REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Miscellaneous Civil Application 55 of 2008

JAMES TOROTICH KISA

NASIR KARMALI

ANNE KIHARA

LAVINGTON RESIDENTS ASSOCIATION ……………………….APPLICANTS

VERSUS

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

JUDGEMENT

The *ex parte* applicants, James Joroitich Kisa, Nasir Karmali and Anne Kihara, describe themselves as residents of Lavington Estate. The 4th applicant Lavington Residents Association is the Welfare Association of the Estate and the 2nd and 3rd applicants are its officials. They are aggrieved by the notice issued by the City Council of Nairobi on 10/1/08 approving the alteration of use of land Ref. L.R. No. 3734/1227. They have challenged it in the Notice of Motion dated 8/8/08 in which they seek to have the decision quashed and the user prohibited from doing any further construction on the said land.

The Notice of Motion was opposed by the respondent and Interested Parties Kamal S. Shah and V. Pal Shah. Issues that seem to arise are as follows:

1. Whether applicants have *locus standi* to bring this application.
2. Whether the Notice of Motion is competent.
3. Whether the applicant has failed to disclose material facts and acted in bad faith.
4. Whether the impugned decision is an illegality.
5. Whether the decision is irrational and unreasonable.
6. Whether the decision is *ultra vires* the powers of the respondent.
7. Whether the decision is in breach of the applicants' legitimate expectation.

The applicants seek the following orders:

(a) An order of certiorari to quash the decision contained in the notice dated 10/1/2008 signed by the Director of City Planning – City Council of Nairobi Reg. No. CDD/DC/LR. 3734/1227 approving alteration of a domestic building into offices on Land L.R. No. 3734/1227.

(b)An order of mandamus directed at the City Council of Nairobi requiring it to exercise its statutory mandate to ensure no further excavation or construction on L.R. 3734/1227 on the authority issued on 10/1/2008.

(c) An order of prohibition prohibiting the City Council of Nairobi from allowing any other excavation or construction on L.R. 3734/1227 on the basis of the notice issued on 10/1/2008.

In support of the Notice of Motion, the applicants filed a verifying affidavit sworn by James Torotich Kisa dated 3/7/2008, a statutory statement of the same date, skeleton arguments dated 24/11/2008 and a list of authorities. In opposing the Notice of Motion, the respondent filed a replying affidavit sworn by Peter Kibinda, Director of City Planning Department dated 8/8/2008 while Karmal S. Shah swore a replying affidavit dated 18/8/08 on behalf of the Interested Parties and skeleton arguments, plus a list of authorities filed in Court on 16/12/00.

It is the applicants' contention that the approval to change user of the land granted to the Interested Parties was contrary to the City Council By-laws. That the notice indicates that the Interested Parties are altering the user while in actual fact they are changing the user of the land. Secondly, the applicants contend that the approval was given for L.R. 3734/1227 but the development is proceeding on a different plot 3734/1227. That this being a residential area, proper procedure should have been followed i.e. advertisement to notify the public of the change of user. That the premises being put up are not offices but a commercial block and that will prejudice the residents. That the notice has contravened sections 29A and 36 of the Physical Planning Act Cap. 286 Laws of Kenya. They deny that any environmental impact assessment has been carried out to-date to enable the residents make the necessary objections. That the City Council could not have altered development of offices because of the policy of the Council that offices are within zone 5 in accordance with the respondent's minutes of 23/9/05 K 3(a) (Review Policy).

That after the applicants raised an objection, the Council issued an enforcement notice No. 5334 against the Interested Parties and work stopped on 12/3/08 but it was been resumed on 28/3/08 (K5). That there had been an attempted development of the land in 1996 but the applicants filed ***NRB HCCC 148/1989 TURI COMPLEX LTD. v. PALTINA E.A. LTD*** and the owners were restrained from developing it till they got the Council's approval. The judgment was exhibited as K8.

In response to the Notice of Motion, the Director City Planning deponed that the owners of L.R. 3734/1227 applied to the respondent for change of user on 3/7/08 from residential to professional offices. That the engineer inspected the premises and an advertisement was published in the Standard Newspaper of 9/7/03 informing the public of the proposed change of user and that said order also sought objections and suggestions (PK 1). No objections were received and it was approved (PK2). Fresh plans were submitted for approval and it was done at the Council's meeting of 17/2/05 (PK 3 – 5). The approval contained conditions *inter alia* that the construction be commenced within 12 months of approval which they did not do. Fresh plans were submitted on 28/11/07 (PK6). Approval was granted on 10/1/08 (PK 8). That the enforcement notice that had been issued on

11/2/08 was withdrawn on 18/3/08 and the Interested Parties were allowed to commence with the construction.

The Interested Parties' case is that they bought the premises from Intervilles Limited who had sought change of user which was granted. They requested for approval of building plans which was granted in September, 2004 - Kshs.6. The construction did not start due to a boundary dispute with James Toroitich Kisa who had encroached on the land. A fresh application was made and approved on 10/1/08 (Kshs.8). That the meeting of 23/9/05 did not bar the establishment of professional offices in residential areas provided they complied with the relevant laws.

In October, 2007 the Interested Parties instructed Mutinda Mutuku to carry out an environmental impact assessment in compliance with Environmental Management and Co-ordination Act (EMCA) and the National Environmental Management Authority (MEMA) duly approved the proposed construction. Initially there was a typographical error in describing the plot as LR 3737/1227 it was but was rectified to read 3734/1227 on 29/7/08. Construction commenced but about 22/7/08 a Court order stopping the work was served on them as a result of which they have suffered great loss. It is the Interested Parties' submission that this application is instigated by malice as the Interested Parties were never served with the motion, that there has been inordinate delay in bringing this application, that the applicants failed to disclose to the Court that the prayers sought in HCCC 148/09 were similar to the present prayers (K 15). Lastly, that the applicants are busybodies and lack the necessary *locus standi* to bring this application because the 1st applicant claims to be secretary to Convent Drive South Residents which does not exist and the 2nd and 3rd applicants purport to act for Lavington residents Association in their capacity as Chairman and Secretary, see application for registration (KSP 17 page 157). That the Interested Parties are members of Lavington Drive Residents Association and the applicants are strangers to that Association. Mr. Singh, counsel for Interested Parties also argued that the applicants have not demonstrated that they are officials of Lavington Residents Association. Mr. Singh also contended that the applicants have acted in bad faith in that they delayed in filing this application and that conduct of the applicant does not merit Judicial Review Orders because the 1st applicant has had a case with the Interested Parties which was dismissed by the Court and they are trying to overcome that judgment through this Judicial Review application. That Judicial Review should not be resorted to after other remedies have been unsuccessful. Counsel also submitted that if the applicants were aggrieved by the decision of the respondent, an appeal lies to the Liaison Committee in Nairobi under S. 17 of the Physical Planning Act and that if one is dissatisfied with the Liaison Committee, an appeal lies to the National Liaison Committee, and lastly to the High Court.

Locus Standi

On whether or not the applicants have the *locus standi* to bring these Judicial Review Proceedings, in the affidavit and statutory statement the 1st, 2nd and 3rd applicants describe themselves as residents of Lavington Estate and belong to Lavington Residents Association. They claim to bring this application on their own behalf and that of the Association (see paragraph 15 of the verifying affidavit). Even if there is nothing exhibited to prove the existence of Lavington Residents Association or that the three applicants represent any other persons, if the persons whose rights are affected or are likely to be affected, they have the necessary standing to bring this application.

There is no doubt that the plot in issue is in Lavington. In fact the 1st applicant's plot is said to be next to the disputed

plot. The Interested Parties and the 1st applicant have had a case before in ***HCC 148/98 – TURI COMPLEX LTD. & OTHERS v. PALPINA E.A. LTD*** on the same suit land. There is no doubt that if indeed there are developments on going on the Interested Parties' plots that might affect the 1st applicant's occupation and enjoyment of his plot, his rights would be affected and he therefore has the necessary standing to bring this case.

The 2nd and 3rd applicants claim to be the in the same estate and in my view, the three have the necessary *locus standi* to bring this case. This is a Judicial Review application and the necessary standing in such matters is not as stringent as other disputes on competence of the application.

Michael Fordhan in his Book, Judicial Review Handbook says that a claimant in Judicial Review only needs to show that he has a sufficient interest. In ***R v. INLAND REVENUE COMMISSIONERS*** *exp*. ***NATIONAL FEDERATION OF SELF EMPLOYED SMALL BUSINESS LTD (1982)*** A.C. 6.7 Lord Diplock observed that the Court is left with unfettered discretion to decide what in its own judgment it considers to be a sufficient interest in the particular circumstances of the case before it.

Whether Notice of Motion is competent

It is trite law that Judicial Review applications are brought in the name of the Republic. The instant Notice of Motion is not brought in the name of the Republic and is not properly intituled. Since the case of ***FARMES BUS SERVICE & OTHERS v. THE TRANSPORT LICENSING APPEAL TRIBUNAL [1959] EACA 779***. Judicial Review applications have been brought in the name of the Republic. This is because of the history and nature of the Judicial Review. Judicial Review is a mechanic whereby the state checks on the excesses of its officers and public bodies in performance of their administrative duties. Once the court granting leave to an applicant to commence Judicial Review Proceedings, the state steps into the shoes of the aggrieved person and bring an application on their behalf. In the ***FARMES BUS*** case, the Court went ahead to format how a Chamber Summons application for leave is formatted and brought in the name of the applicant but after leave is granted, the Notice of Motion is brought in the name of the Republic against the Respondent on behalf of the *ex parte* applicant or aggrieved party. An *ex parte* applicant has no capacity to bring the application in his own name. Ringera J. endorsed the above case in ***JOTHAM MULATI WELAMONDI v. THE CHAIRMAN ECK HMISC 81/02.*** Again the Court went ahead to demonstrate how an application for leave to commence Judicial Review proceedings is drawn, in the name of the *ex parte* applicant and once leave is granted, the Notice of Motion is brought in the name of the Republic against the respondent but on behalf of the *ex parte* applicant. In WELAMONDI case, the Court held that the application was incompetent for not being properly intituled and struck it out. Other cases where the Courts never struck out Judicial Review application for not being brought in the name of the Republic are ***THE CHAIRPERSON OF NATIONAL GOVERNING COUNCIL OF AFRICAN PEER REVIEW MECHANISM AND NATIONAL COUNCIL OF NON GOVERNMENTAL ORGANIZATION v. HON. MINISTER, PROF. ANYANG NYONGO Misc. Appl.1124/05; JOHN NDUNGU WAWERU v. DISTRICT VETERINARY OFFICER MARAGUA HMISC. 1473/05***.

The instant Notice of Motion dated 8/8/08 is fatally defective and is hereby struck out.

Whether order 53 rule 3 (2) and 3 of Civil Procedure Rules were complied with:

Order 53 Rule 3(2) Civil Procedure Rules requires that an applicant serve all persons directly affected by the Judicial Review proceedings. In the instant case, though the Interested Parties were not served, they applied to be enjoined and have been so enjoined. I do however agree with the Interested Parties' submission that NEMA should have been served with these

proceedings. There is no evidence that the applicants served NEMA because under Order 53 Rule 3(3) they should have filed an affidavit of same showing who has been served with the application and how service was effected. It was important that NEMA be served because the respondents are alleged to have failed to have complied with the EMCA which is a statute enforced by NEMA. In the statutory statement at paragraph 13, the applicants argue that the approval of the Plans by Nairobi City Council was not in accordance with the EMCA and the Environmental Impact Assessment Regulations 2003. The plaintiffs on the other hand claim that an Environmental Assessment Impact report was prepared. There is a copy of a report exhibited, prepared by Mutinda Mutuku (KPS 10). In a letter dated 29/1/2007, addressed to the Interested Parties by NEMA, the Interested Parties were asked to provide evidence with consultation with neigbours giving copies of their comments. It is a requirement with the EMCA and Regulations made thereunder order and specifically section 59, (1) which requires the publication of Environmental Assessment Impact Report. That section reads

> ***"S.59, upon receipt of an environmental impact assessment study report from any proponent under S.58(2), the Authority shall cause to be published for two successive weeks in the Gazette and in a newspaper circulating in the area or proposed area of the property, a notice which shall state:-***
>
> ***(a) A summary description of the project;***
> ***(b) The place where the project is to be carried out;***
>
> ***(c) The place where the environmental impact assessment study evaluation or review report may be inspected; and***
>
> ***(d) A time limit of not exceeding sixty days from the submission of oral or written comments environmental impact assessment study evaluation or review report.***
>
> ***2 ….."***

Rule 17 of the Environmental (Impact Assessment and Audit) Regulations, 2003 provides for public participation in the conduct of an environmental impact assessment study. It reads as follows:

> ***"17.(1) During the process of conducting an environmental impact assessment study under these regulations, the proponent shall in consultation with the Authority, seek the views of persons who may be affected by the project.***
>
> ***(2) In seeking the view of the public, after the approval of the project report by the Authority, the proponent shall –***
>
> ***(a) publicize the project and its anticipated effects and benefits by –***
>
> > ***(i) posting posters in strategic public places in the vicinity of the site of the proposed project informing the affected parties and communities of the proposed project;***
> >
> > ***(ii) publishing a notice on the proposed project for two successive weeks in a newspaper that has a nation wide circulation; and***
> >
> > ***(iii) making an announcement of the notice in both official and local languages in a radio with a nation wide coverage for at least once a week for two consecutive weeks;***
>
> ***(b) hold at least three public meetings with the affected parties and communities to explain the project and its effects, and to receive their oral or written comments;***
>
> ***(c) Ensure that appropriate notices are sent out at least one week prior to the meetings and that the venue and times of the meetings are convenient for the affected communities and the other concerned parties; and***
>
> ***(d) ensure, in consultation with the Authority that a suitably qualified co-ordinator is appointed to receive and record both oral and written comments and any translations thereof received during all public meetings for onward transmission to the Authority".***

There is no evidence that the Authority or Interested Parties complied with both section 59 of EMCA and Regulation 17 of the above named Rules. The Interested Parties contend that the neighbours had no objection to the project but that consent or otherwise has to be in accordance with the law. If the public or neighbours were not involved, how was the licence issued? Those are questions that only NEMA can answer and their non joinder deals a fatal blow to this application. Order 53 Rule 3 is couched in mandatory term to ensure that no party is condemned unheard. If this Court were to go ahead and make orders or review NEMA's decision without hearing it, it would be in breach of the tenets of natural justice that no party should be condemned unheard.

After considering all the above shortcomings in this application, this Court deems it unnecessary to go on to consider the merits of the application in the event that the applicants wish to file a competent application. I find that the Notice of Motion dated 8/8/08 is incompetent and I therefore strike it out with costs to the Respondent and Interested Parties.

Delivered and dated at Nairobi this 18th day of February, 2010.

R.V.P. WENDOH
JUDGE

Present