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

Misc Appli 1694 of 2005

REPUBLIC……APPLICANT

Versus

CITY COUNCIL OF NAIROBI……1ST DEFENDANT

CHIEF MAGISTRATE, CITY COURT……2ND DEFENDANT

EX PARTE ……...…MEHBOOB ABDULKADER ESMAIL

JUDGMENT

This is an Application for Judicial Review brought by Mehboob Abdulkader Esmail, the ex parte Applicant, against the City Council of Nairobi and the Chief Magistrate's Court, City Court, Nairobi, the Respondents herein.

The Applicant seeks the following orders:

1) An order of certiorari to remove into this court and quash the decision of the 1st Respondent (City Council of Nairobi) to charge the Applicant on 24th June 2005 in CC 513/05;

2) An order of prohibition to issue against the 2nd Respondent (Chief Magistrate City Court) to restrain him from continuing to take any evidence and concluding proceedings in the said criminal proceedings;

The Application is dated 13th February 2006, supported by the Affidavit of the Applicant of the same date, a Statutory Statement and Verifying Affidavit both dated 2nd December 2005 and filed together with the Chamber Summons in which leave was sought. The Applicant also filed skeleton arguments on 24th November 2006 which he relied upon. Mr. Majanja urged the Notice of Motion on behalf of the Applicant.

The Notice of Motion was opposed and in support, a Verifying Affidavit was sworn by P.M. Kibinda, a Director of City Planning & Architecture of the 1st Respondent, on 29th March 2003 and skeleton arguments were filed in court on 16th May 2006. Mr. Njogu appeared on behalf of the Respondents.

The Applicant is an employee of Braeburn Ltd. He is challenging the decision of the 1st Respondent to charge him for,

a) erecting a building structure without approved plans contrary to Section 30 (1) of the Physical

Planning Act;

b) Dumping, contrary to Section 30 (1) as read with Section 3 of the Physical Planning Act.

The grounds upon which he brings the Application are:

1. That the Respondent's decision of 24th June 2005 charging the Applicant in CRC 513/05 is oppressive and contrary to the law;

2. That the said decision being contrary to the law, the proceedings in the Chief Magistrate's Court at City Court are oppressive and contrary to law;

3. That the Respondent being a public body which makes decisions that affect the rights of the Applicants, is subject to the supervisory jurisdiction of this court.

Briefly the case of the Applicant is as follows; the Applicant is the operations Manager of Breaburn Ltd. The said company owns and operates Braeside School which is situate on LR 3734/1013 Nairobi.

That on 1st April 2005 the School, through its architect T.J. Andrews submitted drawings of building plans of an intended development for approval by the City Council. They waited for about 46 days and having not received any response from the 1st Respondent, commenced development of their property. In the meantime, one Tony Mzee who owns a neighbouring plot complained of Breaburn encroaching on his land and there was some misunderstanding.

On 24th June 2005 the City Council served Braeside Ltd with an enforcement Notice at about 9.45 a.m. on the same date, City Council agents went to the school in company of Tony Mzee at about 12.30 p.m. and demanded to see development plans but were informed that the architect was out of the country and due to return on 27th June 2005but they took him to City Hall where he was arrested and charged with the Criminal Case which he challenges.

In his Replying Affidavit, Mr. Kibinda deponed that the Applicant has admitted to there being no approved plans for the contruction work that was being undertaken and the Applicant was therefore lawfully arrested and charged and there is therefore no basis for this Application. That the Respondent had requested for the plans on several occasions but not given why the order of Judicial Review can issue. According to Mr. Kibinda the 1st Respondent has the discretion to determine the length of the enforcement and that there was no law requiring the Respondent to respond to the development Application and that the court therefore should dismiss this Application.

Before considering the merits of this case, I need to point out that the Applicants Counsel relied on the Affidavit dated 13th February 2005 as supporting his Application. That affidavit was filed along with the Notice of Motion. Order 53 Rule 4 (1) Civil Procedure Rules provides:

"4 (1) Copies of the Statement accompanying the Application for leave shall be served with the notice of Motion and copies of any Affidavits accompanying the Application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said Statement".

The above rule provides that the Verifying Affidavit and Statement filed along with the Chamber Summons is the one to accompany the Notice of Motion and is the one to be relied upon. Under Order 53 Rule 4 (2), if anyone seeks to rely on any other Affidavit they must seek the leave of the court to file one. In this case, the Affidavit that should have been relied upon was that dated 2nd December 2005 and filed along with the Chamber Summons. There is no evidence on record to show that the Applicant ever sought leave of the court to file another Affidavit with the Notice of Motion. The Affidavit dated 13th February 2005 is irregularly on record and therefore struck off.

I had a chance to look at the Affidavit struck off and that dated 2nd December 2005 and find the contents to be similar save that the Affidavit dated 13th February 2006 has several annextures to it. The affidavit dated2nd December 2005 had only one annexture, the charge sheet in CRC 513/05 which is the decision challenged. The court will go ahead and consider the case on the basis of the Verifying Affidavit of 2nd December 2005 because facts are generally not in issue.

I have now considered all pleadings, the submissions by both Counsel and the authorities that have been relied upon.

It is not denied that the Applicants sought approval of Development Plans from the 1st Respondent and the 1st Respondent did not respond to them. S.30 (1) of the Physical Planning Act makes it an offence for a party to carry out a development within the Local Authority without permission from the Local Authority. S.32 (1) then goes to provide:

"A Local Authority to which a development Application has been made under S.31 shall not later than thirty days after the receipt of the Application, refer it to the Director for his comments."

Under S. 33 (1) after the Director's comments, the Director may grant or refuse the approval and communicate its decision within 30 days. Kibinda deponed that the 1st Respondent had no duty to respond to the Applicant's Application. The 1st Respondent is a statutory body mandated to grant or refuse permission to would be Applicants. Such power must be exercised properly or judiciously and I do agree and adopt the statement that "Statutory power isconferred as it were upon trust, not absolutely. That is to say, it can validily be used only in the right and proper way which Parliament when conferring it is presumed to have intended" - Wade Administration Law (5th Ed pg 355-6)

The Council has a wide discretion in making its decisions and the said discretion has to be exercised reasonably and normally the duty to make a decision carries a corresponding duty to give reasons. S.33 envisages that upon denial of permission, the 1st Respondent do give reasons as to why the refusal. In the case of ANNS V LONDON BUROUGH COUNCIL OF MERTON (1978) AC 728 Lord Salman said

"…….there is however nothing in the Act of 1936 nor in the by laws which explicitly provides how the Council shall exercise these powers. This in my view is left to the Council's discretion, but I do not think it is an absolute discretion. It is a discretion which must be responsibly exercised – the exercise of power without responsibility is not encouraged by law."

In this case the 1st Respondent is acting irresponsibly by stating that they have no duty to respond to the Application for approval of the Applicant's Development Plan. In so acting it fetters its powers and acts irresponsibly which amounts to abuse of its powers.

An enforcement order was issued by the 1st Respondent pursuant to S. 38 (1) of the Physical Planning Act. The said notice is meant to ask the Applicant to comply with the Physical Planning Act if it has been flouted.

The enforcement notice is said to be dated 23rd June 2005. The parties differ as to when it was served. Whereas the Respondent say they served it on the same 23rd June 2005,the Applicants claim to have received it on 24th June 2005. Braeburn Ltd. was given 24 hours to comply with the Act by submitting proper plans to the Council remove the dumping. Though the Respondents contend that they had visited the premises severally and asked for the approved plans they have not shown evidence as to, - who visited, when or any written warning served on the Applicants. On the contrary the Applicant said it is on 24th September 2005 that the notice was received at 9.45 a.m. and he was taken away on same afternoon and charged.

The Respondent's stance is that they have a discretion to determine the period of the enforcement notice. Section 38 of the Physical Planning Act does not provide for the period which the enforcement notice

should take. However, under S.38(4) a person who is aggrieved by a notice has a right of appeal to the relevant liason committee set up under Section 13 of the Act. Even assuming that the Applicants were given 24 hours, would they have exercised their right of appeal within 24 hours and have been heard? The answer is obvious and I hold that the period of 24 hours given to the Applicant within which to comply is tainted with bad faith and meant to deny the Applicant a chance to comply or exercise his right of appeal.

In exercise of their discretion, the 1st Respondent had to act fairly and reasonably so that. Whether the notice issued on 23rd June 2005 or 24th June 2005, 24 hours, it is not reasonable in the circumstances. It was too short to enable the Applicant to comply or file an appeal. The Applicant contends that they explained that the architect was away and would return on the 27th June 2005 but that fell on deaf ears. I find and hold that the 1st Respondent acted unreasonably, unfairly, in bad faith and oppressively in the circumstances.

The Applicant in his Affidavit deponed that the criminal proceedings were instigated by one Tony Mzee who had complained and was with the 1st Respondent's Officers at the time of Applicant's arrest. The courts have intervened in criminal process where the criminal case is found to have been instigated by motives other than those intended to do justice. Such was the holding in the case of **KURIA & ANOTHER V THE AG (2002) KLR 69** where Mulwa J. held that the court should prevent any criminal prosecutions if extraneous matters divorced from the goals of justice guide their instigation. In this case, though the Applicant blames Tony Mzee for instigating these proceedings, the said Tony Mzee has not been joined to these proceedings as an Interested Party. It would be unfair for the court to condemn the said Tony in his absence when he has not been given a chance to respond to the allegations by the Applicant.

Was the Applicant properly charged?

No doubt the owner of the development in contention is Braeburn Ltd. The Applicant is said to be the operations manager of the said company. Under S.38(1) of the Physical Planning Act, an enforcement notice can be served on the developer, owner or occupier of the land. The Applicant is said to be an employee of Braeburn Ltd. who own the said land and developments thereon.

The Applicant is neither an owner, a developer nor an occupier of the said land. If there is any offence that was committed, it is by Braeburn Ltd. and who should be charged. In company law it is the Directors who would be charged for the criminal acts of the company but not an employee. The Applicant is wrongly charged and the charges before City Court cannot be maintained.

Can the orders sought be granted?

Judicial Review is concerned not with the merits of a decision that has been made but with the decision making process that is, whether the process was fair, the public body or person acted within their jurisdiction, and observed rules of natural justice.

In the instant case the issue for consideration by this court is not whether the Applicant is guilty ofcarrying on development without approval of plans, but whether the process leading to his arrest and charges is in accordance with the law, rules of natural justice were observed and was fair. The guilt or innocence of the Applicant is not in issue here.

The Supreme Court PRACTICE 1997 VOL 53/1-14/6 states;

"**The remedy of Judicial Review is concerned with reviewing not the merits of the decision in respect of which the Application for Judicial Review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of their purpose to substitute the opinion of the Judiciary or of**

individual judges for that of the authority constituted by law to decide the matters in question."

Lord Hailsham adopted the same view in his decision in **COUNCIL OF CIVIL SERVICE UNIONS V MINISTER FOR THE CIVIL SERVICE (1985) AC 374.**

Having found in this judgment that rules of natural justice were flouted, the decision of the 1st Respondent was unreasonable, oppressive, and made in bad faith, the court must grant an order of certiorari to quash the decision of the 1st Respondent dated 29th June 2005 charging the Applicant in CRC 513/05 and the 2nd Respondent be prohibited from continuing with proceedings therein. The Respondents will bear costs of the Application.

Dated and delivered this 14th day of June 2007.

R.P.V. WENDOH

JUDGE

Present

Mr. Majanja for Applicant

Mr. Njogu for Respondent

Daniel: Court Clerk