REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Miscellaneous Civil Case 753 of 2007

REPUBLIC……..APPLICANT

VERSUS

TOWN PLANNING COMMITTEE OF

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

AND

ARUN RAMJI DEVANI and

ILLA ARUN DEVANI…….INTERESTED PARTY

RULING

The Application

1. The hearing of the application dated 10/08/2007 was conducted before Kubo J (as he then was) before his retirement in June 2009. The learned Judge did not however write the ruling which he had reserved for 07/10/2008. By his letter dated 9/07/2009, the Honourable the Chief Justice allocated this matter, among others, to me to write and deliver the ruling. By the 9/07/2009, proceedings conducted before Kubo J had not yet been typed. The proceedings were confirmed typed on 23/09/2009. I reserved the ruling for 20/11/2009, but due to other exigencies of service, I could not deliver the ruling on the due date. The delay in writing and delivering this ruling is therefore regretted.

2. The Notice of Motion application dated 10/08/2007 is brought under Order LIII Rule 3 of the Civil Procedure Rules. The same is made pursuant to this Honourable Court's leave granted to the Applicant on 3/08/2007. The Applicant prays for **ORDERS** that**:-**

    1. *Judicial Review by way of an order of Certiorari to remove into the High Court the decision of the Town Planning Committee of the City Council of Nairobi made on 8th February 2007 and to quash the said decision approving Building Plans Registration No. EA 681 for the construction of 10 flats by Arun Ramji*

Devani and Illa Arun Devani on LR 209/4889 Riverside Grove Nairobi.

2. Such other, further and/or consequential orders that this Honourable Court may deem fit to grant.

3. That the costs of this application be provided for.

3. The application is premised on nine (9) detailed grounds appearing on the face of the application. Since these grounds consist the whole of the Applicant's case, I will set them out verbatim thus:—

1. At a meeting of the Town Planning Committee held on 29th November, 2006, the said committee granted Change of User from single dwelling unit to multi dwelling units (flats) on plot LR. No. 209/4889 Riverside Grove the area of which plot is stated to be 0.3035 ha to the owners of the said plot Arun Ramji Devani and Illa Arun Devani ("the owners") who had applied for the same through their agent Plumbline Consultants, on the terms and conditions set out below:

"(i) submission of satisfactory building plans within one year and completion [of] construction within two years otherwise the approval lapses.

(ii) Payment of revised rates as will be determined by the Chief Valuer – City Council of Nairobi.

(iii) Payment of revised ground rent as will be determined by the Commissioner of Lands.

(iv) Subject to the plot not constituting part of the disputed public utility land/allocations.

(v) Subject to compliance with Sections 36, 41 and 52 of the Physical Planning Act (emphasis supplied)

(vi) Subject to compliance with the approved zoning policy (Emphasis supplied)".

2. It is obvious from the conditions imposed upon granting the change of user the town planning committee, inter alia, deemed (i) that the proposed development activity will have injurious impact on the environment (ii) that the change of user will have important impact on contiguous land and does not conform to the conditions registered against the title deed of the property and therefore required compliance, with the provisions of, inter alia, section 41 of The Physical Planning Act Cap 286 requiring publication of the notice of the application and service of copies of the application on every owner or occupier of the property adjacent to the land to which the application relates and (iii) compliance with section 52 of the said Act which provides for, inter alia, publication of the Notice in at least two local dailies one in Kiswahili and one in English and for the displaying of such notice at the offices of the Chiefs (emphasis supplied)

3. That at a meeting of the Town Planning Committee held on 8th February 2007 the said committee approved building plans submitted by Thomas Granlykke obviously on behalf of the owners for the construction of 10 flats on their said property LR No. 209/4889 Riverside Grove the size whereof is stated to be 0.3035 Ha.

4. That the said building plans were wrongly and unlawfully approved as aforesaid and despite the non compliance of the conditions set out in paragraph 1 above in that, inter alia:-

(a) That the provisions of Section 41(3) were not complied with in that:-

(i) Copies of the application were not served on any of the owners or occupiers of the properties adjacent to LR 209/4889.

(ii) That the only Notice of the application for change of user that was published in the Daily Nation of Thursday 28th September, 2006 is misleading and deceptive in that it refers to LR 209/4889 Riverside Drive and not Riverside Grove which resulted in the applicants herein not noticing the said notice. Riverside Drive is a road several kilometers long with three or four or more rows of houses on each side of it.

5. The mandatory provisions of Section 52 of the Act were not complied with in that even the deceptive notice in the Daily Nation of 28th September 2006 aforesaid was not simultaneously

published in a Kiswahili newspaper nor was it displayed in the offices of the Chief.

6. *The upshot of all the above was that the Notice in the Daily Nation of 28th September, 2006 went unnoticed by the applicants herein who were on the look out for any development of this nature on Riverside Grove and not on the Riverside Drive. They were therefore deprived of the opportunity which the Act provides be given them to object to the change of user and or the building of multi units and there was therefore a breach of the Act as well as the rules of Natural Justice in that they were denied the opportunity to be heard.*

7. *The Town Planning Committee's glaring errors of fact and law constitute gross breach of its duty to the public and under the provisions of the Physical Planning Act Cap 286 and otherwise and displays its failure to act in good faith and honesty in arriving in its decision and the said committee dealt with the matter of the change of user and the approval of plans in an unfair, negligent manner and displayed lack of probity, honesty, integrity and accountability and its decision clearly reveals lack of honesty and integrity.*

8. *That the said Building Plans were approved without the Town Planning Committee verifying that the mandatory conditions on which the change of user from a single dwelling to multi dwelling units(flats) was granted by it in respect of LR 209/4889 Riverside Grove (albeit wrongly) had been fully complied with.*

9. *That the area of the subject plot which is less than the minimum area of 0.05 Ha under Zone 4 to qualify for the proposed development and the change of user and the approval of the Building Plans therefore infringe the City Council's own zone policy which stipulates that flats in Zone 4 in which the subject property is situate can only be built on land not less than one acre in area.*

4. The application is also supported by averments contained in the Statement of the Applicant dated 16/07/2007 annexed to the Chamber Summons application for leave dated 17/07/2007 and on the affidavits of the Applicants Samson Kuria Kamau, sworn on 12/07/2007, Hardial Singh Lochab sworn on 13/07/2007; Wangai Nyuthe sworn on 14/07/2007 and Kulwinder Singh Sandhu sworn on 16/07/2007.

5. The averments in the Statement of the Applicants are basically those that appear in the grounds on the face of the application (supra). The deponents of the various affidavits also reiterate the grounds that appear on the face of the application. The Applicants are opposed to the proposed apartment development on Plot No. LR No. 209/4889 – Riverside Grove on grounds that the developer did not follow the correct procedure in obtaining the approvals for the change of user and also on the ground that the project will have significant infrastructural and environmental negative impacts that cannot be addressed by the developer and which impacts will directly bear on neighbourhood properties. The Applicants have annexed to the various affidavits some documents in support of their contention that the whole process for approving the changer of user and the building plans and the subsequent publication of the notices in respect of the same was flawed.

6. The application is opposed. The Respondent's affidavit was sworn by Mr. P.N. Kibinda on 16/11/2007, while the Interested Parties' Replying Affidavit was sworn by Ramji Devani on 15/11/2007. Both of these deponents aver that the Applicants' application has no merit, and that the same should be dismissed. The Respondent is of the view that there is infact no decision made by it capable of being called before this court for quashing. As for the Interested Parties, their position is that the Applicants are a conservative lot of people who, while they themselves live in lofty premises are against a development that would be similar to their own. The two deponents urge the court to dismiss the Applicant's application with costs to the Respondent and the Interested Parties.

The Applicants' Submissions

7. The parties also filed detailed written submissions that were also highlighted before Kubo J (as he then was) on the 21/04/2008 (Applicants) and on 24/07/2008 (Respondent and Interested Parties) respectively. The parties also filed their lists of authorities to support their respective positions. The Applicant's submissions are dated 20/12/2007 and filed in court on the same day by the firm of O.P. Nagpal & Company Advocates. The Applicants are seeking orders of judicial review by way of an order of Certiorari to remove into the High Court the decision of the Town Planning Committee (the TPC) of the City Council of Nairobi made on 8/02/2007 and to quash the same for the reasons that appear on the face of the application. In particular, the Applicants want the decision of the TPC approving Building Plans registration no. EA 681 for the construction of 10 flats on LR No. 209/4889 along Riverside Grove quashed. The Applicants submitted that Riverside Grove is a *cul de sac* off Riverside Drive which Drive stretches several kilometers with rows of houses on either side. It is the Applicants' case that the original grant of the suit property was restricted to a single dwelling only and did not provide for flats. The Applicants submitted that the Interested Parties have themselves never lived on the suit premises, though they did apply for change of user of the said property on 2/11/2006 through a firm known as **Plumbline Consultancy**. By a document known as FORM P.P.A. 2 dated 29/11/2006 from the City Council of Nairobi the approval sought by the Interested Parties for change of user from single dwelling unit to Multi Dwelling Units was approved subject to the six (6) conditions set out thereon and also appearing on the face of the application. The approval was signed by one R.W. MUROKI for Director City Planning and Architecture Department. Copies of the approval were sent to:-

   - *The Director of Physical Planning Nairobi*
   - *The Commissioner of Lands, Nairobi*
   - *The Director of Survey, Nairobi*
   - *The Land Registrar, Nairobi*

   According to this FORM P.P.A. 2, the suit property is situate along Riverside Grove on Riverside Road.

8. The Applicants aver, through the various affidavits, that the Interested Parties did not comply with the provisions of sections 36, 41 and 52 of the Physical Planning Act (the Act) and further that the said parties did not also comply with the zoning policy before the matter could proceed further. It is averred by the deponents of the various supporting affidavits that the Applicants first became aware of the granting of the change of user to the Interested Parties sometime in March, 2007 when a person by the name PATRICK ODHIAMBO HAYOMBA LEFT A QUESTIONAIRE AT THE HOME OF Mr. Samson Kuria Kamau headed "*APPENDIX G: RIVERSIDE GROVE APARTMENT, QUESTIONNAIRE ADMINISTERED TO STAKE HOLDERS,*" and that immediately that information became available to the Applicants, the 1st applicant acted immediately by filing an objection to the proposed construction vide a letter dated 24/04/2007 with the Director of City Planning. The letter of objection was written by Racom Associates on behalf of Waku Investments Co. Ltd, the owners of LR No.209/4892 Riverside Grove off Riverside Drive.

   The grounds for the objection were that: -

   - *The plot does not qualify for flats/apartment development in that the plot did not measure 0.4 of a hectare as per the zone planning review policy for zones 3, 4 and 5 dated 3/07/2006.*
   - *There were significant infrastructural and environmental negative impacts that could not be addressed by the developer and that each impact would bear directly on neighbourhood properties.*

9. The applicants also say, again through the various affidavits, that the first time the other applicants came to know of the approval of the change of user of the said property was on 8/06/2007 vide a letter dated 8/06/2007 from Mentor Management (hereafter referred to as "MM") to the applicants' advocates, M/S O.P Nagpal. The letter from MM is marked SKK8 annexed to the affidavit of Samson Kuria Kamau. MM advised that they were compiling the responses from the various property owners in the affected areas with a view to forwarding them to the National Environmental Management Authority (NEMA) for their information and attention.

10. MM's letter of 8/06 2007 made the following key averments: -

    (a) That the first questionnaire was delivered to various residences on Riverside Grove, including White House Villas, earlier in the year and that they had received a number of responses dated mid-February and early March, "including a couple from White House Villas".

    (b) The second questionnaire, together with covering letter was delivered to all residences in May, 2007. "The response has been good."

    (c) That the necessary approvals had been received from the relevant authorities namely: -

        (i) Approval of Development Permission given on 29/11/2006 for change of user and,

        (ii) Approval for Proposed Development dated 26/10/2007 and that

        (iii) Change of user notice was advertised in the Daily Nation by the appointed Professional Town Planner on 28/09/2006.

11. MM also stated in their said letter that the proposed development was in keeping with the "*standard and quality of other residential developments*." The applicants submitted that neither the respondent nor the Interested Parties challenge or deny the contents of both the supporting and verifying affidavits sworn by Mr. Samson Kuria Kamau and that it is not denied that MM's questionnaire is headed "*Riverside Grove apartment questionnaire administered to stakeholders*."

12. The applicants took issue with the discrepancy in the description of the property in the advertisement in the Daily Nation of 28/09/2006 and the description of that property in MM's letter dated 8/06/2007. That whereas MM's letter of 8/06/2007 describes the property as being situate along Riverside Grove the advertisement in the Daily Nation of 28/09/2006 described the property as being on Riverside Drive. The applicants allege, and in particular Mr. Samson Kuria Kamau at page 24 of his supporting affidavit, that the Applicants could not have known that the advertisement that was published in the Daily Nation referred to a plot on Riverside Grove and not Riverside Drive. The applicants further allege that the misdescription of the property was deliberate and was meant to deceive the applicants and other people who had a stake in what the Interested Parties intended to do. To buttress the point that the misdescription of the plot was deliberate, both Mr. Samson Kuria Kamau and Mr. K.S. Sandhu at paragraphs 25 and 7 respectively of their supporting affidavits said that as soon as the ploy was discovered the road signs at the junction of Riverside Grove and Riverside Drive were deliberately removed by City Council Askaris. The Applicants say that neither the Respondent nor the Interested Parties have denied the applicant's averments regarding the removal of the sign posts; that the respondent in particular completely failed to answer to their allegations despite having been served with the chamber summons for leave, that such failure by the respondent confirms the applicants' claims of impropriety by the respondent in giving the necessary approvals to the Interested Parties.

13. The applicants also submitted that the respondent has not denied paragraph 20 of Mr. Kamau's verifying affidavit which is to the effect that the applicants were opposed to the proposed developments, nor have the respondent and the Interested Parties denied the Applicants' contention on the misdescription of the plot for the proposed

construction. The Applicants also submitted that both the Respondent and the Interested Parties have not denied that the conditions set out by the TPC were not met by the Interested Parties.

14. The applicants also submitted that the respondents answer to the applicants' complaint that the Interested Parties did not comply with Section 36 of the Physical Planning Act was inadequate in that the Environmental Impact Assessment Report referred to in paragraph 5 of Mr. Kibinda's replying affidavit was not annexed as alleged. The Applicants contended that the fact that the assessment was done in accordance with Section 36 clearly means that the council agreed that the proposed development was bound to have a negative and injurious impact on the environment.

15. Regarding non-compliance with Section 41 of the Physical Planning Act the applicants contended that the very fact of publication of the Notice in the Daily Nation of 28/09/2006 meant that the respondent was satisfied that the change of user was going to have a serious impact on contiguous land in terms of Section 41(3) of the Act. The applicants however argued that though the notice was published as required by Section 41(3) of the Act, copies of the application for change of user were not served upon every owner or occupier of the property adjacent to the plot in question and that for this reason, this application must succeed. The Applicants contended further that the provisions of Section 41(3) and 41(4) are mandatory by the use of the word "shall" and that neither the Respondents nor the Interested Parties should treat those provisions flippantly, hence the requirement upon them to comply fully with those provisions, including fulfilling the conditions for the approval of development plans. The Respondent tried, through the affidavit of Mr. Kibinda to say that they were not bound by the notice that was published in the Daily Nation of 28/09/2006, but the Applicants have said, and I think rightly so, that there is provision in the Act providing for a "*Without Prejudice Notice*". The Applicants also pointed out that the Interested Parties do not infact agree with the Respondent's contention that the publication of the Notice in the Daily Nation on 28/09/2006 was on a "*Without Prejudice*" basis when at paragraph 12 of the Interested Party's Replying Affidavit, the deponent says:—

> *"A notice was duly published in the Daily Nation newspaper of 28th September 2006. This was the most expedient manner of publishing the notice in the circumstances, in keeping with Section 41(3) of the Physical Planning Act. Attached hereto is a copy of the notice in the Daily Nation of 28th September 2006 and marked "ARD 6".*

16. The Applicants also contended that the provisions of the Act, and in particular section 43 thereof are meant to ensure that every person who is or may be affected by the change of user is made aware of the application first by publication and secondly by service on them of the application; the essence of which is that such person(s) is (are) afforded the opportunity to be heard before the critical decision of granting approvals is taken. The Applicants submitted that in the instant case the Applicants were denied the opportunity of being heard through trickery and deceit thus rendering the TPC decision making process flawed and invalid and that in any event, all the six (6) preconditions set by the Respondent for the granting of the approvals were not met by the Interested Parties.

17. Mr. Kibinda alleged at paragraph 7 of his Replying Affidavit that in approving the Change of User, the Respondent did so subject to certain conditions as per annexture "PMK 1". Annexture "PMK 1" is a letter from NEMA dated 22/12/2006 and addressed to Arun Devani (Syrensins Ltd) of P.O. Box 18725-00500 Nairobi. The letter reads:—

> *Ref. NEMA/PR/5/2/1634*
>
> *22nd December, 2006*
>
> *Arun Devani (Syrensins Ltd)*

P.O. Box 18725-00500

NAIROBI

RE: ENVIRONMENTAL IMPACT ASSESSMENT PROJECT REPORT FOR THE PROPOSED RESIDENTIAL APARTMENTS ON L.R. NO. 209.4889, RIVERSIDE GROOVE, OFF RIVERSIDE DRIVE, NAIROBI.

The Environmental Impact Assessment (EIA) Project Report for the above-mentioned development has been reviewed, and the following issues need to be addressed to help the Authority make an informed decision:-

1. Consult the neighbours and attach evidence of consultations.

2. Consult with the City Council on the zoning specifications and give us feedback.

3. Attach design drawings that have been approved by the City Council of Nairobi.

Kindly note that the EIA processing time stops running until the above issues are addressed.

Your prompt action will be highly appreciated.

B.M. LANGWEN

For: DIRECTOR GENERAL"

18. According to the letter (if it was properly issued) the Interested Parties still had to comply with the 3 (three) conditions to enable NEMA make an informed decision on the environmental impact which the proposed development was likely to have on the neighbourhood.

19. The Applicants have argued regarding the said alleged approval by the Respondent that NEMA's letter dated 22/12/2006 did not amount to an approval by the Respondent since the letter does not emanate from the Respondent and that in any event, since the letter is not copied to any organ of the Respondent, one is left wondering how the Respondent became seized of the letter. This alleged approval, coupled with the fact that the plot was misdescribed in the Notice appearing in the Daily Nation of 28/09/2006, the Applicants argued, succeeded in deceiving the Applicants and other residents of Riverside Grove as to the actual property that was targeted by the notice, and that the court should not allow the Respondent to take advantage of its own deception to plead an estoppel against the Applicants. That in any case, the Respondent has not come to court with clean hands.

20. As regards the Applicants' contention that the whole process adopted by the Respondent in giving the approvals was flawed, the Applicants relied on three authorities. In **Musyoka Kavingo v Minister For Lands, Settlement & Housing & Another [2007]e KLR** the court held that in matters of this nature, the court should not be so much concerned with merits of the decision, but with the process by which that decision was made. In **Commissioner of Lands –vs- Kunste Hotel [1995-1998]1 EA 1,** the Court of Appeal, in reaching its decision applied the finding in the English case of **R –vs- Secretary of State For Education & Science Ex Parte, Avon County Council** where the English Court held that—

> *"—it must be remembered that Judicial Review is concerned not with private rights or the merits of the decision being challenged but with the **decision making process.** Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected."*

The above principle was also applied in the other English Case of **Chief Constable of North Wales Police –vs- Evans (1982) 1 WLR 1155** where the court (Lord Hailsham of St. Marylebone) said that —

> *"--- the purpose of Judicial Review is to ensure that the authority, after according fair treatment, reaches on a matter which it is authorized by law to decide for itself a conclusion which is correct in the eyes of the court."*

21. The Applicants argued that it is not the duty of the Applicants to adduce evidence on when the decision was taken; that all that the Applicants need to show and which they say they have shown beyond any reasonable doubt is that they were denied the opportunity to raise their objections at the appropriate time to the proposed developments.

22. The Respondent contended that the policy review of zones 3, 4 and 5 was only a provisional report. It is the Applicants' contention that the assertion by the Respondent (paragraph 13 of Mr. Kibinda's Replying Affidavit) is not backed by evidence to show whether and when the provisional or the current (if any) guidelines on zoning policy other than those published on 3/07/2006 are. Mr. Kibinda did refer to a document entitled "REPORT ON PLOT NO. 209/4889 – RIVERSIDE DRIVE" which is dated 17/10/2006 and is marked as annexture "PMK 4" to Mr. Kibinda's Replying Affidavit. Because the document is brief and has a direct bearing on the contest between the Applicants and the Respondent, it is helpful to set it out verbatim.

"REPORT ON PLOT 209/4889 – RIVERSIDE DRIVE

LOCATION:	*The plot is located on Riverside Drive on the slope towards Nairobi River and facing Mvuli Road area of Westlands.*
SITE CONDITION:	*The site has an old single dwelling house together with the other outbuildings including the domestic servant quarter and a garage. The terrain of the site is quite steep and is therefore well-drained.*
NEIGHBOURHOOD DEVELOPMENT:	*The immediate neighbourhood has high-rise residential apartments which have recently been developed. This is in conformity with the development of the general area which predominantly has multi family dwelling units.*
INFRASTRUCTURE:	*The road network has all weather roads upto the entrance of the site. The site is accessed from a small access road known as Riverside Grove which branches downhill from Riverside Drive.*
CONCLUSION:	*From the foregoing, the site is located within a neighourhood that has multiple dwelling units and is within zone 4 of the development policy for the area which allows for flats. This site is surrounded by high-rise flats on all sides. In this respect the development of apartments is acceptable.*

REPORT BY:

A.M. MURANI

FORWARD PLANNING

CITY PLANNING DEPARTMENT

CITY COUNCIL OF NAIROBI."

23. In response to the above document, the Applicants submitted that the document is self-serving and is an attempt by the Respondent to justify the illegalities and wrongful acts of the TPC and the Respondent generally. As regards the Kibinda Affidavit generally, the Applicants have asked this Honourable Court to strike out the same on grounds that it offends the provisions of the Civil Procedure Rules for failure to state which paragraphs of the affidavit are based on knowledge within Mr. Kibinda's own knowledge and which paragraphs are based on information from other sources and what these sources are.

24. The Applicants also made detailed submissions on the Interested Parties case as put forward in the Interested Parties Replying Affidavit sworn on 15/11/2007. The Applicants argued that contrary to what is alleged in the Replying Affidavit, the development known as Whitehouse Villa's was built long before the Interested Parties acquired the suit property and that in any event, there is a clear admission from the available evidence that the

construction of the multi-storey complex will have a detrimental effect on the Applicant's property and on the neighbourhood generally. The Applicants also denied the Interested Parties allegation that the suit property is surrounded by high-rise flats on all sides as there are no high-rise flats on Riverside Grove. The Applicants also questioned the authenticity of annexture "*PMK 4*" which is the same document marked "*ARD 2*" to the Interested Parties Replying Affidavit and urged the court to note:- (i) that the date on the document is inserted by hand and is not typed and (ii) that the court should make a finding that this document got into the Interested Parties hands under unexplained and suspect circumstances.

25. The Applicants, also dissected annexture "ARD 3" to Interested Parties Replying Affidavit and submitted that the conditions set out therein (Form P.P.A 2 already referred to earlier in this ruling) were not met by the Interested Parties. Referring to annexture "ARD 5" – a letter dated 25/07/2007 from the Respondent to NEMA, the Applicants argued that the said letter which only notes that there has been satisfactory response to environmental issues does not, in fact, present the full picture and seems to be concerned only with the number of trees to be planted on the suit property. The Applicants also submitted that by paragraph 13 of the Interested Parties Replying Affidavit, it was conceded that issues of environmental impact, as set out by section 41(3) of the Act required compliance by the Interested Parties, including the issuance by NEMA of an environmental Impact Assessment report.

26. The Applicants also reiterated their earlier submissions that approvals for the Change of User were inextricably tied to the compliance by the Interested Parties of the conditions set out by the TPC, which conditions the Applicants say were not complied with. Referring to a document dated 19/12/2006 and marked "*ARD 8*" to the Interested Parties Replying Affidavit, which document contains some figures and computations on the proposed developments, the Applicants contended that there was no indication as to who the author of the document is nor is there any substantiation of the allegation that the property is bigger than the minimum set out in the guidelines. The Applicants also submitted earlier that the zoning guidelines allegedly referred to by the Respondent are in doubt.

27. The Applicant's also questioned annexture ARD 9 which refers to a meeting of the WORKS AND TOWN PLANNING COMMITTEE held on 16th January 1979, at 1415 hours together with an accompanying report allegedly adopted thereat relevant portions of the Nairobi City Commissions approved planning policies for 1980-1991 and the Minute No. 24 of 13/05/1987. The Applicants have argued that this document has neither head nor tail since there is no evidence to show where the document came from nor does it state that the previous zoning policy has been superceded. The Applicants do not agree with the Interested Parties that "*development proposals were to be considered solely on the specifications of ground coverage and plot ratios*."

28. The Interested Parties had said that the present application is premature, to which the Applicants have contended that their concern in this case is the process by which the proposed developments were approved; a process which the Applicants say was flawed and invalid because the Applicants and other residents of Riverside Grove were denied an opportunity to be heard on their objections before the granting of approvals by the Respondent. Further, that the concerns of the Applicants are with deliberate breach of the provisions of sections 36, 41 and 52 of the Act, whose tenor is mandatory and not discretionary. The Applicants have also asked the court to disregard paragraphs 28, 29, 31 and 32 of the Interested Parties Replying Affidavit for the reason that the deponent of the affidavit purports to speak for the Respondent and is also trying to mislead both the court and the Applicants through a misleading advertisement in the Daily Nation of 28/09/2006.

29. The Applicants also contended that as stated in the Verifying Affidavit of Samson Kuria Kamau, and which fact remains uncontroverted by both Mr. Kibinda of the Respondent and the Interested Parties, Riverside Drive is a long road covering several kilometers and that Riverside Grove is only one of scores of roads off Riverside

Drive on both sides of Riverside Drive each with its own name. The Applicants argued that whatever attempts the Respondent and the Interested Parties make to cover up their deception they cannot succeed, and further that for the Interested Parties to allege that the Applicants' properties will not be affected by the proposed development and that the only feasible development on the suit property is the proposed development is to add insult to injury.

30. Finally, the Interested Parties contended that the approval of the building plans is not a decision which is capable of being quashed; that it is not a decision from which judicial proceedings or proceedings for prerogative orders can arise. In response to the above contention, the Applicants submitted that such a claim is not based on any legal basis, that these are arguments which should not be included in an affidavit. The Applicants reiterated their earlier arguments that the decision making process adopted by the TPC in approving the Building Plans is fully amenable to the process of judicial review because the process failed to ensure that the laid down conditions by TPC were fulfilled before the approval was given, and further that the Applicants were denied an early opportunity to raise their objections to the proposed development.

31. For the reasons given above, the Applicants pray that their application be allowed with costs. The Applicants are of the view that granting of the orders will not only do justice to the Applicants but will also have a salutary effect on those who adopt questionable means to achieve their ends.

The Respondent's Submissions

32. The Respondent's Submissions are premised on the Replying Affidavit by P.M. Kibinda, the Director of City Planning of the Respondent. The affidavit is dated 16/11/2007 while the submissions are dated 20/12/2007 and filed in court on 07/01/2008.

33. Before I go into the details of the Respondent's Submissions, I will set out the contested sections of the Act, namely sections 36, 41 and 52. The three sections of the Act read as follows:—

> *"36. If in connection with a development application, a local Authority is of the opinion that proposals for, in cultural locations; dumping sites, sewerage treatment quarries or any other development activity will have injurious impact on the environment, the Applicant shall be required to submit together with the application an Environmental Impact Assessment Report.*
>
> *"41(3) Where in the opinion of a Local Authority an application in respect of development, change of user or subdivision have important impact on contiguous and or does not confirm to any condition registered against the title deed of property, the Local Authority shall at the expense of the Applicant, publish the Notice of the application in the Gazette or in such other manner as it deems expedient and shall serve copies of the application on every owner, or occupier of the property adjacent to the land to which the application related and to such other ----- pursuant as the Local Authority may deem fit."*
>
> *"52. Every notice published in the Gazette under any of the provisions of this Act, except the notices published under Section 49 and 52, shall be simultaneously published in at least two local dailies, one in English and one in Kiswahili and be displayed at the offices of the Chiefs."*

34. In his submissions, Mr. Abwao Erick Odhiambo, counsel for the Respondent argued that as far as section 36 of the Act is concerned, the requirement for submission of an EIA Report is dependent upon the Local Authority being of the opinion that a proposed development will have a negative impact on the environment. He submitted that such a requirement is discretionary. He stated that in the instant case, the TPC did not, in its opinion view the Interested Parties proposed development and/or Change of User from a single storey to a multiple storey building as being injurious to the environment, and that it was in its discretion that the TPC called for the EIA

report, which report according to Mr. Abwao was positive, namely that the development would not have an injurious impact on the environment. A point to note here is that counsel for the Respondent did not exhibit for the eyes of the court a copy of the EIA report requested for and submitted to the TPC.

35. As regards section 43(1) of the Act, Mr. Abwao argued that the subsection gives the Respondent's TPC discretion as to whether or not to gazette the application for Change of User and/or development, the discretion being informed by the TPC's opinion as to whether the Change of User/development is likely to have an injurious impact on the environment. Counsel argued that in the instant case, the TPC formed the opinion that the proposed development would not have an injurious or important impact on contiguous land; that further the proposed development complied with the conditions registered against the title. That the TPC exercised its discretion of not gazetting the proposed development application. It is to be noted however, that the application was published in the Daily Nation of 28/09/2006, which according to section 41(3) amounts to "*such other manner*" as is deemed expedient It also seems to the court that the publication of the Notice for application for change of user, whether in the Kenya Gazette or the Daily newspaper presupposes that the local authority (Respondent in this case) has already formed the opinion either that the proposed development, Change of user or subdivision will have a negative impact or does not conform to the set conditions.

36. In his further arguments, counsel for the Respondent contended that the TPC acted within its mandate and scope of operation so that no part of its decision warrants being quashed. Counsel referred to a report of the City Planning Department dated 17/10/2006 which report purportedly confirmed to the Interested Parties that the plot was located within a neighbourhood that was dotted with multi-storey dwelling units and was thus approved for the development. It is important to note at this point that the Report dated 17/10/2006 was the subject of a scathing attack by the Applicants. The Applicants have questioned the authenticity of this document and said that the date thereon is inserted by hand, which according to the Applicants suggests that the Report is not a genuine document emanating from the City Planning Department of the Respondent.

37. Counsel for the Respondent also submitted that approval for the development/change of user was given on 29/11/2006 after the TPC satisfied itself that all the conditions required of the Interested Parties were complied with, including the payment of revised land rates and ground rents. He also said that the suit plot does not constitute part of a disputed public utility land or allocation.

38. Counsel for the Respondent also submitted briefly on the provisions of section 52 of the Act. His view was that the wording of the section is not mandatory, and that it is only applicable where there has been publication of the notice in the gazette. Counsel conceded that a notice was indeed published in the local daily but submitted that publication in the local daily did not make it mandatory for the Respondent to comply with section 52 of the Act. The Applicants' position on this issue is that the Respondent did not comply with the section which is set out in mandatory terms and that the Respondent can therefore not escape from its responsibility under the section by trying to bury its head in the sand. The Respondent thinks that the provisions of section 52 are irrelevant to this case. Section 52 requires that where the notice is published in the Gazette, it must also given in the two local dailies as provided thereunder.

39. Further, counsel for the Respondent submitted that there was nothing unlawful about the decision of the TPC in approving the development plans/change of user once the Interested Parties had satisfied all the conditions precedent; and that because the approval was given by the TPC in its administrative capacity, the decision is not subject to Judicial Review, unless the court finds that the exercise of that administrative power was outside the

mandate of the TPC or that the decision was unreasonable. (see **Chief Constable of North Wales, Police –vs- Evans** – supra as applied in **Republic vs National Environmental Management Authority & Another [2006] ELR** at p. 5 paragraph 8). Counsel submitted that the Applicants have not demonstrated to this honourable court that the jurisdiction of the Respondent was unreasonably exercised, and that if the court goes ahead to grant the orders sought, such a decision would amount to interference by the court of the Respondents administrative powers.

40. Counsel also submitted that the building plans submitted by the Interested Parties set out very clearly the plot ratio and also complied with the zoning policy of the area being zoning Policy guidelines of 1986. Counsel submitted further that the plot in question is NEARLY the minimum set out in the guidelines. He also said that the zoning policy referred to by the Applicants, namely the 1981 policy were infact overtaken by the revised 1986 policy guidelines. What comes out from these submissions by the use of the word NEARLY by counsel confirms that the area for the proposed development did not meet the minimum area required by the applicable zoning policy.

41. Finally, counsel submitted that the instant application has been brought prematurely and in bad faith for the following reasons:-

(a) the provisions of section 59 of the Environmental Management and Co-ordination Act (1999) requires NEMA upon receipt of an Environmental Impact Assessment Study Report, to cause to be published for two successive weeks in the Gazette and in Newspaper a notice which among other things allows for a period of not more than Sixty days for submission of comments on the study report, and once NEMA is satisfied with the adequacy of the report, NEMA then issues an Environmental Impact Assessment (EIA) license on such terms as may be necessary to facilitate sustainable development and sound environmental management.

(b) the applicants still have ample opportunity to be heard by NEMA on their (Applicants') view as regards the proposed developments and therefore the Applicants should not allege that they have been denied a hearing contrary to the rules of natural justice.

(c) the concerns (if any) of the Applicants regarding EIA are to be addressed by NEMA and not TPC

(d) the proposed development cannot proceed without the requiste EIA license from NEMA after NEMA has considered all matters relating to sustainable development and the sound management of the environment

(e) the Respondent acted within its jurisdiction without contravening any law.

On the basis of the above grounds, the Respondent prays that the Applicants' application be dismissed with costs to the Respondent.

Authorities cited by Respondent

42. The Respondent cited a number of authorities for the court's assistance in this matter. The court has considered all these. Some highlights of these authorities include **Halisbury's Laws of England Vol. II** at page 805 under item (iii) **Purposes for which Certiorari is granted**. Paragraph 1528 thereof reads:—

> *"1528. General. For the purpose of quashing such proceedings, certiorari lies at common law to remove the proceedings of inferior courts of record or other persons or bodies exercising judicial or quasi-judicial functus.*
>
> *There is no rule in regard to Certiorari, as there is with Mandamus that it will lie only where there is no other equally effective remedy and provided the requisite grounds exist, Certiorari will lie although a right of appeal has been conferred by statute.*
>
> *Certiorari lies to remove orders made by the Crown Court other than in matters*

relating to trial on indictment, and all orders or commissions before justices of the peace in order to quash them. Certiorari also lies to bring up and quash an order of the county court where the judge of the court has acted without jurisdiction. Certiorari does not lie to quash a decision of an inferior court merely on the ground that fresh evidence which might have affected the result has come to light since the date of the hearing."

43. In the case of **Associated Provincial Picture Housing Ltd. –vs- Wednesbury Corporation [1948] KB 223** it was held inter alia, that

"*in considering whether an authority having so unlimited a power has acted unreasonably, the court is only entitled to investigate the action of the authority with a view to seeing if it has taken into account any matters that ought not to be or disregarded matters that ought to be taken into account. <u>The court cannot interfere as an appellate authority to override a decision of such an authority, but only as a judicial authority concerned to see whether it has contravened the law by acting in excess of its power!.</u>* (emphasis supplied).

44. In **Republic –vs- NEMA & Another (2006) e KLR,** Emukule J set out the nature and scope of Judicial Review as found in The Supreme Court Practice – 1997 paragraph 53/1 – 14/6 which is that

> "*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."* (also see **Chief Constable of North Wales Police –vs- Evan** (supra).

45. What comes out from the above authorities is that a decision in respect of which the application for judicial review is made can be quashed if that decision was made without authority/jurisdiction or where the body making the decision did not observe the rules of natural justice, or where there is an error of law on the face of the record or, as sometimes happens, the decision is unreasonable. According to the **Chief Constable of North Wales case** (above), the chief duty of the court in matters of judicial review is to ensure that lawful authority is not abused by bodies into whose hands the law has placed such lawful authority. Emukule J (at page 5 of his ruling) also referred to the case of **David Mugo t/a Manyatta Auctioneers –vs- Republic – Civil Appeal No. 265 of 1997** in which the Court of Appeal in considering the existence of an alternative remedy of appeals said that —

> "*--- the existence of an alternative remedy is not a bar to the granting of an order of Certiorari. The correct view in this matter, is that expressed by Lord Parker, CJ in the* ***English case of Republic –vs- Criminal Injuries Compensation Board****, exparte LAIN [1967]2 QB when he said that,*
>
> > "*the exact limits of the ancient remedy by way of Certiorari have never been and ought not to be specifically defined. They have varied from time to time, being expended to meet the changing conditions ---. We have not reached the position when the ambit of certiorari can be said to cover every case in which a body of persons of a public as opposed to a purely private character, has to determine matters affecting subjects provided always that it has to act judicially."*

46. It is also clear from the above authorities that a court hearing a judicial review application is not concerned with the merits of the Applicants or Respondent's case. The concern of the court at this stage is to see whether the process giving rise to the decision the subject of the judicial review application was correct and in accordance with the law.

<u>The Interested Parties' Submissions</u>

47. The submissions dated 20/12/2007 were filed in court on the same date by the firm of H.H. & M. Advocates. The

Interested Parties gave the highlights of the submissions before Kubo J on 24/07/2008. The submissions were rooted in the Replying Affidavit sworn by Arun Ramji Devani on 15/11/2007 and the annextures thereto. The Interested Parties position is that all the steps required by the law were complied with. They also agree with the facts giving rise to this application but argued that if the building plans did not accord with the Building Codes of the Respondent herein the plans would have been rejected. The Interested Parties also submitted that there are no prescribed procedures in the Act for the approval of building plans.

48. Learned counsel referred to the case of **Council of Civil Service Unions v Minister for Civil Service [1985] AC 374** at page 48, a case that was referred to in **Lightways Limited –vs- Municipal Council of Mombasa and Others [2003] LLR 879 (HCK);** in which Lord Diplock stated that —

"to qualify as a subject for judicial review, the decision must have consequences which affect some persons (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other persons either:

(a) By altering rights or obligations of that person which are enforceable by or against him in private law; or

(b) By depriving him of some benefit or advantage which either;
(i) He has in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it or which he has been given an opportunity to comment or;

(ii) He has received assurance from the decision-maker that this will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.

On the basis of the above considerations, counsel for the Interested Parties submitted that there is no decision in this case capable of being reviewed. That the approval was for building plans only and nothing more; that the plans per see —

(a) do not alter any rights or obligations of the Applicants

(b) do not deprive

(c) the Applicants of any benefits currently accruing to them.

Alleged Breach of Section 36 of the PPA

49. On whether or not there was breach of section 36 of the Act, it was argued on behalf of the Interested Parties hat the provisions of this section do not apply to the approval of building plans. It is the view of counsel for the Interested Parties that section 36 as framed does not require that the building plans be accompanied by an environmental impact assessment report; unless and until the local authority forms the opinion that the proposed development will have an injurious impact on the environment. Counsel also argued that putting up dwelling units, a development that is consistent with the land use in the area, would not be considered to be injurious to the environment. Counsel was of the view that section 36 does not make it mandatory to submit the report for the opinion of the authority and further that in the circumstances of this case where there is remoteness between the decision and the subject matter of the power to be exercised and the purposes prescribed by the authority; this court should not be in a hurry to review the decision that is being called into question by the Applicants. (see **De Smith, Woolf and Jowell in Judicial Review Administrative Action, 5th Edition, p. 306 paras 6-022).**

50. It was also argued by counsel for the Interested Parties that the situation in this case is worse because the Respondent herein did not form any opinion as to whether or not the proposed development by the Interested

Parties would be injurious to the environment. In any event, counsel argued that the Applicants would still get an opportunity to be heard by NEMA before the EIA licence is issued as provided under section 59 of the EMCA which allows for a period of 60 days within which comments from the public may be received on the report and that it is only the decision of NEMA that will determine whether or not the construction proceeds. What counsel for the Interested Parties are saying is that it is the expected NEMA decision and not the Respondent's decision that would be the subject of an application such as the instant application.

51. It was further contended by counsel for the Interested Parties that the order of certiorari sought by the Applicants ought not to be granted because the Applicants have not demonstrated that the Respondent acted without authority or jurisdiction or in excess of such jurisdiction. Counsel contended that the Respondent herein acted lawfully and within the limits of its jurisdiction.

Alleged Breach of Section 41(3) of the Physical Planning Act

52. It was contended on behalf of the Interested Parties that there has been no breach whatsoever of this subsection. Once again, counsel for the Interested Parties argued that whatever is required to be done under the said sub-section depends on the opinion of the local authority concerned, and in this case, it is the Respondent. Counsel argued that no opinion was rendered by the Respondent and further that the Applicants have fallen short on their case because they have not provided any evidence to show that the proposed development would be against conditions registered against the title deed of the suit property, nor that such development would have an important impact on the neighbouring properties.

53. As to service of the notice of the application for change of user, counsel for the Interested Parties submitted that the neighbours to the suit property were infact all served twice with the notice, in early 2007 and in May 2007 pursuant to directions from NEMA. Counsel contended that once the questionnaires were issued, there was no requirement that the same be submitted before the grant of the EIA licence. It is also contended that the Applicants and/or owners of adjoining properties did not file any objections within the stipulated period of 14 days after they were served with the questionnaires, so that the complaints raised by the Applicants have been made *mala fides*.

Alleged Breach of Section 52 of the Physical Planning Act

54. Section 52 relates to publication of the notice of change of user in the Gazette publication, which should also be done simultaneously in at least two local dailies, one in English and one in Kiswahili and also be displayed at the Chief's camp. Counsel for the Interested Parties argued that just as section 41(3) is not applicable to building plans, this section 52 is also not applicable. In any event, counsel argued that since the publication of the notice was not done in the Kenya Gazette, it was not necessary to publish the notice in the local dailies. Counsel further submitted that once the notice under section 41(3) was published only in a newspaper, that publication effectively dispensed with the requirements of section 52, to wit publication in two local dailies and display at the offices of the Chief.

Alleged Breach of Section 33(2) of the Physical Planning Act

55. While conceding that the Interested Parties were notified of the approval of Change of User after the 30 day statutory period, counsel argued that no prejudice was suffered by the Applicants who should not now be heard to base their objection to the proposed development on this ground.

Alleged Breaches of Zoning Policy

56. Counsel for the Interested Parties submitted that contrary to the allegations of the Applicants, there was no contravention of the zoning policy, either by the Respondent or the Interested Parties. Counsel argued that the relevant zoning policy was the one that was approved under Minute 20 of the TPC meeting held on 12/11/1986 and adopted under Minute 24 of the same Committee at its meeting of 13/05/1987. The effect of these two Minutes, according to counsel for the Interested Parties, is that the minimum plot size permitted for comprehensive development was discarded and that development proposals were now to be pegged on the ground coverages and plot ratios only. Counsel submitted that his clients read mischief in what they saw as a deliberate attempt by the Applicants to keep away from the court this very vital information on applicable zoning policy. The view of the Interested Parties is that the proposed development satisfied the conditions as to ground coverages and ratios, and that the Applicants failed to place before the court evidence showing that minimum plot size of 0.04 Ha in zone 4 has been adopted as the required size. On this ground, counsel for the Interested Parties submitted that the approval for change of user, which approval according to counsel, was lawfully granted cannot be used to challenge the approval of the building plans.

Alleged Illegality of the Decision Approving the Building Plans Registration No. 681

57. Counsel for the Interested Parties submitted that no illegality has been demonstrated by the Applicants since the various sections of the Physical Planning Act upon which the Applicants have hinged their case are not applicable in the approval of building plans. Further, counsel argued that there was neither excess exercise of power nor any sinister objective in the approval of the plans. In brief, the Interested Parties maintain that all the provisions of the Physical Planning Act namely ss 36, 41 and 52 were duly complied with and that the Applicant's application has therefore got no basis upon which to stand. In this regard counsel for the Interested Parties relied on **Ruto & 11 Others versus Ainabkoi Land Control Board [1991] KLR 237** in which it was held that a courts discretion in the issuance of orders of certiorari is exercisable only in cases where the orders sought to be quashed were made beyond the powers of the body which made such orders. Counsel also referred to **Republic –versus- Minister for Lands and Settlement Exparte Narankaik & Another [1988] KLR 693** where a similar view was held.

58. Counsel for the Interested Parties also stated, and I think quite rightly so, that the court in dealing with an application such as the instant application should only consider the procedures employed by the authority whose decision is in dispute, to see for itself (court) whether the authority properly employed those procedures, and that it is not for the court to substitute its decision of that of the body authorized by law to make that decision. It was further submitted that the proposed development should be allowed to proceed because it is in the interest of all parties concerned and the public at large that the development is undertaken to satisfy the ever increasing demand for housing because there is a dearth of housing in the rapidly growing city of Nairobi (see **Turi Complex & Another –vs- Panalpina East Africa Limited – Nrb HCCC No. 148 of 1999** (unreported).

The Issues and Findings

59. After the above analysis of the contending views in this matter with the Applicants on one hand and the Respondent and the Interested Parties on the other, it is now time to look at the issues that have arisen for determination and to make findings on the same. The issues in this case are whether

(i) Sections 36, 41 and 52 of the Physical Planning Act and the approved zoning policy were

complied with in giving approval for change of user;

(ii) The Interested Parties failed to publish the notice of Change of User as provided by section 52 of the Physical Planning Act to personally serve the Applicants and other residents of the area with the notice

(iii) The TPC gave approval of the change of user in an unfair and negligent manner and without probity, honesty, integrity and accountability

(iv) There was deliberate misdescription of the suit property, hence the Applicants inability to notice the Notice that appeared in the Daily Nation of 28/09/2006

(v) The approval for change of user was given without considering that the conditions for the granting of such approval had not been complied with

(vi) The proposed development infringes the zoning policy under Zone 4, namely that the construction of flats in Zone 4 can only be built on land that is not less than one acre in area.

(vii) As a result of the above, the whole process which gave rise to the approval of the building plans was flawed thus resulting in improper employment of its authority by the Respondent.

60. In determining these issues the court is guided by the principle that this court should only consider the process by which the decision that is sought to be quashed was arrived at, that is to say whether the process was properly employed by the Respondent. It is not the duty of this court to review the merits of the decision in respect of which this application for judicial review is made (**Republic –vs- NEMA & Another (supra)** is relevant. That being the legal position, I shall consider the six (6) issues listed above globally in terms of issue number (vii), that is to say whether the process which gave rise to the approval of the building plans was flawed thus resulting in improper employment of the Respondent's authority.

61. The Respondent has contended that it did not make a decision that can be called before this court for quashing. On the other hand, the Interested Parties contended that the Respondent acted properly in giving the approval for the building plans. Section 36 of the Act requires an Applicant to submit together with the application an Environmental Impact Assessment Report if the local authority (the Respondent herein) is of the opinion that the proposed development will have an injurious impact on the environment. In the instant case, the Respondent called upon the Interested Parties to submit an Environmental Impact Assessment report. This means that the Respondent formed an opinion that the proposed development by the Interested Parties was going to have an injurious impact on the environment. Once the Respondent formed that opinion, it had to comply with the provisions of Section 41(3) and 52 of the Act. In this regard I find that the Respondent did comply with Section 36 of the Act by failing to call upon the Interested Parties to furnish an EIA Report together with their application for the building plans for Change of user.

62. What about Section 41(3) of the Act? The court's view is that having made a requirement of the Interested Parties to submit an EIA, the Respondent went further to publish in the Daily Nation of 28/09/2006, the notice of the Interested Parties application for Change of User and the proposed development. Section 41(3) required the Respondent to publish the Notice of the application either in the Gazette or in such other manner as is deemed expedient. It is evident that the Respondent herein chose the "*other manner*" of publication and published the notice in the Daily Nation of 28/09/2006. The Applicant's contention is that there should have been publication of this notice in another newspaper namely a Kiswahili daily newspaper and further that the notice ought to have been exhibited at the offices of the chief. It was contended on behalf of the Respondent and the Interested Parties that since the publication was not carried in the Kenya Gazette, the Respondent's notice in the two local dailies and to exhibition of the notice at the offices of the chiefs was not necessary. I agree with the position of

the Respondent and the Interested Parties up to this point, there is the issue of service of copies of the application on every owner, or occupier of the property adjacent to the land to which the application relates.

63. As for service, the Applicants have contended that the service was not adequate, namely that the application was not served upon the Applicants as by law prescribed and secondly that there was such a serious, and deliberate misdescription of the suit property that the Applicants would not have known that it was the suit property that was the subject of the application. Both the application and the notice referred to "*Plot 209/4889 – Riverside Drive*". The Applicants contended that the suit property is located on Riverside Grove and not Riverside Drive, the latter of which is a long road with many developments on either side. I think that the description of the suit property was misleading to the Applicants who have a right to complain that they could not have known that it was the suit property that was being referred to in the application even if they had seen the notice.

64. The Applicants also argued that the notice of the application was served on the Applicants some eight (8) months after the publication of the application in the Daily Nation of 28/09/2006. Though the Respondents and the Interested Parties argued that the application was served twice upon the Applicants, the court does not find that contention to be a fact. There is no evidence placed before the court to support that contention. Consequently, the Applicants had no or no proper service and were therefore denied the opportunity to register their objections before the building plans were approved by the Respondent. A reading of Section 41(3) of the Act makes the publication of the notice and service of the same one and the same transaction, so that service of the application eight (8) months down the road after publication cannot be said to amount to service in accordance with the said section. In light of the above, I am persuaded that the Respondent and the Interested Parties did not comply with section 41(3) of the Act. It therefore follows that the approval given by the TPC was not supported by evidence that the notice of the application had been properly published and served. It can thus be said that such approval by the TPC was unfair to the Applicants and was given in a negligent manner with all the attendant consequences that go with such negligence.

65. It is worth noting that the letter dated 22/12/2006 from the National Environmental Management Authority (NEMA) required 3 things of the Interested Parties:-

- *consultation with the neighbours and evidence of such consultation was to be availed to NEMA*
- *consultation with the City Council of Nairobi on the zoning specifications and feedback made to NEMA*
- *provision of approved design drawings by City Council of Nairobi*

66. The evidence that has been laid before the court shows that all the 3 conditions were not fulfilled by the Interested Parties. Of great importance was the requirement that the Interested Parties consult with the neighbours. There is no evidence of such consultation, or if there was the same came too late in the day some eight (8) months after for the Applicants to make their voice heard. In light of the authorities that the court has referred to in the preceding paragraphs of this ruling the Applicants were denied fair treatment by not being given an opportunity to raise their objections at the appropriate time. It is also not in doubt that the tenor of Sections 36, 41(3) and 52 is mandatory, so that the Respondent and the Interested Parties having failed to comply with all the provisions resulted in the Applicants not being taken through a fair process leading to the approval of the building plans and change of user by the Respondent. The court therefore finds that the decision made by the Respondent in favour of the Interested Parties was not fair in the eyes of this court.

67. There is also the issue of the zoning policy. After considering the two contending views on this issue I am

persuaded that the proposed development was not according to the zoning policy for the area. Both the Respondent and the Interested Parties agree that the area upon which the proposed development was to be put up was only NEARLY, as large as the size of land required by the zoning policy. This admission that the land size was below that required by the relevant zoning policy for Zone 4 does not support the Respondent's and Interested Parties contention that there was compliance on their part with regard to the zoning policy for Zone 4.

68. The Interested Parties also contended that the Applicants are a conservative lot of people who are against modern development such as the one proposed by the Interested Parties. What the court can say on this allegation by the Interested Parties is that everyone is for development but such development must and ought to be done in a systematic manner and upon open and sufficient notice being given to all those who are or are likely to be affected by the proposed development. Such development must also be in accordance with the zoning policy of the local authority concerned. In my view, it is not enough that one individual is permitted to carry out a development of a particular type that is different from the rest. What appears from the instant case is that the Respondent has not established a visible and binding zoning policy for zone 4. It would thus be dangerous to allow piecemeal approvals that are given through an opaque process that denies the Applicants an opportunity to air their objection, conservatism or not conservatism.

69. Further, the proposed zoning policy recommended by the Respondent in 1987 provided that, high-rise buildings in the suit premises were to be restricted, so that it was critical for the Applicants to be given adequate notice of the project that would impact upon them negatively so that they could raise their objections. As far back as 1987, the Respondent noted that the available facilities/services in the area could not support a population larger than 300,000 people.

70. The Respondents and the Interested Parties also relied on a document dated 17/10/2006 which is stated to be a Report by one A.M. Murani of the Forward Planning City Planning Department of the Respondent buttress their argument that the proposed development was in an area that allows for flats; that the area was surrounded by high-rise flats on all sides. Two points are important to note from this document. The document does not bear the letter head of either an individual or a body corporate. Secondly, the document is not formally dated and finally the property described therein is said to be located along Riverside Drive and not Riverside Grove. In my view the document supports the Applicants contention that the suit property was not properly described in the application for Change of User and that the document is of little probative value to the Respondents' case.

71. The upshot of what I have said above is that the Applicants Notice of Motion application dated 10/08/2007 succeeds. Accordingly the decision of the TPC made on 8/02/2007 approving the building plans registration No. EA 681 for the construction of 10 flats by Arun Ramji Devani and Illa Arun Devani on LR No. 209/4889 Riverside Grove Nairobi be and is hereby removed into this court and quashed. The Interested Parties are however at liberty to pursue their quest for the proposed development as long as they follow the laid down procedures.

72. The costs of this application shall be paid to the Applicants.

Orders accordingly.

Delivered and Dated at Nairobi this 16th day of February, 2010.

R.N. SITATI

JUDGE

Delivered in the presence of:-

Mr. Ondieki (present) for the Plaintiff/Applicant

Mr. Abwao (present) for the Respondent

Miss Buba (present) for the Interested Parties

Weche – court clerk