



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

Misc Appli 753 of 2007

WAKU INVESTMENT CO. LTD.

KULWINDER SINGH

HARDIAL SINGH SANDHU

HARDIAL SINGH LOCHAB

AMERJIT SINGH LOCHAB

NARINDER SINGH LOCHAB

RANJIT SINGH LOCHAB

**OM PARKASH NAGPAL & PAMELA DEVI NAGPAL STEWAN HOLDINGS
LTD ...APPLICANTS**

Versus

**CITY COUNCIL OF NAIROBI.....
.....DEFENDANT**

RULING

By the Chamber Summons dated 17th July 2007 the Applicants, Waku Investment Co. Ltd. Kulwinder Singh Sandu, Herdial Singh Lochab, Amarjit Singh Lochab, Naminder Singh Lochab and Ranjit Singh Lochab, OM Parkash Nagpal and Pamela Devi Nagpal and Stewan Holdings seek an order of certiorari to issue against the City Council of Nairobi to remove into the High Court and quash the decision of the Town Planning Committee of the Respondent made on 8th February 2007 approving Building Plans Registration No. EA 681 for 10 flats by Arun Ramji Devani and 11/9 Arun Devan on LR 209/4889, Riverside Grove, Nairobi, and that if leave is granted, the same do operate as stay. In support thereof the Applicant has filed a statement of facts and a Verifying Affidavit of Samson Kuria Kamau dated 12th July 2007, various Verifying Affidavits by other Applicants and lists of authorities.

After hearing the Applicants' Counsel exparte, the court ordered that the Chamber Summons which is normally heard ex parte be heard inter partes. The Respondents having been served, the Respondent filed grounds of opposition dated 23rd July 2007 and a preliminary objection on 31st July 2007.

Brief facts of this case are that the Applicants are owners and occupiers of houses on Riverside Grove in Nairobi. On the same Grove resides one Arun Ramji Devani and Illa Arun Devani in Plot LR 209/4889.

The Applicants are aggrieved by the decision of the City Council made pursuant to the Physical Planning Act, Local Government Act and City of Nairobi By laws. The Town Planning Committee of City Council of Nairobi at a meeting on 29th November 2006 granted change of user from single dwelling unit to multi-dwelling units i.e flats to Illa and Arun Ramji Devan on their plot which measures about 0.3035 ha. Conditions that they were supposed to comply with were set out in the minutes and they included the conditions; that they had to comply with S.36, 41 and 52 of the Physical Planning Act and they had to comply with the approved zoning policy. Section 36 of the Planning Act provides for submission of an environmental impact assessment report if one is engaged in development of an activity that would be injurious to the environment while S.41 (3) provides for publication of a notice in the gazettee by the local authority on behalf of the Applicant; An applicant for change of user or development to serve a copy of the Application on every owner or occupier of an adjacent land or any other person as the authority deems fit.

S. 52 then provides for publication of the notices in at least 2 local dailies, one in English and another in Kiswahili. The Applicants contend that despite non compliance with these conditions by the owners of the plot by the owner of the plot the plans were approved as no Environmental report was submitted with the Application as required under S.36 of the Physical Planning Act; copies of the Application was not served on owners or occupiers of adjacent plots; and that the notice which was published in the Daily Newspaper of 28th September 2006 was misleading because it refers to Plot LR 209/4889 Riverside Drive instead of Riverside Grove and as a result the Applicants did not notice the said notice in the daily newspaper as Riverside Drive is several Kilometers long while Riverside Drive is off the Drive. The Applicants contend that they were denied an opportunity to object to the change of user as per the Act thus breaching the Rules of Natural Justice and that the decision of the Committee constitutes an error of law on the face of the record.

In reply, the Respondents contend that the Applicants have not demonstrated that they are entitled to the orders; that the orders should have been sought against the developers but not the Respondent and lastly that some of the Applicants have not sworn Verifying Affidavits. Mr. Abwao submitted that the Application offends Order 53 R. 3 (2) Civil Procedure Rules for failing to join the developer to the proceedings. Further that the owner of the property is also not joined.

At this stage, the court only need to be satisfied that the Applicant has demonstrated that they have an arguable case that the orders might be granted after the motion is heard without necessarily going into the depth of the case.

This was the holding by the Court of Appeal held in the case of **NJUGUNA V MINISTER OF AGRICULTURE (2000) 1 EA 184** and adopted in the case of **AGA KHAN EDUCATION SERVICE KENYA V REP (2004) 1 EAI**.

Upon considering the Affidavit of Samson Kuria and annexures thereto, plus submissions, it is apparent that the Applicants have raised objection to the construction of flats on a plot in Riverside Grove for the Council's failure to comply with the law and failure to give the relevant notices to the affected parties as required by law. I am satisfied that prima facie an arguable case has been made by the Applicants.

If indeed the law has not been complied with and the Applicants have not been heard, the Applicants would suffer irreparably which involves change of land user were to go ahead.

I have considered the objections by the Respondents, and observe that these are Judicial Review proceedings. Judicial Review is concerned not with the private rights or 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 an authority to which he has been subjected. This is the holding in the case of **REP V SECRETARY OF STATE FOR EDUCATION AND SCIENCE ex parte AVON COUNTY COUNCIL (1991) 1 ALL ER 282** and adopted by Court of Appeal in **COMMISSIONER OF LANDS V KUNSTE HOTEL LTD (1995-1998) EA LR 62**.

In this case the decision under attack is that made by the City Council of Nairobi which is a statutory body. It is unknown whether the developer is a public body against whom the public law remedy of Judicial Review would lie.

Under Order 53 Rule 3 (2) after leave is granted to apply for Judicial Review and the Notice of Motion is filed, the Notice of Motion is then served on all persons that may be affected by the court's orders. In my view the Respondent is properly sued as the statutory body which made the decision. It is premature for the Respondent to object to this proceedings as the Developer or owner of the land can be enjoined to the proceedings as interested parties because the orders of Judicial Review cannot lie against them, being private individuals. The objection that has been raised is therefore premature and unmerited.

As regards the filing of Verifying Affidavits by all Applicants, this being Judicial Review, any party can be enjoined to the Application at any time even on the hearing date if they appear, they can address the court on that case even without filing any papers. So that even if one Applicant is not yet involved in the proceedings they can still come on record. The court would not refuse to grant leave just because some Applicants have not sworn Verifying Affidavits. I do note that some Applicants have sworn verifying Affidavits and given authority to Benson Kuria to represent others. That is sufficient to move this court for leave.

For the above reasons, I am satisfied that the Applicants are entitled to leave to bring Judicial Review proceedings in terms of prayer A of the Chamber Summons dated 17th July 2007.

Leave so granted do operate as stay for 90 days in terms of prayer B of the Chamber summons.

The Substantive Notice of Motion be filed and served within 15 days of today's date in default all the above orders will lapse automatically.

Costs to abide the Notice of Motion.

Dated and delivered this 3rd day of August 2007.

R.P.V. WENDOH

JUDGE

Read in Presence of

Mr. Nagpal for Applicant

Mr. Abwao for Respondent

Daniel: Court Clerk

R.P.V. WENDOH

JUDGE