REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. APPLICATION NO.92 OF 2010

SAMUEL K. MWEMA …….....…….....……. …….APPLICANT

VERSUS

THE NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY ……..……1ST RESPONDENT

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

ABRAHAM KARUTI ITABARI ……..….....…….…….1ST INTERESTED PARTY

DOMINIC MUTHOGA NDEI …….…….....…..…..2ND INTERESTED PARTY

RULING

In the Notice of Motion dated 11th February 2011 the applicant seeks the following orders:

1. THAT an Order of Certiorari do issue, removing into the High Court for purposes of Quashing the decision made by the 2nd Respondent through its officers to approve Development Plans and issue development permits in respect of L.R.NO.s13330/508 and 13330/503 and more particularly Plans Nos. EU 538 and EX 356.

2. THAT an Order of Certiorari do issue, removing into the High Court for purposes of Quashing the decision made by the 2nd Respondent through its Officers to approve Change of User applications in respect of L.R. NO.s 133350/508 and 13330.503 without consulting the Applicant.

3. THAT an Order of Prohibition do issue, Prohibiting the 1stg Respondent from granting and/or issuing an Environmental Impact Assessment License in respect of L.R. NO.s 1233350/508 and 13330/503.

4. THAT an Order of Certiorari do issue, removing into the High Court for purposes of Quashing the decision made by the 1st Respondent through its Officers to Accept and Approve the Project

Report and the Environmental Impact Assessment Report submitted to it in respect of L.R. NO.s 13330/508 and 13330/503.

5. THAT an Order of Prohibition do issue, Prohibiting the 1st Respondent from issuing and/or granting an Environmental Impact Assessment License or any other license in respect of L.R. NO.s 13330/508 and 13330/503.

6. THAT an Order of Prohibition do issue, Prohibiting the 2nd Respondent from issuing and/or granting any further approvals, Permits or Licenses in respect of L.R. NO.s 13330/508 and 13330/503.

7. THAT the costs of this application be borne by the Respondents and/or Interested parties.

I have considered all the documents, material and arguments filed by all the advocates appearing for the parties. The first issue is whether this court has jurisdiction to entertain the application by the exparte applicant. The issue of jurisdiction is pertinent because it has been argued by the 1st respondent and the two interested parties that the decision sought to be quashed was made outside the mandatory six months period allowed, therefore, this court has no powers to grant the orders sought.

It is trite law that when a party aggrieved by a decision of public body or authority, he has to move the court appropriately for Judicial Review within a period of six months from the date of the decision. In this case, it is alleged the applicant has moved court way past the statutory period prescribed by law. It is alleged that the statutory period as clearly laid out by the statute cannot be extended by the consent of the parties or through leave of the court. it is a time line that has to be strictly adhered to and followed to the letter for all parties seeking to file any proceedings of a Judicial review nature. It is also submitted that the applicant has not attached any decision upon which it invites this court to quash therefore, the court should not act in vacuum and cannot be called upon by any litigant to quash that which does not exist or which is not before court. It is a cardinal rule of judicial review for a party to succeed, it has to demonstrate;

1. That there exists a decision by a public body or authority.

2. The applicant is aggrieved by the decision.

3. The decision was made within the last six months or within six months period.

In the replying affidavit of the 1st interested party it shows the change of user from residential to commercial was granted on 1st April 2010 pursuant to an application dated 24th February 2010. The intended change of user was placed in the Standard Newspaper of 25th February 2010 granting 14 days for any objections or comments as provided for under the Physical Planning Act. It is also clear the building plans were subsequently approved on 5th July 2010. The 1st interested party then applied for a NEMA license and before the application there was environmental impact assessment report before any construction of the said property was to be commenced. The application of the 1st interested party was approved and was authorized to commence the construction of the building. The said letter is by and large a license to commence construction on the site as the 1st interested party has adhered to the terms and conditions laid down by the 1st respondent.

It is clear that there was no objection to the license and approvals granted to the 1st interested party. It is also clear that the 1st interested party is undertaking the construction in his parcel of land and not on a public road or road reserve. The applicants have not demonstrated to this court that the parcel of land in possession of the 1st interested party is a public road, a road reserve or a public parking bay. In any case, the 1st and 2nd respondents have approved the development plans and the necessary license after being satisfied that the owner had fulfilled all the legal and statutory requirements. The applicants have

not given any indication as to any environmental and health hazards that have occurred in the area which have even necessitated them to oppose the construction.

The 2nd interested party has also confirmed that all procedures and processes prior to the granting of approvals being challenged have been granted in accordance with the law. The notification of approval of development permission for LR. NO.1330/508 and the approval of change of user was issued on 18th December 2008. It is the contention of the 2nd interested party that the applicant filed the application challenging the grant of the approval on 25th November 2010, twenty three (23) months after the approval was granted, they also contended that the building plans were approved on 30th March 2010 which is also outside the six months statutory limitation. In any case there is a consent between the applicant and the 2nd interested party that the construction should continue.

It has been contended that the fact that the applicant consented to the continuation of the construction is a demonstration of double standard. The applicant is on one hand saying that there is a serious environmental problem yet it consented to the continuation of the construction. In my view that is a valid argument. It is a valid argument because the points of contention are that the two interested parties did not follow the relevant provisions of the law before they commenced the constructions which the applicant thinks is offensive. The same parties who were alleging that the interested parties did not follow the law cannot consent to the continuation of the constructions which they thought was offensive and contrary to the law. In my view that is a fundamental defect in the case of the applicant. A party, in law, cannot be allowed to take two divergent and contrasting positions. In that regard, I think, the applicant is not entitled to the orders sought. Furthermore, the application for judicial review was brought outside the mandatory period required under the law. Consequently the application by the applicant is not well merited and is dismissed with no orders as to costs.

Dated, signed and delivered at Nairobi this 28th day of October 2011.

M. WARSAME
JUDGE