REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Misc Appli Case 398 of 2001

PATRICK MUNGAI & 22 OTHERS ……..…… APPLICANTS

V E R S U S

NAIROBI CITY COUNCIL PLANNING AND

ARCHITECTURE DEPARTMENT…..……... RESPONDENT

R U L I N G

By a Notice of Motion dated and filed on 14-06-2001 (the Application), the Ex-Parte Applicants sought judicial review orders to remove into the High Court and quash the decision of the Nairobi City Council, City Planning and Architecture Department dated 23-11-2000 granting and/or approving the application for change of user of Plot L.R. No. 15065/27 from residential to offices and/or commercial, granted to Gamefields Limited and/or to M/S Ker and Downey Safaris Limited. That was the first prayer. The second prayer for an order to discontinue the use of the premises for commercial and or industrial purposes was discontinued.

The third prayer was for an order that if the prayer for an order for certiorari was granted, there should also follow an order that the Respondent do restore the subject premises to its original residential condition within 90 days of the date of the order. The Ex-parte Applicant also sought costs.

The Application was based upon the statement and the Affidavit Verifying the facts by the 1st Ex-Parte Applicant, Patrick Mungai sworn on 19th April, 2001, and filed together with the Application for leave on 27th April, 2001. I will refer to these documents in the course of this Ruling.

The application was opposed, first by the Respondent and secondly by the 1st and 2nd Interested Parties who all filed papers in reply, and were represented by Counsel at the hearing of the Application. Again I shall presently set out each party's case.

The 1st Ex-Parte Applicant Patrick Mungai and the other 22 applicants are residents of the exclusive Karen Estate (remember Karen Blixen of the Out of Africa fame- the estate is named after her and not "***Wanjiku" "Anyango***" or "***Nduta***" or "***Atyang'a").*** The Respondents are limited liability companies, but whose directors may or may not live in the same estate, or even on the land known as L.R. No. 15065/27, Langata South Road ***(the suit premises***).

The owners of the suit premises applied to the Respondent for change of user of the suit premises from purely residential to residential/commercial. The application was made by one Dennis Lenferna Architect

through his letter of 16-11-1998 to the Director of City Planning. By his letter dated 26-01-1999 signed by one Mrs B.W. Mwaniki, the Director of City Planning and Architecture advised the Architect that the application should be submitted by a registered Physical Planner in accordance with the Physical Planning Act of 1996 and provide a planning brief and that an advertisement be placed in three local dailies and on site (and which site advertisement must remain in place for fourteen days, and measure 6ft X 4ft.

On 11-03-1999 the Respondent's Town Clerk published a Public Notice in the East African Standard Newspaper of that date under the title "***PUBLIC NOTICE Change of user from residential to offices" o***f ***L.R. No. 15065/27***.

By a letter dated 22-03-1999, through their Advocates, S. Thuo & Company Advocates, the Applicants raised strong objections to the proposed change of user from residential to offices.

It is unclear whether it was as a result of those considerations or as a result of a formal decision by the Respondent's Department for City Planning and Architecture, or on consideration of the objection by the Applicant's Advocates, the Respondent through a letter dated 6-05-1999 rejected the application for change of user by the Interested Parties, Gamefields Ltd and Ker & Downey Safaris Ltd.

Following the said disapproval and about seven (7) months thereafter the Respondent by its Notice to the 2nd Interested party, dated 21-02-2000 required the Respondent to stop/remove the unauthorized structures. This notice went out under the Director of City Planning and Architecture.

However on 23-02-2001 that is about a year later after the notice requiring the Interested Parties to remove the unauthorized structures, the Interested Party advertised in the Daily Nation of that date, that the Interested Parties were moving to their new offices along the Langata South Road/Opposite the A.F.C. Sports Complex giving their new telephone, postal and E-mail address.

The question one might ask is this. How is it that the Interested Parties were able to construct their new offices despite the refusal and notice to stop/remove unauthorized structures within a specified period?

The answer to this question is to be found in paragraph 9 of the Verifying Affidavit of the 1st Applicant, Patrick Mungai sworn on 19-04-2001 and filed with the application, the subject of this Ruling. It states that 1st Interested party's (Gamefield Ltd.) application for change of user of the suit premises was granted by the Town Planning Committee at its meeting held on 3-11-2000, under Item 19, subject to the conditions stated in the said Notification of approval dated 23-11-2000. The approval is said to be given pursuant to the provisions of Section 33 (1) (a) of the Physical Planning Act 1996 (**No. 6 of 1996**). The said approval effectively revoked the Respondent's earlier letter of 6.05.1999 already referred to above.

In their reaction to the approval, the Applicants per their letter of 24-02-2001, the Karen Residents Welfare Association not only expressed shock, at the grant of approval for change of user, but also argued cogently the implications to their environment, arising from the said grant of permission to change user of the suit premises. According to the Karen Residents Welfare Association, the grant of approval was:-

(a) unprocedural and impartial because the Association's views were not represented during the Town Planning Committee sitting on 3-11-2000.

(b) unfair to the Association's community as original objectors whose views ought to have been heard;

(c) fraudulently sneaked behind the Association's back by Ker & Downey.

The Association also urged that the change of user would negatively impact upon the environment contrary to the provisions of the Environmental Management and Coordination Act 1999 (Part II).

In relation to the garage, the Association sets out the negative impact on air pollution which pollute air upto 3km radius and would affect the Association's land and homes with emissions from vehicles, including sprays, noise, smell and dust from the garage. So also argued the association the Interested Parties, change of user would negatively impact upon water, soil and land pollution. Besides, the Association urged in its letter, no Environment Assessment Report had been carried out contrary to the Environmental Management and Coordination Act, 1999 which required an impact assessment report be carried out in respect of any "***activity out of character with its surroundings, or any structure of a scale not in keeping with its surroundings; major changes in land use."***

Miss Ngugi, learned Counsel for the Applicants closely relied on these pleadings, and cited the case of ***RIDGE –VS- BARDWIN [1964] A.C. 40***. In that case the Applicant (RIDGE) was dismissed as Chief Constable of borough Police force, the appointment was subject to the Police Acts and regulations. The Appellant was charged with corruption, but no material evidence was found, and the appellant was acquitted. His application for reinstatement was rejected by a Committee called the Watch Committee who found that he had been negligent in the discharge of his duties as Chief Constable, and in the purported exercise of its powers under Section 191 (4) of the Municipal Corporation Act 1882, and dismissed him from office of Chief Constable. The said provision provided:-

"***191 (4) The watch Committee, or any two justices having jurisdiction in the borough, may at any time suspend, and the Watch Committee may at any time dismiss any borough constable who they think is negligent in the discharge of his duty or otherwise unfit for the same."***

The House of Lords held (Lord Evershed dissenting), that the decision of the Respondents to dismiss the Appellant was null and void; and accordingly, notwithstanding that the decision of the Home Secretary was "***final and binding on the parties"*** by section 2 (3) of the Police Appeals Act, 1927, that decision could not give validity to the decision of the Respondents. The decision of the Respondents was a nullity, since:-

Per Lord Reid, Lord Morris & Lord Hodson – as the Appellant was not the servant of the Respondents and they could dismiss him only on grounds of neglect of duty, they were bound to observe the principles of natural justice by giving the appellant an opportunity of being heard, and that they had not done so."

Per Lord Devlin (agreeing with Lord Evershed) if this matter fell to be decided on the ground of a breach of the principles of natural justice, such a breach would render the decision to dismiss voidable and ***not null and void***.

Lord Evershed at page 86 said:-

"***Upon the question (****whether decisions* ***afterwards impugned can be said to be void or voidable only) the cases provide as I think, no certain answer, nor have I found any in the textbooks. Indeed, in the vast majority of circumstances, it does not in the end matter whether the decision challenged is void or only voidable; for if the court does quash a decision or otherwise set it aside, then the effect is in general the same whether such decision is considered void or only voidable. For my part, I have come to the conclusion that a case where a body is acting within its jurisdiction but of which the court will say it has failed to act in accordance with the principles of natural justice, then the decision is only voidable and cannot strictly be described as a nullity."***

In summary the Applicant's case is that they were not heard as per their objections, by the Association directly and by their Advocates S.M. Thuo & Co. that the Respondent ignored the relevant provisions of Physical Planning Act, 1996, namely (a) Section 32 (b) – that the change of user had no regard to the health amenities and conveniences of the community generally, the proper planning and density of the development and land use in the area contiguous to the suit land, and roads.

(b) Section 32 (3) (a) – an office block would not be in harmony and aesthetic in character in an up-market residential area as originally planned and marketed by Karen Estates Ltd;

(c) Section 36 – an office block would have an injurious impact on the environment, noise pollution, vehicle pollution (increased), back filling a whole parcel of land with hardcore eliminates any prospects of replanting any tree or shrub on the parcel.

Miss Ngugi also dismissed the Respondents contention that the Applicants should have approached the Liason Committee if they were aggrieved with the Respondents decision granting approval of change of user.

Miss Ngugi similarly dismissed the issue of limitation, that the Application for judicial review was brought after the expiry of the 6 months period prescribed by Section 9 of the Law Reform Act, and Order LIII rule 2 of the Civil Procedure Rules.

I shall refer to these various contentions, once I have considered the submissions, first by Mr. Omotii on behalf of the Respondent, and Miss Lavuna on behalf of the Interested Parties.

The Respondents' submissions were both short and well measured. Mr. Omotii relied upon the Replying Affidavit of one David Nderitu Gichohi sworn on 16-10-2001 and filed in court on that date and the Skeletal Arguments dated 23-11-2005, and filed on 24-11-2005. The Respondents answer to the various contentions of the Applicant were addressed by the Replying Affidavit of Mr. David Nderitu Gichohi, an Assistant Director i***n Charge*** of Development Control Nairobi City Council.

(a) the Interested Party's application for approval or change of user was submitted to the Respondent's Town Planning Committee on 3-11-2000 at 14.30 hours and not 22-11-2000 as erroneously indicated in the Notification of approval of 23-11-2000 (*paragraph 4),*

(b) ***the application approved on 3-11-2000 was that first made on 16-11-1998 (****paragraph 5).*

(c) it is not unknown to initially reject an application for change of user, to enable an applicant refine and resubmit his application, but the date of application remains that date when the application was first made. It is usual for the technical departments to do this. Hence Mrs Mwaniki letter of 6/05/1999 (paragraph 6, 7, 11 & 14),

(d) Only the Town Planning Committee has jurisdiction to approve or disapprove a change of user.

(e) the Applicant's objections of 22-03-1999 were taken into account in approving the change of user.

(f) the Applicants major objection was on the ground of health, sewerage facilities,) but that an acreage of 2.4 acres can accommodate adequate conservancy tanks and that acreage can accommodate 20 people according to the City Planning Department, (*paragraph 16-17****)***

(g) On the scarcity of water, the planning assumption is that residential premises use more water than commercial premises, the change of user would preserve rather than waste water (*paragraph 18).*

(h) the change of user would not introduce a garage or cause extra damage to the roads in the area (*paragraph 19).*

(i) an impact assessment report was not required by the Respondent because the change of user would not cause any substantial alteration in the character of the suit land or on contiguous land, and that the Interested Parties demonstrated ability to internalize any externalities *(paragraph 20 & 21).*

(j) public notices are issued only in respect of fresh applications, and in this case the applicants submission were on record *(paragraph 25).*

(k) the Town Planning Committee's decision was made fairly, without any impartiality or ulterior motives, or any fraud, within the Committee's jurisdiction taking into account all reasonable circumstances, including the Applicants objections and withdrawal of objections by Karen-Langata

District Association and prevailing socio-economic and planning policies.

(l) the Town Planning Committee acted in good faith honestly, and the application was not approved before submission *(paragraph 27)*

(m) the Town Planning Committee was not *functus officio* ***when it rendered its decision of 3-11-2000 as the communication of 6-05-1999 did not come from the Committee, and in any event the Town Committee can always review and change its prior decisions*** *(paragraph 28)*

The Replying Affidavit of Jeremy Watkins Pitchford was a book-let comprising of a Replying Affidavit sworn on or about 25-09-2001 (Kirugura Commissioner for Oaths signed it, but forgot to date it (pages **1 – 3)** and annextures thereto (pages 4-46). The parties took the Affidavit, accepted the Affidavit as duly filed in terms of Order XVIII rule 7 that the court may accept any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof, and in any event the Affidavit is not misleading in any way, and would be in order in terms of Section 72 of the Interpretation and General Provisions Act (Cap 2) Laws of Kenya.

The material part of the Replying Affidavit of Pitchford are those set in paragraphs 4 – 5, 7, 15, and 17 thereof:-

(a) that the application for change of user made on 16-11/1998 was null and void because it was not made in accordance with the Physical Planning Act (No. 6 of 1996***) (paragraph 4).***

(b) following the disapproval by the Respondent's letters of 6/05/1999 the Interested Parties submitted a fresh application on 5-04-2000 through a Registered Physical Planners as required by the Physical Planning Act 1996. *(paragraph 5****), and approval was granted on 23-11-2000.***

(c) the orders sought do not lie, because the

Notice of Motion herein was filed six (6) months after the decision was made by the Respondent on 3-11-2000 (*paragraph 7)*

(d) there is no evidence or particulars of

bad faith, unreasonableness or corruption in the decision by the Town Planning Committee in the decision approving the change of user application of the Interested Parties (*paragraph 5 & 6),*

(e) there is no basis for an order of mandamus,

The Respondents Skeleton Arguments already referred to above and those of the Interested Parties were adopted and relied upon by both Counsel for the Respondent (Mr. Omotii and Miss Mwenesi respectively) in their submissions to the court. The basic issues raised by the application may therefore be summarized in the following propositions:-

(1) ***Whether the Respondent acted within the confines of the Physical Planning Act, 1996 in granting and approving the Interested parties change of user of L.R. No. 15065/27.***

(2) Whether the Respondent acted corruptly, fraudulently, and in bad faith, and unreasonably in considering and granting the Interested Parties change of user of the said property;

(3) was the letter of 6.05.1999 from the Respondents issued pursuant to the authority of the City Planning and Architectural Department, or the Town Planning Committee?

(4) What is the status of a Policy Paper in law?

(5) When is an Impact Assessment Report required for the purposes of the Physical Planning Act,

(6) Is an applicant in judicial review proceedings required to exhaust alternative available remedies?

(7) Is the Applicant entitled to orders of certiorari and mandamus?

(8) Does the Applicant's Notice of Motion lie within the provisions of Order LIII rules 2, and 7?

I shall dispose of these issues not necessarily in the order in which they are set out above. The first issue is to clearly determine whether the Applicant's Notice of Motion dated and filed on 14-06-2001 is maintainable in light of the provisions of Order LIII, Rules 2, and 7 of the Civil Procedure Rules which respectively provide:-

(a) ***leave shall not be granted to apply for an order of Certiorari to remove any judgement, order, decree, conviction or other proceedings for the purpose of being quashed, unless the application for leave is made within six (6) months after the date of the proceedings … (Order LIII, Rule 2),***

(b) in the case of an application for an order

of *Certiorari* ***to remove any proceedings for the purpose of being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless*** *before the hearing of the* ***motion he has lodged a copy thereof verified by Affidavit with the Registrar or accounts for his failure to do so to the satisfaction of the High Court.***

The decision, the subject of these proceedings was made by the Respondents Town Planning Committee on 3-11-2000. The application for leave to bring these proceedings was not made until the 25-05-2001, that is after 6 months and 3 weeks from the date of the decision complained about. In terms of Order LIII rule 2, above, leave ought not to have been granted and therefore technically speaking these proceedings do not lie. However as there was no application by either the Respondent or the Interested parties to set aside the said order granting leave, and as this court is not an appellate Court, it lacks jurisdiction to pronounce on that order of leave these proceedings have to be determined on other grounds.

Order LIII rule 7 requires that in an application for an order of certiorari, the applicant cannot complain against the validity of any order, warrant, commitment, conviction, inquisition or record, unless ***before the hearing thereof*** he has lodged a copy thereof verified by Affidavit with the Registrar.

The decision of a Town Planning Committee is neither an Order, warrant, commitment, conviction nor inquisition. Its decision is however a record as is contemplated by this rule. No such record was lodged with the Registrar of this Court, nor was there any account or explanation offered by the Applicant's Counsel why it was not lodged. In the absence of such record, there is nothing for this court to call to be removed into this court and quashed. The Applicant's Notice of Motion of 14-06-2001 fails on this ground alone.

I will also dispose of the issue of ***mandamus,*** although not referred to as such in prayer (c) of the Applicant's Notice of Motion. Miss Ngugi's (***learned Counsel for the Applicants***), argument was to the effect that if the prayer for Certiorari is granted, it must follow that an order for mandamus must follow. No, with respect to Counsel, Rule 1 (1) of Order LIII prohibits the filing of an application for an Order of Mandamus, Prohibition or Certiorari unless leave therefore has been granted in accordance with this rule. The Applicant applied for, and was granted leave to apply for an order for Certiorari, and for no other order. Prayer (c) of the Notice of Motion dated and filed on 14-06-2001 therefore fails for this reason.

It was the contention of both the Respondent and the Interested parties that the Applicant ought to have exhausted available remedies under the Physical Planning Act, 1996 that, the Applicants ought to have appealed to the Liason Committee, and the National Planning Committee before coming to this court.

Rule 2 of Order LIII provides ***inter alia*** that where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired. Section 9 (3) of the Law Reform Act has provision to the same effect.

In other words the existence of an appeal mechanism or an alternative remedy such as an appeal is not a bar to an application for judicial review.

Judicial Review is a procedure for a speedy and effective remedy for inquiry into decisions of inferior courts or tribunals acting in a quasi-judicial capacity or made pursuant to some enabling legislation in the exercise of their jurisdiction in excess or without jurisdiction. An appeal mechanism or alternative remedy may not grant the same speedy and effective remedy. An applicant in judicial review proceedings is not required or does not have to exhaust any alternative remedy. The Respondent's and the Interested Party's argument on this point therefore fails.

It was the Applicants ***forte*** that their application should succeed because the Respondent did not have an Impact Assessment Report as required by the Environmental Management and Coordination Act, 1999 (EMCA) so as to ensure that every person enjoys a clean and healthy environment, safeguards, and enhances the environment. Section 58 of the EMCA requires an impact assessment to be carried out in respect of the projects set out in the Second Schedule to the Act. Those projects described as "***General***" required to undergo an environmental impact assessment include:-

(a) an activity out of character with its surroundings;

(b) any structure of a scale not in keeping with its surroundings;

(c) major changes in land use.

The EMCA does not define either an ***activity out of character with its surroundings*** or lay down any guidelines as to a ***structure not in keeping its surrounding***, or what constitute major changes in land use.

According to the Replying Affidavit of David Nderitu Gichohi, the Respondent's Assistant Director in charge of Development Control, no Environmental Impact Assessment Report was submitted because in the opinion of the Respondent's City Planning and Architecture Department, no substantive alteration in the character of land (***L.R. No.*** 15065/27) or on contiguous land was to be used, occasioned, and that the Interested parties had demonstrated ability to internalize any externalities and once an Applicant for change of user had demonstrated an ability to internalize externalities, that is, not to interfere with other peoples enjoyment of land – then the purpose of an Impact Assessment Report is accomplished, and unless there is any other reason to refuse change of user, the Department recommends approval for change of user.

It seems to me therefore that in the absence of any challenge that the change of user and activity arising therefrom including the erection of structures in keeping with the land surroundings would change the character of the surrounding and in absence of major changes in the land use, the contention by the Respondent's Assistant Director In Charge of Development and Control that no environmental impact assessment report was called for is correct provided the Interested parties kept the development on the land to that approved, and in accordance with the conditions prescribed by the Respondent. It would be unlikely that the character of the subject land and contiguous lands would be adversely affected or would change at all by the change of user. The Applicant's contention on this ground also fails.

The Applicants also contended that approval for change of user granted by the Respondent to the Interested Party was contrary to the Respondents Local Development Plan, and Policy Paper prepared in 1979.

The Respondents' Assistant Director in Charge of Development Control answered this contention in paragraph 22 of his Replying Affidavit. He stated that the Local Development Plan referred to was

general in nature, and not specific in approach and that each application for change of user is considered in light of prevailing socio-economic considerations, and that City Planning is dynamic and not static, and cannot be tied to a policy paper of 1979.

Both the Applicants and the Respondents have a point, that in city and urban planning, there must be some benchmark upon which future physical planning of the City or urban centre revolves. That benchmark usually is founded upon a blue print paper, some Governments like the U.K. or U.S.A. refer to such major suggestions or proposals as "***White Paper"***. In Kenya we call them a "***Sessional paper***" it has a higher status than a "***Policy Paper."*** A sessional paper is usually tabled before Parliament, not for enactment, but for general information of the legislative arm of state showing the policy trend of the executive arm of government. Unless the Sessional Paper is translated into law by way of a Government Bill, or a Private Member's Bill, it remains a sessional paper. Like any other Policy Paper, it remains a policy paper. It is not law. It has no legal status. It is not a ground for supporting or founding an action in judicial review. Judicial review is about the exercise of legal authority or the non-exercise thereof. A Policy paper is no basis for such exercise or non exercise of such legal power. The Applicants' contention on this ground is equally misplaced.

The Applicants also contended that the Respondent was ***functus officio*** once it had issued its letter of 6-05-1999 to the Interested Party that its application dated 16-11-1998 for permission to change user of its land had been disapproved on the grounds that the property falls in an area with adequate planned centres for commercial development and on account of objections received from the residents of Langata South Road area.

Functus officio is a Latin term which means and connotes done and complete cannot be undone except by way of an appeal to a higher authority, legally established or constituted. The issue here is whether the letter of 6-05-1999 signed by one B.W. Mwaniki (Mrs) for the Director of City Planning and Architecture was the act or deed of a person with the legal competence to decide and convey the decision in her letter. The letter certainly was, an act of the Director City Planning and Architecture. It is perhaps a perfect answer, expected from that Department, the custodian and trustee of City Planning records, and authority on the physical development of the City of Nairobi.

However, according to the sworn statement of the Assistant Director in Charge of Development Control, at the City of Nairobi the letter of 6/05/1999 did not emanate from the Town Planning Committee, and that that Committee was not ***functus officio*** when it rendered its decision of 3-11-2000. The Assistant Director aforesaid also argued that even if the decision conveyed by Mrs Mwaniki the letter of 6/05/1999 emanated from a decision of the Committee, the said Committee is mandated to review its decision if it so desires after six months from the date on which the decision was rendered.

The decision conveyed by the letter of 6.05/1999 was not, and does not from the available material in the pleadings of parties herein support the proposition that the decision was made by the Respondent's Town Planning Committee and that being so, the said Committee could not have been ***functus officio*** when it made its decision of 3-11-2000. This leg of the Applicants case also falls by the way side.

By far the most important issues raised by the Applicants were firstly that the Applicants were not heard, particularly in respect of the amended application by the Interested Parties made on 5th April, 2000, and that consequently the said application was sneaked in fraudulently, and that the Respondent and/or the Interested parties, or both acted corruptly, in bad faith and unreasonably in granting permission to the Interested Party for change of user of the subject property.

In ordinary civil proceedings under the Civil Procedure Rules, allegations of fraud, (***Corruption is a form of fraud***), bad faith and unreasonableness are extremely weighty allegations, and must be specifically pleaded and proved. Their casual mention in judicial review proceedings does not lessen this stringent requirement. Bad faith connotes absence of confidence and trust or breach thereof, and unreasonableness connotes too, absence of reason, not based on, or in accord with either reason or good sense.

To determine whether the Respondent's Town Planning Committee in arriving at its decision to approve,

the change of user acted in bad faith or unreasonably we must and will look at all the circumstances which led to the decision in issue.

So far as the Interested Party was concerned, their application of 16-11-1998 had been emphatically rejected by the Respondent's letter of 6/05/1999. In the meantime, the Interested Parties must have pondered on their next course of action. Light came by the Respondent's letter of 26-01-1999 which directed the Applicants to submit their application through a registered Physical Planner in accordance with the Physical Planning Act 1996.

By an application date, marked **April, 2000**, the Interested Parties lodged an application for Change of User, through a Mr. E. Mairura Omwenga, Principal Consultant, Practicing (Registered Physical Planner). To my mind that application constituted the basis upon which in the ordinary course of operations by the Respondent's City Planning and Architecture Department's consideration and recommendation to approve or otherwise, the Application for change of user to the Town Planning Committee of the Respondent. It gave what in my view is a comprehensive basis for the change of user application; (the location, the developer, land tenure, a complete description of the subject land, access, services and utilities, the land use patterns, and proposed land use), the existing and proposed services, social harmony noise, fauna and flora in the area.

The application also considered the ***Revised Karen Langata Structure Plan and Rezoning of the Area*** approved by the Works and Town Planning Committee on 16-2-1979, and in particular policy on Location of Professional Offices, and noted that essentially the policy allowed for extension of user planning permission to include professional offices on residential properties.

In addition, the Works and Planning Committee by its meeting on 11-05-1988 also approved the rezoning of Karen-Langata to 0.2 hectares ($^{1/2}$ acres) and 0.4 hectares (1 acre) as per the plan, for development of one dwelling house per unit but not flats and maisonnetes, except for religious institutional development on not less than 20 acres of land.

The subject land is 2.4 acres, and therefore met zoning requirements of the said policy of 1979,and 1988 as approved by the Works and Planning Committee of the Respondent. That being the case, there is no basis for a conclusion such as that reached by the Applicants that the decision of the Respondent's Town Planning Committee was reached either in bad faith, or without reason or simply unreasonably. So long as a decision was reached on the basis of the application set out by the Physical Planner as recited above, it cannot be said to have been made in bad faith or without reason. I reject the Applicant's contention otherwise.

The second and final part of Applicants' case was that the Applicants were not heard, by the Planning Committee of the Respondents, and that the decision of the Respondents Planning Committee was not consonant with the provisions of the Physical Planning Act 1996 (***No. 6 of 1996***)

On the question of the right to be heard, I am of the view that the Applicants were accorded a hearing. The Applicants had no right of hearing before the Town Planning Committee, no member of the public usually has that privilege. If allowed to attend its sittings as either members of the press or interested public, the right is merely to be present and to hear, and not to be heard.

The reason is this. When the Town Planning Committee of the Respondents sits, it does not hold a public inquiry to which it solicits views from those in the gallery. It is deliberating the business of the City of Nairobi as elected representatives of the City. It assumes that the City officers, the public servants have done what the law requires of them before they seek the final imprimatur from the Committee to a particular course of action.

On the subject of change of user, the applicable law is the Physical Planning Act (***Chapter 286, laws of Kenya***) which came into force on 29-10-1998. Part V of the said Act devotes twelve sections to the question of Control of Development. Having regard to sections 32 (3) (b) (regard to health, amenities and convenience, Section 33 (3) (a) (being bound by any relevant regional or local physical development plan

approved by the Minister) and Section 36 (Environmental impact assessment to which I have already referred to above), I am satisfied that the Respondent did consider all these matters before making recommendations to the Town Planning Committee for approval.

In addition to compliance with the Physical Planning Act, the Respondents did also comply with the requirements of the consultation with the public who are likely to be adversely affected by the Change f User. The Respondents caused an advertisement to be placed in the local daily newspaper in the East African Standard of 11.03.1999 pursuant to which the 1st Applicant on behalf of the other Applicants wrote his objections on 24-02-2001, and earlier by the Applicants Advocates per their letter of 22-03-1999.

The Applicants were thus expressly given an opportunity to raise their objections, and the objections did reach the Respondent. There is no provision in the Physical Planning Act aforesaid, or the Local Government Act that a decision would only be valid if such or other objections raised are accepted. The purpose of the public notification is to sound public opinion, consider objections in accordance with established criteria in accordance with the applicable law, in this case, the Physical Planning Act, and where those criteria are met, the decision of the Town Planning Committee or other arm of a local authority, or the authority is concerned, is valid and legally binding upon the parties concerned, including those who objected to the application for permission for change of user being granted.

The Applicants were clearly heard per their own, and their Advocates written objections, and cannot be heard to say that they were denied a hearing. It is to be understood that their objections were evaluated against the Applicant's grounds and were rejected. I also reject the Applicant's contention that they were not heard.

Finally, and to the crux of the Application are the Applicants entitled to an order of certiorari?

An order of Certiorari as was very ably discussed in the Court of Appeal case of ***Kenya National Examinations Council –Vs- Njoroge and Others*** will lie to quash a decision of the Respondent or Respondents on the grounds of lack or absence or excess of jurisdiction. Having regard to the relevant provisions of the Physical Planning Act aforesaid, there is no provision of that Act or other relevant law which has been breached by the decision of the Respondent to grant permission to the Interested Party for the Change of user of its property from being purely residential to residential cum-commercial office. The Interested Party having fulfilled the conditions to which the approval was subject, there is no cause for impugning the decisions of the Respondent.

If I were to sumarise this long Ruling, I would say the following:-

(1) There was no fraudulent approval of the Interested Party's Application for Change of user of its land L.R. No. 15065/27 – Karen-Langata,

(2) The Town Planning Committee was not *functus officio* ***when it granted approval to the Change of User of the Interested Party's land aforesaid.***

(3) The Applicants were granted a hearing and were heard through their own written objections, and those of their Advocates. The Applicants had no right of audience before the Town Planning Committee which was conducting the ordinary business of the Respondent and was not conducting a public inquiry. The case of *BRIDGE –VS- BALDWIN* ***has no application to this situation.***

(4) The Respondent had regard to all the applicable provisions of the law, and in particular the Physical Planning Act.

(5) There was no basis of allegations of corruption and (*or fraud****). Such matters if they have substance should be matters of an ordinary civil suit where the Applicants could be subjected to cross-examination and strict proof of allegations of criminal impropriety on the part of officers of the Respondent without any basis.***

(6) Save for allegations of fraud and corruption the Applicants were entitled to come to a judicial review court notwithstanding the availability of other or alternative remedies;

(7) The Applicants failed to lodge a copy of the decision impugned, and their application ought to have been struck out on that ground alone.

(8) No order of Mandamus was prayed for and cannot therefore be granted. Sections 30 (4) (a) 38 of the Physical Planning Act is not dependent upon the quashing of a decision of the local authority, but rather an act of the local authority in accordance with those provisions of that Act.

For all those reasons I am satisfied that the Respondent acted in accordance with the due process of the applicable law, and the Applicants' Notice of Motion dated and filed on 14-06-2000 is incompetent and the same is dismissed with an order that each party bears its own costs. This is public interest litigation and the applicants representing the public interest should neither be deterred nor be burdened by an order of costs against them. There shall be orders accordingly.

I express regret that this being a judicial review application, a remedy intended to afford parties a speedy and effective determination of their grievances has taken over five (5) years to do so. It is no consolation, I realise that I am the third judge to hear and finally determine the matter.

Dated and delivered at Nairobi this 26th day of July, 2006.

ANYARA EMUKULE

JUDGE.