



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION
JUDICIAL REVIEW APPLICATION No 77 OF 2008**

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

REPUBLICAPPLICANT

AND

**NAIROBI CITY COUNCIL1ST RESPONDENT
THE CHIEF MAGISTRATE’S COURT
AT CITY HALL NAIROBI2ND RESPONDENT
THE ATTORNEY GENERAL.....3RD RESPONDENT
ADOPT A LIGHT.....INTERESTED PARTY**

EX-PARTE

BARCLAYS BANK OF KENYA LIMITED.

JUDGMENT

ADOPT A LIGHT embarked, with the consent of the **NAIROBI CITY COUNCIL** (‘the Council’), on a beautification project in Nairobi, in which it provided and installed a street lighting programme, which was coupled with the advertisements for various firms on the City streets. It would appear that a dispute arose between Adopt A Light and the said Council over a contract entered into for the said purpose, pursuant to which the Council has filed a litany of cases against the former and its customers for whom it carried out the said advertisements. Adopt A Light claims that the sole aim of the action that has been taken by the Council is to frustrate its effort to perform its contractual obligations under the said contract with the Council.

BARCLAYS BANK OF KENYA LIMITED, which I shall now refer to as ‘the bank’ or ‘the ex parte applicant’ herein, happens to be one of the customers of Adopt a Light, and being aggrieved by action taken by the Council against it in the aforesaid manner, it filed this Notice of Motion on 3/5/2008.

I shall now refer to Adopt A Light as ‘the interested party’.
The same is brought under Order LIII Rule 3(1) of the Civil Procedure Rules, and it seeks several orders against the said the Council, as the 1st respondent, **THE CHIEF MAGISTRATE COURT AT CITY**

HALL as the 2nd respondent and **THE ATTORNEY GENERAL** as the 3rd respondent, and though it initially sought five orders it later abandoned one and now prays for:

1. *An order of prohibition prohibiting the 1st respondent from:*

(a) *Prosecuting and from proceeding any further or taking any other step in any manner whatsoever with the hearing and determination of the Criminal Case No. 40 of 2008 filed in the Subordinate court at City Hall, Nairobi between the Republic and this ex parte applicant relating to any matter pertaining to advertisement on street land from filing any other proceedings against it relating to any matter pertaining to the advertisement on street lamp posts at any time now or in the future.*

(b) *Using enforcement notices issued under Section 30(1) of the Physical Planning Act as a means of collecting advertisement revenue.*

2. *An order of Mandamus compelling the 2st respondent to cease using enforcement notices under Section 30(1) of the Physical Planning Act as a means of collecting unpaid advertisement revenue.*

3. *An order of Certiorari to quash the criminal proceedings in the aforementioned Criminal Case. It also prays for costs.*

The bank, which is represented by Mr. Allen Gichuhi, has had its verifying sworn by one David Swao. The same in essence confirms the following grounds:-

(a) *The 1st respondent's action of preferring the said criminal charges against it, is ultra vires the Physical Planning Act and the charge as drawn is null and void because:-*

(i) *No enforcement notice pursuant to Section 38 of the Physical Planning Act to support the precise ingredients of the charge sheet was mandatorily issued and served on it to sustain the present charge sheet, which makes the charge fatally defective, null and void.*

(ii) *The enforcement notice purportedly issued on the 30/5/2007 was in relation to advertisement on lamp posts and not the putting up of various lamp posts as set out in the charge sheet.*

(iii) *The enforcement notice issued mentioned above was issued by the City Council of Nairobi while the criminal charge was instituted by the Nairobi City Council an entity that does not exist.*

(iv) *Advertisement per se on lamp posts is not an offence known in law and as defined under Section 3 of the Physical Planning Act.*

(v) *The charge as drawn is fatally defective as the statement of the offence in the charge sheet relates to advertising while the particulars of the offence relate to the erection of lamp posts.*

(b) *The 1st respondent is illegally using enforcement notices as debt collection vehicles which action is ultra vires the spirit and purpose of the Physical Planning Act. This is against public policy and has infringed on the liberties of Nairobi city residents.*

(c) *The ex parte applicant never erected any sign posts as the same were put by Adopt A Light, the Interested Party.*

(d) *The bank has dutifully paid for all the advertisements to the Interested Party and is a stranger to any battle between the 1st respondent and the Interested Party.*

(e) *The bank has been condemned unheard as it has been denied the opportunity of proving that it has dutifully paid for all the advertisements to the Interested Party.*

The 1st respondent was represented by the Mr. Mubea. It opposes the application and has had filed on its behalf a replying affidavit, sworn by one James Maina its Deputy Director, City Planning Department.

I shall deal with the affidavit later for I feel that it is imperative at this stage that I firstly deal with the 'replying affidavit' which was filed on behalf of the interested party, by one Esther Passaris on 30/10/2008 and in which she deposes in support of the bank, in that she deposes that prior to the case forming the subject matter of these proceedings herein, the 1st Respondent instituted Criminal Case No. M. 460 of 2007 at the Chief Magistrates Court, against one Peter Fundi who is one of her employees charging him with an offence of advertising contrary to Section 30 (1) with reference to Section 3 of the Physical Planning Act Cap 286 and punishable under Section 30(2) of the same Act, the particulars of the charge being that on '6/6/2007 at about 1:30 p.m. along Valley Road near the Department of Defence Headquarters being an employee of Adopt-A-Light Company did put up a new lamp post advertisement written Barclays without permission from the City Council of Nairobi'.

She also deposes that the 1st respondent had on 10/7/2007 filed another case at the same City Court Nairobi against another of her employees, namely John Oganga Okwaru concerning an advert on behalf of the bank, being Criminal Case No. M. 466 of 2007, the particulars of the offence and charge being 'advertising contrary to Section 30(1) with reference to Section 3 of the Physical Planning Act Cap 286 and punishable under Section 30(2) of the same Act, and the particulars were that on 10/7/2007 at about 3.00 p.m. along Langata Road near Langata Barracks within the City of Nairobi, being the supervisor of Adopt-A-Light Limited did erect new lamp posts of Barclays without permission from the City Council of Nairobi', and that the matter was heard and Okwaru was acquitted.

Bearing in mind the fact that she claims that her firm was acting within the mandate of the contract with the Council, it is therefore her contention that it is clear from the foregoing that '*the 1st respondent is aware that the subject advertisements have been erected by the Interested Party within the terms of the said contract but has decided to prefer the said charges so as to defeat the contract and scare away the Interested Party's customers*', and she is therefore of the view that the charges against the bank are improper and an abuse of the criminal process of the court; an abuse of the prosecutorial powers granted to the Honourable Attorney General and delegated to the 1st respondent's officers, made in bad faith and against the principle of legitimate expectation, and further thereto that having conducted a total of 25 allied cases against her company employees, these criminal charges that have now been preferred herein against the ex parte applicant are for extraneous purposes and are mainly intended to settle scores between her company and the 1st respondent, and in which case, the court's process is being invoked unfairly.

The 2nd and 3rd respondents did not file any skeletal arguments but made brief oral submissions. They were represented by Mr. Obiri Advocate, a state counsel who contended that no decision was ever made by his clients to charge any party; that according to them no prerogative orders ought to issue against them as the dispute is between the bank, the 1st respondent and the Interested Party.

The Interested Party was represented by Mr. Nyandieka. It filed its skeletal arguments, in which it supports the position taken by the Applicant and avers that there is a dispute between the 1st respondent and his client over the said contract. He further argues that this application ought to be allowed as it is necessary, as the prosecution of the bank is an abuse of process in court, oppressive, vexatious and brought up for the extraneous purposes. It cited the decision in the case of **JARED BENSON KANENANA V ATTORNEY GENERAL MISC. APPLICATION NO 446 OF 2000** at page 67 where the court held that:-

"It is, therefore, immaterial whether the prosecution reasonably suspects that an offence has been committed because that is not an issue in a prohibition. The test is whether there are circumstances which will make the proceedings an abuse of the process of the court. Acts of such an abuse are not restricted to acts of any party and the prosecution or the Respondent should not be telling this court, not to rely on anything done by the victim to decide whether there is an abuse while at the same time the

prosecution are saying they will rely on what the victim is saying or doing to prove the criminal charge against the Applicant. The court should ask whether its process is being fairly invoked.”

The Interested Party has also relied on the decision in the case of **R VS. CHIEF MAGISTRATE’S COURT NAIROBI EXPARTE ANURIK SINGH s/o GURBAKSH SINGH & 2 OTHERS NAIROBI HC MISC APPLICATION NO 117 OF 1983** where Nyarangi and Cockar JJ (as they then were) granted an order of prohibition on the basis of the fact that the proceedings complained of did not disclose a criminal case.

The 1st respondent filed the skeletal arguments which included a preliminary objection urged within the main hearing of this application. In its preliminary objection which is dated 10/4/2008, it avers that it is entitled to enforce its statutory duty of regulating advertising as mandated by the Physical Planning Act as well as the collection of revenue from advertisements under the Physical Planning Act and the Local Government Act. It also argues that the following are undisputed points of law namely:-

- *Under section 3 (d) of the Physical Planning Act, the display of any advertisement constitutes class “A” development.*
- *Section 29 of the Physical Planning Act, empowers it to prohibit and control development (including display of advertisements “A” developments); and,*
- *Section 130 (1) (2) and (3) of the said Physical Planning Act makes any development without permission from the Local Authority illegal, criminal, null and void.*
- *Section 38 of the Physical Planning Act empowers it to issue enforcement notice to developers, occupiers and owners of any development erected without development permission from the Local Authority.*
- *Sections 13 and 15 of the Physical Planning Act establish tribunals which ought to adjudicate any challenge to the enforcement notices.*
- *The bank is not party to the contract dated 28/3/2002 between the interested party and the Council.*
- *The bank is not party to the High Court Civil case No. 637 of 2006.*

The 1st respondent also contends that if the bank is indeed aggrieved, it should have followed the procedure as laid down under the Physical Planning Act and as stipulated herein-under:-

Section 38(4) If a person on whom enforcement notice has been served under Subsection (1) is aggrieved by the notice, he may within the period specified in the notice appeal to the relevant liaison committee under Section 13.

Section 38(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.

Section 38(6) Any 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.

It further contends that the High Court is not the right forum to challenge Enforcement Notices but that it should be the tribunals as established under the Physical Planning Act, and that that being the case, the bank has no legal basis howsoever to prefer this judicial review application, without first exhausting the procedure under the aforementioned Act. It is further contended that the judicial review application herein cannot pass the test for prerogative orders set out by the Court of Appeal in the case of **KENYA NATIONAL EXAMINATION COUNCIL EX-PARTE GEOFFREY GATHENJI NJOROGE (CIVIL APPEAL NO 266 OF 1995)**.

It also maintains that there is no reason why the court should prohibit it from proceeding with the prosecution of Criminal Case No. 40 of 2008 and from filing any other proceedings against the bank relating to any matter pertaining to the advertisement on street lamp posts now and in the future as long as the bank continues to disregard the City planning laws; that this court cannot prohibit it from discharging its obligations or exercising its statutory authority.

The council has further argued that the bank's action of advertising on street lamps without paying the public revenue due for such advertisement offends the provisions of Section 45(1)(d) of the Anti Corruption and Economic Crimes Act which stipulates that "*a person is guilty of an offence if the person fraudulently or otherwise unlawfully fails to pay any taxes or any fees, levies or charges payable to any public body or effects or obtains any exemption, remission, reduction or abatement from payment of any such taxes, fees, levies or charges.*". It therefore interprets the bank's action as meant to prematurely challenge the Enforcement Notices which in its view is wrong as the court cannot usurp its role as established under Section 13 and 15 of the Physical Planning Act.

I now come back to the 1st respondents replying affidavit, by the aforementioned James Maina who concedes that the Council entered into a contract with the Interested Party on or about 28/3/2002, and though he however deposes, in a rather uncertain manner, that the said contract cannot override statute law, he nevertheless goes further to add that the Ministry of Local Government and at its full Council meeting, recommended and subsequently ordered the termination of the contract with the interested party on what he says was because of '*its enormous illegality, which thus rendered the said contract null and void abinitio*', which fact he also deposes that the prima facie illegality of the said contract was confirmed in the matter of **MONIER 2000 LTD & 9 OTHERS Vs. CITY COUNCIL OF NAIROBI & ADOPT-A-LIGHT LTD** in **Nairobi High Court Miscellaneous Application No. 1406 of 2004**, and also in the matter of **ADOPT-A-LIGHT LTD Vs. CITY COUNCIL OF NAIROBI HCCC NO. 1110 OF 2007**, and that despite all this, the Interested Party has undertaken developments in direct and deliberate contravention of the law and more specifically the Physical Planning Act ('the Act'), which requires that developments be licensed before they are undertaken. Given the above it is thus his contention that the bank was under a statutory obligation to know and obey the law and that it cannot be exonerated by the mere fact that it entered into an agreement with the Interested Party.

Though the 2nd and 3rd respondents did not file any submissions in this matter, Mr. Obiri who appeared for them, made brief oral submissions on points of law which I will revert to later in this judgment.

The bank concedes that the subject lamp posts were erected but it claims that this was done by the Interested Party to whom it paid the relevant advertisement fees. Indeed, James Maina concedes as much for he not only states that '*the Interested Party was responsible for the development, but that the said Interested Party was ordered not to construct any bill boards without complying with the 1st respondent's By-Laws*'.

The bank thus maintains that from the foregoing, the 1st respondent ought to pursue the issues arising from its contract with the Interested Party as it was not the party which erected the subject lamp posts, a fact which the Interested Party readily concedes to. It would therefore appear that it is for these reasons that the bank argues that the charge sheet is fatally defective as it states that it was the bank that erected the lamp posts which, we have now established was not the fact.

The bank further contends that the enforcement notice was ultra vires the Act as the 1st respondent is taking advantage of it to collect revenue instead of addressing developmental concerns as envisaged by the Act.

I have perused paragraph 2 of the Enforcement Notice ('the Notice'), and I note that it states that no City Council licence was obtained for the advertisement while paragraph 3 thereof sets out the fine as K.Shs.901,000.00 which according to the Applicant is ultra vires the Act, as the said Act does not set out the penalties payable for non-payment for an advertisement licence.

The bank argues that the offence if any, should be under the Local Government (Adoptive By-laws) (Building) Order 1968 whereof Section 229 criminalises failure to obtain a licence for advertisement. Furthermore Section 231 thereof gives the Council the power to issue a notice to the person who has advertised without licence, and thereby to request it to remove the advertisement within such a time as the Council may prescribe, and it provides for a fine of K.Shs. 2,000.00 or imprisonment for a term not exceeding 6 months (see section 257 thereof).

In my humble opinion, the 1st respondent ought to have first demanded the removal of the advertisements before preferring the charges in the manner that it did.

But that is not all, for in addition thereto, the bank states that the charge sheet is unconstitutional, and I readily agree with it for none of the respondents complied with following fundamental Constitutional conditions:-

(a) *Under section 77 (2) (b) of the now repealed Constitution, during whose pendency this Notice of Motion was filed, an accused person shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence which is charged.*

(b) *Of penalties shall be held to be guilty of a criminal offence on account of an act or omission that did not at the time it took place, constitute such an offence and no penalty shall be imposed for a criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed.*

(c) *Section 77 (8) of the same Constitution provided that no person shall be tried for a criminal offence unless that offence is defined and the penalty thereof is prescribed in a written law.*

I have gone through the pleadings and the skeletal arguments filed in this case. Before I address the merits of the application herein, I wish to state that the judicial review is a special jurisdiction on the High Court which is exercised only when it is the most efficacious remedy available.

The scope of judicial review is a well trodden area and there are numerous decisions on the subject. In the case of **REPUBLIC V JUDICIAL SERVICE COMMISSION EXPARTE PARENO, HIGH COURT MISC CIVIL APPLICATION NO 1025 OF 2003**, the court held inter alia:-

“The remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself. It is important in every case that the purpose of the remedy of judicial review is to ensure that the individual is given a fair treatment by the authority to which he has been subjected and that it is not part of that purpose to substitute the opinion of the Judiciary or of the individual Judges for that of the authority constituted by law to decide the matters in question.”

The concern for this court is the credibility of the decision making process which led to the impugned decision in this application, not the merits of the decision. This court can only intervene where the decision making process is wanting. The province of judicial review has experienced unprecedented growth in the last decade with regard to the grounds for the intervention and the courts are facing challenges of new emerging trends and situations. However, there are several main grounds that trigger judicial review such as abuse of discretion, illegality, improper motive, excess of jurisdiction, irrationality among others.

As a result of the fast growth in this area, the courts must examine each case on its peculiar facts and merits.

Going by the facts of this, in the view of the court the following are the issues that call for determination:

(a) **Whether the decision to charge the bank by the 1st Respondent was made in blatant breach of the rules of natural justice?**

(b) **Whether the demand by the 1st respondent to the bank to pay the sum of**

K.Shs.901,000/= being advertisement charges, of within 48 hours is irrational; unreasonable or was meant for an improper motive?

(c) Whether the 1st respondent acted ultra vires in issuing the Enforcement Notice and in subsequently charging the bank with a criminal offence?

(d) Who should pay costs in this matter?

The onus of demonstrating to this court that the challenged decisions were arrived at in blatant breach of the rules of natural justice, or that the said decisions are unreasonable or otherwise, so as to allow intervention, squarely lies on the bank, for it must discharge the burden in order to succeed in its case, by availing tangible evidence.

The bank argues that failure to pay advertisement revenue is not defined in the Act as an offence, but that it only appears as so in the Local Government (Adaptive By-laws) (Building) order 1968, yet the charge sheet refers to the offence allegedly committed under the Act. A perusal of the charge sheet reveals that the charge is duplex, for the simple reason if found guilty, the bank stands to suffer a multiplicity of penalties, which thus renders it defective for the law requires that there be clarity and that an accused person be certain of the consequences of what crime he is alleged to have committed. I agree with the finding in the case of **KENGELES HOLDINGS LTD V REPUBLIC Criminal Revision No. 36 OF 2008**, where Ojwang J. held that *“the manner in which the charges have been framed, invites the application of different penalties, of profoundly differing gravity and thus there is duplicity in the charges. Charges of such a kind will inevitably limit the scope for defence, and in this way, they stand in contradiction to the applicable provisions of the constitution notably those set out in S.77. The court intervenes by quashing the charge and the proceedings so far conducted by the trial court.”* The same principle ought to apply in this matter.

All in all, and in addition to the above findings I also find that the bank was not furnished with a notice as required, nor was it accorded an audience before the charges were preferred, which omission obviously means that it was condemned unheard, contrary to the principles of natural justice which dictate that no man shall be condemned unheard.

In view of the above, I am convinced that the Council is simply using the criminal process as a means of intimidating the bank to pay for advertisement revenue, which situation cannot be sustained for *“it is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals on the advancement or frustration of their civil cases. That is an abuse of the process of the court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some ulterior purpose. The Interested Party in this matter was more actuated by desire to punish the Applicant or to oppress him into acceding to his demand by brandishing the sword of punishment under criminal law, than in any genuine desire to punish crime on behalf of public. The predominant purpose was to further the ulterior motive which the High Court could not allow”* (**R V CHIEF MAGISTRATES COURT MOMBASA EX-PARTE GANIJEE & ANOTHER [2002] 2 KLR 703**).

The rules of natural justice are fundamental and are a cushion to ensure that public bodies do not take decisions at their whims to the detriment of those affected.

The applicable rule in this instant case is expressed by the principle *audi alteram partem* which means *“hear the other side.”*

Ordinarily, each party to a dispute should be given an opportunity to state its case particularly if the decision taken will affect it negatively. In the case of **RIDGE V BALDWIN (1963) 2 ALLER 66 at page 81**, Lord Reid stated as follows:-

“Time and again in the cases I have cited it has been stated that a decision given without regard to the principles of natural justice is void.”

Similar sentiments were also expressed in the case of **GENERAL MEDICAL COUNCIL V SPACKMAN (1943) 2 ALLER 337 at page 345** where Lord Wright held as follows:-

“If the principles of natural justice are violated in respect of any decision, it is indeed, immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision.”

The right to hear the other side is not necessarily a right to personal hearing or appearance before the body making the decision, what is vital in such a situation is to ensure that the party to be adversely affected is timely informed of the substance of the case it has to meet, which must be reasonably and clearly formulated. Further, such a party who stands to be prejudiced should be given a reasonable opportunity to present its case.

I now turn to the issues vis a vis the evidence on record.

In this instant, the bank was served with Enforcement Notice dated 30/5/2007 and ordered to the sum of K.Shs.901,000/=, within 48 hours. The 1st respondent appears to have unilaterally made the decision that the bank was liable to pay the said sum within the said time. The bank was never afforded an opportunity to state its case. With the greatest of respect the period of 48 hours was due to expire on 1/6/2007, which a Friday and, it is a matter of public notoriety is Madaraka Day which is a Public holiday. From the conduct of the 1st Respondent, there was no intention on its part to afford the bank a fair hearing or at all.

Section 38(4) of the Physical Planning Act provides that *“if a person on whom an enforcement notice has been served under subsection (1) is aggrieved by the notice; he may within the period specified in the notice appeal to the relevant liaison committee under section 13.”* The bank was given 48 hours notice to pay the aforesaid amount of money, and as already stated, part of the period fell within was Madaraka day and followed by a weekend and it would not have been possible in my view to do official work during the period. In essence, the 1st respondent made it almost impossible for the bank to appeal, and arising from that conduct the 1st respondent, is estopped from alleging that the bank did not follow the laid down procedure of challenging the Enforcement Notice.

The court is aware and alive to the fact that the right to hear the other side does not necessarily mean or amount to a hearing before a court of law. In the case of **BOARD OF EDUCATION V RICE (1911) A.C. 179 at page 182**, Lord Loreburn L C stated as follows:-

“In such cases the Board of Education will have to ascertain the law and also ascertain the facts. I need not add that in doing either, they must act in good faith and fairly listen to both sides, for that is the duty lying upon everyone who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer oath and need not examine witnesses. They can obtain information in any way they think best always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.”

It is clearly evident that the bank was never heard by the 1st respondent and even from the notice, as already stated there was no intention to give the bank an opportunity to be heard. The 1st respondent was merely interested in collecting the advertisement charges, and hence the short and impracticable notice of only 48 hours.

It is for the above reasons that I find that the process leading to the charging of the bank was made in blatant breach of the rules of natural justice and consequently it cannot stand.

Needless to say, I also find that the demand for the payment from the bank while knowing very well that the contractual obligation lay with the interested party was irrational, unreasonable or motivated by ill will, for it is clear from the pleadings, that the 1st respondent and the Interested Party have had protracted legal battles in court and perhaps they are far from being over. Although this court would not want to be drawn into that line of antagonism, there is ample and uncontroverted evidence that it is the Interested Party who undertook the advertisement for the bank upon payment by it. It was thus extremely irrational

and unreasonable for the 1st respondent to give the bank the said notice and to require it to make payment for the said advertisement whereas the bank had already fulfilled its obligations with the interested party.

The short notice also demonstrates malafide and unreasonableness on the part of the 1st respondent. In the landmark case of **ASSOCIATED PROVINCIAL PICTURES V WEDNESBURY CORPORATION** (1948) 1 KB, 223 where Lord Green MR stated as follows:-

“Decisions of persons or bodies which perform public duties or functions will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the court concludes that the decision is such that no such a person or body properly directing itself on the relevant law and acting reasonably could have reached that decision.”

It is implied that whenever a public body such as the 1st respondent is exercising discretion, the resultant decision must be reasonable and justifiable. The guiding principle should be fair treatment to all who stand to be adversely affected by the decision taken. As stated earlier, the 48 hours notice to the bank was to a large extent denial of opportunity to present its case and further to ensure that no appeal would be preferred since time was to lapse soon thereafter. After failure to comply the 1st respondent resulted to instigating criminal charges against the Applicant.

The third issue is whether the 1st respondent acted ultra vires by serving the bank with the Enforcement Notice? The bank has suggested that indeed the 1st respondent acted ultra vires the Physical Planning Act. I do not subscribe to the views advanced by the bank for the following reasons:-

- (a) The 1st respondent served the enforcement notice dated 30/5/2007 to the bank and indeed the 1st respondent was right to do so save that the period for compliance was unreasonably brief.
- (b) The issue of whether advertisement perse is an offence amounts to splitting of hairs and is purely a matter of semantics.
- (c) Section 38 of the said Act empowers the 1st respondent to issue enforcement notices.

Since the 1st respondent was acting within its mandates, it is not correct to allege that it acted ultra vires of the said Act.

As already noted herein, this court is not interested in the merit of the decisions by the 1st respondent but on the legitimacy of the decision making process.

I now turn to the prayers which the bank seeks, and I do note that prayer 1 has two limbs, for the bank prays for an order of prohibition, on which I have already made the finding that the 1st respondent breached the rules of natural justice and that it acted unreasonably while giving a 48 hours notice to pay the alleged advertisement fees. Having made the above findings, it is obvious that the order of prohibition must issue and indeed is hereby issued to stop further proceedings in the criminal case No. 40 of 2008 in the subordinate court at City Hall. Likewise a prohibition order is hereby issued to stop the 1st respondent from using the enforcement notice dated 30/5/2007 as a means of collecting advertisement revenue from the bank.

The second prayer for the order of mandamus lacks in merit and I decline to grant it, for the court cannot bar the 1st respondent from performing its functions as authorised by law, and I need not reiterate that for as long as the 1st respondent exercises its powers properly, the court cannot interfere with the said action, save that the Council must abide with all the rules prior to such notifications.

The bank also prays for an order of certiorari to quash criminal case No. 40 of 2008 **REPUBLIC V BARCLAYS BANK OF KENYA LTD**, I find it superfluous. Since the court has already issued an order of prohibition, there is no reason why certiorari should issue. The court cannot issue orders in vain. Consequently, I decline to allow the said prayer.

As for costs, I have no doubt in my mind that it is the unreasonable conduct of the 1st respondent which triggered the proceedings, and although the matter herein falls under public interest litigation, the 1st respondent must be visited with costs and to that extent, I do order that the 1st respondents shall bear the costs of all the other parties in this cause

Dated and delivered at Nairobi this 17th day of June 2011.

JEANNE GACHECHE
Judge

Delivered in the presence of:

For the ex parte applicant – Mr. Oginde holding brief for Mr. Gichuhi

For the 1st respondents - Mr. Mubea.

For the 2nd and 3rd respondents –No appearance

For the interested party – Mr. Mubea holding brief for Mr. Nyandieka.