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

Miscellaneous Application 457 of 2001

DYNO HOLDINGS LIMITED.....APPLICANT

VERSUS

THE DIRECTOR OF CITY PLAINING DEPARTMENT

NAIROBI CITY COUNCIL.....RESPONDENT

J U D G M E N T

By the amended Notice of Motion dated 1/7/04, the ex parte applicant, Dyno Holdings Limited is challenging the decision of the Director of City Planning Department of the Nairobi City Council contained in the letter Reference No. CDD/GD/0959/209/13002 and dated 3/10/01 purporting to refuse to accede to the application for approval of its development plans and seeks an order of certiorari to have that decision quashed. The applicant also seeks an order of mandamus directed at the Nairobi City Council and its Director of Planning to reconsider the application for approval of its development plans submitted by its agents Registration No. D203 and to consider the plans in a justifiable manner. The applicant also seeks costs of this application.

The Notice of Motion is supported by the affidavit of Mohan Galot, the Director of the plaintiff Company, dated 14/5/01 and the statutory statement dated 11/5/01 which were filed with the chamber summons and another affidavit sworn by Richard Mundia Kariuki filed along with the amended notice of motion and is dated 4/2/04 and filed in court on 5/2/04. The applicant also filed skeleton arguments on 15/2/06 and a list of documents filed in court on 7/12/05.

The application was opposed and a replying affidavit was sworn by Jane Chege Advocate on 25/2/03 and another affidavit by C.K. Mbithi Chief Building Survey dated 28/6/01. The respondent also filed arguments on 7/5/06. A list of documents was also filed on 25/5/05.

At the centre of this controversy is a piece of land LR 209/13002, registered in the name of the applicant and measuring about 0.0434 Ha. It is situate within the City of Nairobi registered under Registration of Titles Act Cap 281 (RTA) – IR 71827, on 23/12/1996. The Registrar of Titles in exercise of his powers under S65 of the RTA registered a caveat against the land but on 9/3/00 he withdrew the caveat. The applicant exhibited the withdrawal of caveat and notice as Exhibit A & B. The applicant proceeded to pay land rent to the Commissioner of Lands and was issued with a clearance certificate, Annex 073032 dated 25/7/00, receipt BS 8808/10 dated 18/7/00. The applicant also paid the rates to Nairobi City Council on 11/11/00 vide certificate No. 06192. Though Satish Shah, the applicant's agent submitted development plans for approval which was receipted (E) dated 4/9/00. In reply the Respondent indicated to the agent that there was an issue with the land and the Development had to await the response from the Commissioner of Lands. (The comment is F) The Applicant's agent wrote a

reminder to the respondent on 20/2/2001 ("G") and on 27/3/01 the applicant also wrote a reminder the respondent. (Annexture H). On 3/11/01 the Director of City Planning wrote to the applicant refusing to approve the said plans. The letter was annexed as (I). The applicants appealed to the respondent to reconsider the decision but the decision was not forthcoming. It is the applicant's contention that the decision to deny the permission is unreasonable illegal and unjustified. That the Respondent have all along recognized the said title and the Plaintiffs has met all requirements and Respondents can not claim that it is on a road reserve.

Mr. Kithi, counsel for the applicant submitted that a public body has to act within its statutory powers and it is not the duty of the Respondent to determine ownership to land or question the validity of the title. That the RTA has recognized the title under S24 and all the respondent needs to do is exercise its discretion lawfully and judiciously in approving the said plans. That the two letters written by the Director declining to approve the plans were written outside the Respondent's mandate. That once they accepted the rates, they raised the applicant's expectation that the Development plans would be approved. That before declining to approve the plans, the applicants should have been given a hearing. That the statute governing this regulation is Local Government Act Cap 265 Laws of Kenya, Its by laws and the Building code for council City of Nairobi of 1968. That Regulation 10 gives the circumstances under which plans can be disapproved. That the reasons under regulation 10 were not assigned to the decision arrived at. He urged that the decision made is unreasonable and this court has the jurisdiction to intervene and quash it.

In opposing the application, Jane Chege, an advocate who had conduct of this matter deponed that the application is an abuse of the court process, lacks any merit as the suit premises is on a road reserve, the title is suspect and the Registrar has placed a caveat on the land. That the applicant filed another application which is still pending before the court. That this issue is one of public interest as the Director can not approve developments on a road reserve. Mr. Mbithi, the Chief Building Survey deponed that the decision of the Director City Planning is not unreasonable or unjustified as the suit premises forms part of a road reserve of Green way road which links Westlands Avenue with Chiromo Road. That a decision was made in 1997 to revoke the allocation and it was communicated to the Permanent Secretary Ministry of Lands and Settlement – (CKM 1) That the original allottee of the land was one KOMAKOS Ltd. and the owners of the adjoining land petitioned the Government to have the allocation revoked and the Permanent Secretary undertook to take it up (CKM 2) – That no developments can be approved on a road reserve and it has to await the Commissioner's decision on the matter. On acceptance of rates by offices of the respondent it was submitted that the cashiers receive all monies and that acceptance is not recognition of the applications title. He urged that this application is premature and some of the questions will be best answered by the Commissioner of Lands.

Since the applicant's development plans were not acceded to for reasons that the land is on a road reserve and given the history of the lands, that the Registrar had earlier put a caveat on it, the Commissioner of Lands should have been brought into these proceedings to clarify whose land this is whether it is public land i.e. road reserve and therefore improperly allotted to the Applicant or it is rightly the Applicant's land. The Commissioner is an interested party in the matter and should have been served. It is futile for the applicant urguing that the respondent approve the plans when it does not have the mandate to determine ownership of land without bringing into these proceeding the party that would have settled that controversy of ownership. The Commissioner of Lands should have been served and an affidavit to that effect filed in accordance with Order 53 Rule 3 (2) and (3). That rule requires that any party that may affected by the orders of the court should be served, and an affidavit confirming service filed. Even if the plans were approved and the Commissioner comes out to say that it is a road reserve, it would be an exercise in futility to approve them. The respondent has indicated that the Commissioner was notified of this issue and they are awaiting his response. The commissioner should have been enjoined as he is a necessary party determining the issue of ownership. The Respondent can not approve plans of persons who have not established title to the land to be developed. Failure to do so renders this application incompetent.

This application offends Order 53 Rule 1(2) Civil Procedure Rules. That rule requires that the chamber summons be supported by a statement and verifying affidavit. The statement should contain the

names and description of the applicant, the relief sought and grounds upon which it is sought. The verifying affidavit is supposed to contain the facts upon which the application is brought. In the instant case, all the facts are contained in the statement and all documents are annexed to the statement. The verifying affidavit of Mohamed Galot is made up of only 4 paragraphs in which he introduces himself and confirms that he is authorized to swear the affidavits, (at para 3) and to confirm that the contents of the statement are correct and avers that what he depones to is correct. The affidavit has no evidential value. Order 53 Rule 4(1) requires that the notice of motion be served along with statement and affidavit(s) filed with the chamber summons and that is what is relied upon when arguing the notice of motion. If one has to file any further affidavits, it has to be with the leave of the court.

In the instant case, there is no evidence to support the notice of motion. The documents (annextures) are not introduced in the affidavits and the application is therefore incurably defective. In *ONEMA OWAKI V COMMISSIONER OF INCOME TAX C/A 45/00.* The Court of Appeal confirmed that it is the affidavit which is of evidential value in a Judicial Review application but not the statement. The court said:-

"*We would observe that it is the verifying affidavit not the statement to be verified, which is of evidential value in an application for judicial review. That appears to be the meaning of rule 1 (2) of Order LIII. This position is confirmed by the following passage from the supreme court practice 1976 Vol. 1 at paragraph 53/1/7:*

The application for leave "By a statement" – The facts relied on should be stated in the affidavit (see R. V. Wandsworth JJ., ex p. Read [1942] 1 K. B. 281). "The statement" should contain nothing more than the name and the description of the applicant, the relief sought, and the grounds on which it is sought. It is not correct to lodge a statement of all the facts, verified by an affidavit."

There being no evidence to support the notice of motion, this application can not stand. It is incompetent and is for striking out.

I would stop there, but the question is whether there are any merits in this application. It is the applicant's case that the impugned decision is ulta vires the powers of the Director and also the Building Code promulgated under the By-laws made under the Local Government Act Cap 265,which does provide for grounds disapproval of plans. Regulation 10 reads:-

"*Subject to any power of relaxation conferred upon the Council by these By-laws, the council shall disapprove the plans for the erection of a building if—*

(a) the plans are not correctly drawn or do not provide sufficient information or detail to show whether or not the submission complies with these By-laws;

(b) such plans disclose contravention of these By-laws or any other written laws".

According to Chege, counsel for the respondents, the above provision has to be read in conjunction with the Physical Planning Act. That the latter Act mandates the Director to advise the Commissioner on use of land and S 29 places authority on the respondent to control the land user. In my view, It is absurd for the applicants to submit that the Director had no business refusing the approval. An approval can not be made in the abstract. The Director has to establish that the land belongs to the person or body seeking to develop it. So that a stranger to a piece of land cannot seek such approval and be allowed by the Respondent. The respondent's role can not be divorced from the issue of ownership and user of the land.

Ms Chege also urged that this application is premature because there is special mechanism provided under the Physical Planning Act for resolution of disputes and that the applicant should have appealed to the Liasion Committee first before coming for Judicial Review. Section 7 of the Physical Planning Act Cap 286 of the Laws of Kenya establishes the Physical Planning Liasion Committee. Section 8 (1) provides for the composition of the National Physical Planning Liasion Committee where as S 8 (2) provides for the conmposition of the Nairobi Physical Planning Liasion Committee. The functions of the

Committee are listed under S 10 (1) of the Act. The section reads:

"*10 (1) The functions of the National Physical Planning Liasion Commiittee shall be—*

(a) to hear and determine appeals lodged by a person or local authority aggrieved by the decision of any other liaison committee;

(b) to determine and resolve physical planning matters referred to it by any of the other liaison committees;

(c) .....

(d) .....

10 (2) The functions of other liaison committees shall be—

(a) to inquire into and determine complaints made against the Director in the exercise of its functions under this Act or local authorities in the exercise of their functions under this Act;

(b) to inquire into and determine conflicting claims made in respect of applications for development permission;

(c) .....

(d) .....

(e) to hear appeals lodged by persons aggrieved by decisions made by the Director of local authorities under this Act."

In Juducial Review, an alternative remedy is not a bar to one invoking the courts jurisdiction for other remedies but it is the duty of the Applicant to inform the court at the earliest stage, especially at leave stage, why the alternative remedy is not suitable in the circumstances. Michael Fordham QC in his book "Judicial Review Handbook 5th edition" para.36.3 says:

"*An existing alternative remedy raises a question for the court's discretion and judgment. Judicial Review is regarded as a last resort and can be declined on the basis that the claimant should first pursue a suitable alternative remedy. This question is best addressed at the permission stage having regard to all the circumstances."*

In the English case of *R V MINISTRY OF AGRICULTURE FISHERIES AND FOOD ex parte LIVE SHEEP TRADERS LTD (1995) COD* 292, the court said:

" *It is a cardinal principle that, save in exceptional circumstances, the jurisdiction to grant Judicial Review will not be exercised where other remedies are available and have not been used,"*

Back home in the case of *JAMES NJENGA KARUME V SPEAKER OF THE NATIONAL ASSEMBLY CA 192/1992 (2208) IKLR 425,* this court said:

"*There was considerable merit in the submission that where there was a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure*

should have been strictly followed. Order 53 of the Civil Procedure Rules could not oust clear Constitutional or statutory provisions. The non disclosure of the filing and pendency of the election petition in the Respondent's statement of facts was a material fact that was capable of affecting the manner in which the judge exercised his discretion."

With all the above authorities it is clear that a duty rests on the Applicant to disclose what alternative remedies are available at leave stage and why that particular procedure/remedy has not been sought. The Applicant never referred to the existence of the Liaison Committee. It is a specialized Tribunal set up in the Physical Planning Act to deal with such issues as complained of herein. The Applicant should have disclosed that fact to enable the court exercise its discretion accordingly to allow or disallow leave. The Applicant is also guilty of material non-disclosure.

In conclusion, I find that this notice of motion had been brought to this court prematurely it also lacks merit. The result is that it is dismissed with costs to the Respondent.

Dated and delivered at Nairobi this 25th day of September 2009.

R. P. V. WENDOH

JUDGE

Delivered in the presence of:-

M/s Mburu holding brief for Mr. Kithi for the Applicant

Ms Chege for the Respondents

Muturi. – court clerk