The Respondents also attacked these proceedings by way of a Preliminary Objection on a point of law wherein they state that this court should dismiss the Application for want of form.

The Applicants filed submissions in support of their case. In the Applicants view, the issues that present themselves for determination are:

- a) Whether the Application is fatally defective by reason of the procedural error of titling

- b) Whether the Applicants have locus standi to bring and sustain these proceedings
- c) Whether the suit properties were legally allotted to the Applicants
- d) Whether the developments built in or about the applicants suit properties encroached on a road reserve
- e) Whether the Applicants were or should have been heard before the enforcement notices issued

The Respondent also filed submissions to advance its case. The Respondent submitted that the orders sought ought not to be granted because:

- a) The Application is fatally flawed, since it has not been brought in the name of the Republic
- b) The proceedings in this case touch on the merits of the decision of the Respondents.

On 23rd April 2012, the Respondents raised a preliminary objection on a point of law seeking that the application dated 23rd March 2012 be struck out and dismissed on the grounds that:

- a) The Application is fatally defective in form, incompetent and ought to be dismissed; and
- b) The Application is bad in law, legally untenable and misconceived and ought to be struck out *ex debito iudiciae*.

I will deal with the preliminary objection first. Order 2 rule 14 of the Civil Procedure Rules which states that “**No technical objection may be raised to any pleading on the ground of any want of form.**” The Applicants state that the defect regarding the title of the Application would not prejudice the Respondents in any way since it can be remedied by way of an amendment. The Applicants have cited Article 159 (2) (d) of the Constitution of Kenya, 2010 which calls for justice to be administered without undue regard to procedural technicalities, as well as Sections 1A and 1B of the Civil Procedure Rules which provide for the overriding interest of litigation.

The Applicants position in regard to this is that the defect is simply a procedural technicality and that the court ought to consider the substance and merit of the application. Counsel referred me to the case of **Tom Mbaluto v Tribunal Of Inquiry to Investigate the Conduct of Puisne Judge Tom Mbaluto Civil Appeal No 310 of 2009** wherein the Court of Appeal invoked Article 159 of the Constitution and Sections 3A and 3B of the Appellate Jurisdiction Act to overlook the defect in the chamber summons, and granted leave to the Applicant to apply for an order of certiorari.

The Respondents submit that the application is fatally flawed. They have cited the authority of **Farmers Bus Service & Others v The Transport Licensing Appeal Tribunal 1959 EA 779** where the court found that an application for judicial review must be brought in the name of the Republic. They further submit that judicial review is a special jurisdiction of this court, donated to the court by dint of the Section 8 of the Law Reform Act. Failure to use the correct procedure that is provided for in law is fatal. They have also cited **Pagrex International v In the Matter of the Minister for Finance and Others Civil High Court Case number 785 of 2001** where it was stated that “**failing to use the correct format introduces procedural muddles which in the context of judicial review lead to interested parties not being correctly described or identified with possible confusion concerning the proper people being served.**” However, in that case, the judge also found that the application was further defective not only on the title, but also on the form of the affidavit and on service of the application. On these grounds, the judge declined to invoke section 72 of the Interpretation and General Provisions Act, Cap 2 of the Laws of Kenya.

This section states “**Save as is otherwise expressly provided, whenever a form is prescribed by a written law, an instrument or document which purports to be in that form shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument or document, or which is not calculated to mislead.**” In this case however, the defect of the application is only in the heading. It does

not go to the substance of the application. The preliminary objection of the Respondent therefore fails and it is dismissed.

On substance, the issues for determination are as follows:

- a) The applicants have *locus standi* to bring these proceedings
- b) The Respondents action of issuing the Enforcement Notices is ultra vires.

The Applicants submit that they have *locus standi* as they were allotted the suit properties following a joint project between the World Bank and the 2nd Respondent. The Applicants have annexed to their pleadings written agreements between themselves and the 2nd Respondent, which agreements show that the Respondents had assigned them the plots in question. The Respondents also issued the enforcement notices to the Applicants, and they submit that they will be greatly prejudiced by the actions of the Respondents. In support of this position, they cited ***Municipal Council of Nakuru v Tom Wambua Rueben & 96 Others Nakuru JR No 49 & 31 of 2009***, where the court held that the Applicants were rate payers and thus had *locus standi* to institute a judicial review application.

Locus standi is the legal capacity of a person to institute and maintain legal proceedings in court. It can also be defined as the right to be heard before a court heard before the court. It is generally accepted that in judicial review matters, parties only have to show that they have sufficient interest so as to have *locus standi* before the court. In ***Republic v Resident Magistrate, Milimani Commercial Court & Another ex parte AIG Insurance Company Ltd [2010] eKLR (Miscellaneous Application 723 of 2007)*** the court found that the words ‘sufficient interest’ should be construed in a very wide manner and each interpretation would depend on the circumstances of each case. The Court adopted the sentiments of Lord Diplock in ***R V Inland Revenue Commissioners ex parte National Federation of Self Employed and Small Business Ltd (1982) AC 617***. Lord Diplock stated that:

“...the draftsmen...avoided using the expression ‘a person aggrieved’ although it lay ready to his hand. He chose instead ordinary English words which on the face of them leave the court an unfettered discretion to decide what in its good judgment it considers to be ‘a sufficient interest’ on the part of (a claimant) in the particular circumstances of the case before it. For my part, would not strain to give them any narrow meaning.”

Applying these findings to the instant case, I am of the view that the Applicants have an interest in the outcome of these proceedings. The notices issued by the Respondents will directly affect their interest (if any) in the parcels of land. The Respondents arguments that the Applicants have no *locus* therefore fails.

The second issue is whether the Respondents acted ultra vires in issuing the Enforcement notices. The Enforcement Notices are issued by the Respondent under section 38 (1) and (2) of the Physical Planning Act. This section reads as follows:

38. (1) When it comes to the notice of a local authority that the development of land has been or is being carried out after the commencement of this Act without the required development permission having been obtained, or that any of the conditions of a development permission granted under this Act has not been complied with, the local authority may serve an enforcement notice on the owner, occupier or developer of the land.

(2) An enforcement notice shall specify the development alleged to have been carried out without development permission, or the conditions of the development permission alleged to have been contravened and such measures as may be required to be taken within the period specified in the notice to restore the land to its original condition before the development took place, or for securing compliance with those conditions, as the case may be, and in particular sue enforcement notice may require the demolition or alteration of any building or works or the discontinuance of any use of land or the construction of any building or the carrying out of any other activities.

The enforcement notices in question comply with section 38 (1) and (2). These notices specify the illegal development which is the development on a road reserve or link road and specify that the developer stop any further development and remove the said structures within seven days.

This notices also provide that where a person is aggrieved by the notices then appeal to the Liaison Committee as the case may be.

The Applicants have faulted the enforcement notices for being, among other things, illegal, unreasonable, oppressive, discriminatory, unjustified and contrary to the rules of natural justice; the Applicants have also stated that the notices have been actuated by irrelevant considerations.

The Respondents on their part have stated that the Applicants have encroached on a road reserve, and that is the reason why the Enforcement Notices were issued – to correct a wrong committed under section 30 of the Physical Planning Act.

The Applicants have submitted that the developments on the properties in question have not encroached on a road reserve as has been alleged by the Respondents. They have annexed an area map in their pleadings which shows the demarcated public roads and public utilities as well as the location of the parcels of land. They also state that at no time did the Respondents indicate that the plots lay on a road reserve.

The Applicants maintain that they are the rightful owners of the properties in question, and that the actions of the Respondents amount to compulsory acquisition without compensation. They have annexed to their pleadings various documents to prove that they own the properties. The Respondents on the other hand aver that there has been no allocation of the properties in question, and that the letters of allotment have been fraudulently acquired. These issues raised by the parties are on the ownership of the subject properties of land, which cannot be a ground for granting judicial review orders.

In *Sanghani Investment Limited V Officer In Charge Nairobi Remand & Allocation Prison [2007] eKLR (Misc Appli 99 of 2006)* Wendoh J rightly pointed out that “**Judicial Review proceedings is not a forum where such a dispute can be adjudicated and determined as there would be need for viva voce evidence to be adduced on how the land was acquired and came to be registered in the names of the Applicant; whether the title is genuine or not...**” I find that this position correctly applies to this case. There is need to determine whether or not the properties in question form part of a road reserve as has been alleged by the Respondent, or if they belong to the Applicants by virtue of the allotment letters that they hold. The interests of justice will not be served by orders of judicial review.

The Applicants also state that there has been a violation of the rules of natural justice because they were not heard before the issue of the enforcement orders. In *Jane Njeri Nkrumah v Chief Magistrates Court at Nakuru Judicial Review No 26 of 2009 (Unreported)* the court found that “**the orders of certiorari and prohibition therefore issued primarily to inferior courts and other persons and bodies having the duty to act judicially, where there has been an actual or threatened usurpation of jurisdiction or a breach of the rules of natural justice or an error of law on the face of the proceedings.**”

The Respondents on the other hand have submitted that the Applicants encroached on a road reserve and that is why enforcement notices were issued against them. Section 30 of the Physical Planning Act provides that it is an offence for any person to carry out development within the area of a local authority without development permission of the local authority. Section 38 (4) of the Act allows all persons aggrieved by the enforcement notices to appeal to the national liaison committee. In *Republic v Electoral Commission of Kenya & Another ex parte James Mokuia Rute [2010] eKLR (Judicial Review 21 of 2008)* where the court stated that “**although I have stated that the decision of the 1st Respondent is amenable to judicial review, it must be borne in mind that where a statute provides a procedure for challenging elections, that procedure ought to be followed.**”

Section 38 (4-7) provide for elaborate procedures of appeal:

- 4) ***If a person on whom an enforcement notice has been served under subsection (1) is aggrieved by the notice the may within the period specified in the notice appeal to the relevant liaison committee under section 13.***
- 5) ***Any person who is aggrieved by a decision of the liaison committee may appeal against such decision to the National Liaison Committee under section 15.***
- 6) ***An appeal against a decision of the National Liaison Committee may be made to the High Court in accordance with the rules of procedure for the time being applicable to the High Court.***

A reading of section 38 of the Physical Planning Act and the Enforcement notices which are annexed to the Applicants' pleadings show that there is a procedure outlined in the law to challenge the issue of an enforcement notice, and this procedure entails first making an appeal to the Liaison Committee that is established under section 13 of the Physical Planning Act. In this case, the procedure has not been followed. Upon receiving the enforcement notices, the Applicants came to this court; they have failed to take up the procedure provided in law to address the enforcement notices. I agree with the Respondents' contention that the Applicants should have challenged the Enforcement Notices through the statutory procedure provided in the Physical Planning Act.

In ***Republic V City Council Of Nairobi Ex-Parte Leah Aida Wambete [2010] eKLR (Miscellaneous Civil application 10 of 2009)*** Mbogholi-Msagha J was dealing with an application such as the instant one, found that the Applicant in that case had failed to exhaust the mechanisms that are provided in law to address the Enforcement notice, and so could not come seeking judicial review to quash the same. I hold a similar view. Having failed to take up the process to appeal to the Liaison Committee, they have not gone through the entire process that they would need to in order to fully address the issues on the alleged encroachment. Judicial review cannot issue where the procedure complained of has not been undertaken or a decision has not been reached. The purpose of judicial review orders are to ensure that there is good administration that is in accordance with the law. In this case, the steps that have been taken by the Respondents so far have been in compliance with the Physical Planning Act.

The upshot of this is that the Notice of Motion dated 23rd March 2012 is dismissed with no orders as to costs.

Dated and signed this 10th day of December, 2012.

M. WARSAME
JUDGE

Delivered at Nairobi this 13th day of December 2012.

W. KORIR
JUDGE