Fatania & 6 others v Nairobi City County Government; Greenview Developers Ltd (Interested Party) (Environment and Planning Judicial Review E005 of 2024) [2025] KEELC 4382 (KLR) (5 June 2025) (Judgment)

Neutral citation: [2025] KEELC 4382 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND PLANNING JUDICIAL REVIEW E005 OF 2024

AA OMOLLO, J

JUNE 5, 2025

BETWEEN

SURESH FATANIA & 6 OTHERS & 6 OTHERS & 6 OTHERS ..... APPLICANT

AND

THE NAIROBI CITY COUNTY GOVERNMENT ..... RESPONDENT

AND

GREENVIEW DEVELOPERS LTD ..... INTERESTED PARTY

JUDGMENT

1. The 1st -7th Applicants filed this judicial review vide notice of motion dated 23rd September 2024 seeking for the following orders:

    a. An Order of Certiorari to bring before the Environment and Land Court and quash the enforcement notices issued by the Respondent's Director of Planning and Compliance dated 3rd September, 2024 to the Applicants.

    b. An Order of Prohibition to bring before the Environment and Land Court and prohibit the Respondent, their agents, representatives or any other person acting notices under their instructions from proceeding with and effecting, the enforcement dated 3rd September, 2024 as against the Applicants.

    c. An Order of Prohibition to bring before the Environment and Land Court prohibiting the Respondent, their agents, representatives or any other person acting under their instructions and directions from proceeding with and effecting the enforcement notices dated 3rd September, 2024 as against the Applicants.

    d. Costs of these proceedings be provided for.

2. The motion was supported by the verifying affidavit of Kiran Kumar Patel attached to the chamber summons application dated 5th September 2024 and statement of facts of even date. The motion was premised on the grounds that on 3rd September 2024, the Respondent issued Enforcement Notices to the Applicants, instructing them to vacate their homes located on L.R. No. 1XX0/VIII/2X8 within seven days due to the alleged "occupation of unsafe townhouses."

3. The Applicants argue that the enforcement notice is illegal, as it does not meet the requirements outlined in Section 72 of the *Physical and Land Use Planning Act*, which mandates that the notice specify the development conducted without permission, the corrective actions to be taken, and the timeline for compliance. The Applicants have lived in the houses since 2016, and these properties were certified as safe by the Respondent.

4. The Applicants contend that the enforcement notice amounts to an eviction order without a fair hearing and is an unlawful violation of their property rights under Article 40 of *the Constitution* of Kenya. They seek a stay of the enforcement notice, as its implementation would cause irreversible harm and undermine their right to property. They assert that they have established a prima facie case, and the notice's enforcement is not in the public interest.

5. In their statement of facts, the Applicants reiterate the enforcement notice in subject infringes on their constitutional rights, particularly their right to property under Article 40 of *the Constitution* of Kenya, which protects individuals from arbitrary deprivation of property.

6. They contend that the notice's enforcement would interfere with their property rights and is contrary to the public interest. They further emphasize that the issuance of the enforcement notice does not meet the legal requirements, such as specifying unauthorized development or actions required to rectify the situation, making it illegal and unjustified.

7. The Respondent filed a replying affidavit sworn on 5th November 2024 by Wilfred W Masinde, its acting Deputy Director Planning Compliance and Enforcement. The affiant acknowledges the issuance of enforcement notices to the Applicants by the Nairobi County officers on 3rd September 2024, instructing them to vacate their homes due to the buildings being deemed unsafe for occupation.

8. That the decision followed a routine inspection in the Spring Valley area, where the officers identified the houses as being in a dilapidated condition and the purpose of the notice was to ensure the safety of the occupants and not to deprive the Applicants of their property rights. That it was a precautionary measure aimed at preventing potential harm, given the recent instances of building collapses in Nairobi.

9. The affiant stresses that it is the County's responsibility to enforce planning regulations and address hazardous buildings, asserting that the enforcement notice was issued in good faith and in the interest of public safety, in line with the County's mandate to protect its residents. Copies of the impugned enforcement notices were attached to the replying affidavit.

Submissions.

10. The Applicants filed submissions dated 27th January 2025 in support of their motion. They argue that the notices were issued unlawfully and procedurally flawed, as their developments had complied with all necessary legal requirements, including obtaining physical planning approvals and a certificate of occupation.

11. They cited the case of Republic vs Kenya National Examinations Council ex parte Gathenji and Pastoli vs Kabale District Local Government Council to support their position, emphasizing that judicial review orders, such as certiorari, can only quash decisions that are tainted with illegality, irrationality, or

procedural impropriety. The Applicants submit that the Respondent's decision lacked proper evidence to justify the claim of unsafe occupation and that the Applicants were not provided an opportunity to be heard, violating the principles of natural justice.

12. The Applicants further assert that the enforcement notice failed to meet the legal requirements stipulated in Section 72(1) of the Physical Planning and Land Use Planning Act, which mandates that notices be issued only when development permission has not been obtained or when conditions of development are violated. Since the Applicants had obtained the necessary approvals and complied with all regulations, the notices were issued in error.

13. They argue that the enforcement notices did not specify the alleged violations or corrective measures as required by law, indicating procedural malice and intent to deprive the Applicants of their property rights.

14. I have not found on record (CTS) submissions by the Respondent.

Analysis and determination:

15. I have read and considered the pleadings comprised in the Notice of Motion; the affidavits in support together with the statement of facts; the Replying Affidavit and the written submissions filed by the Applicants. Consequently, the issues framed for determination are two-fold;

    i. whether the enforcement notice was legal.

    ii. whether the Applicants were accorded an opportunity to be heard.

16. On the first issue, the Applicants have pleaded and submitted that the enforcement notice is illegal, as it does not meet the requirements outlined in Section 72 of the *Physical and Land Use Planning Act* which provides as follows;

> "
>
> "72. Enforcement notice
> (1)A county executive committee member shall serve the owner, occupier, agent or developer of property or land with an enforcement notice if it comes to the notice of that county executive committee member that—
>
> (a) a developer commences development on any land after the commencement of this Act without the required development permission having been obtained; or
>
> (b) any condition of a development permission granted under this Act has not been complied with.
>
> (2) An enforcement notice shall—
>
> (a)specify the development alleged to have been carried out without development permission or the conditions of the development permission alleged to have been contravened;
>
> (b)specify measures the developer shall take, the date on which the notice shall take effect, the period within which the measures shall be complied; and

(c)require within a specified period the demolition or alteration of any building or works or the discontinuance of any use of land or the construction of any building or the carrying out of any other activities.

(3) Where a person on whom an enforcement notice has been served is aggrieved by that notice, that person may appeal to the relevant County Physical and Land Use Planning Liaison Committee within fourteen days of being served with the notice and the committee shall hear and determine the appeal within thirty days of the appeal being filed.

(4) Any party aggrieved with the determination of the county physical and land use planning liaison committee may appeal to the court only on a matter of law and the court shall hear and determine the appeal within thirty days.

(5)A person who has been served with an enforcement notice and who refuses to comply with the provisions of that notice commits an offence and is liable on conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding two months or to both.

17. The distinction between judicial review and an appeal was discussed by the Court of Appeal in the case of Municipal Council of Mombasa v Republic & Umoja Consultants Ltd [2002] eKLR, where it stated;

> "Judicial review is concerned with the decision making process, not with the merit itself; the court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether the in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters.....The court should not act as a court of appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision".

18. Consequently, this court shall only limit itself to the process of issuing the enforcement notice in determining whether the Applicants were given an opportunity to be heard. This is by dint of the court's mandate being exercise of supervisory jurisdiction over the County Physical and Land Use Planning Liaison Committee, a quasi-judicial body within the legally established scope. That scope was aptly captured by the court in Pastoli v Kabale District Local Government Council & Others (2008) 2 EA 300 where the court held;

> "In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the

decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

19. In assessment of the grounds of judicial review relied on by the Applicants in their application, it anchors on procedural impropriety; that they were not given an opportunity to be heard. The Respondent did not contradict the averment that the enforcement notice was issued without the Applicants being heard.

20. The Respondent states that the enforcement notice was issued after a routine inspection in the Spring Valley area and identified the houses as being in a dilapidated condition. There is no mention that the persons carrying out the inspection conversed with the Applicants and pointed out the issues that were required of them to rectify.

21. The Applicants contend that the said houses were built after obtaining development approvals from the Respondent. Once the construction was completed, occupation certificates were obtained certifying them as safe. The Applicants annexed the permits issued by the Respondent with regard to the houses. I have looked at a copy of one of the enforcement notices and it does not specify the reasons why the houses are deemed unsafe. It stated thus, "occupation of unsafe house no. 1within Peponi Villa estate. Vacate the house no. 1."

22. In the case of Karanja (Suing as the Representative of the Estate of David Karanja Ng'ang'a) v Kiboinet t/a Sweetland Consultant Limited & 2 others (Environment & Land Case 45B of 2021) [2024] KEELC 3654 (KLR) the court held that;

> " The right to be heard is one of the cardinal rules established under the principle of natural justice and it is generally expressed as audi alteram partem (that a party should not be condemned unheard). However, this does not mean that a party must be heard in all circumstances or despite the circumstances. It only means that a party ought to be given the opportunity to present their case, and then it is up to that party to either utilise the opportunity or not."

23. Therefore, it is my opinion that the Respondent should have given the Applicants an explanation for the impugned notice taking into accounts the weight of its impact which required of them to vacate their homes within seven days. The right to a fair administrative action is provided for under article 47 of *the Constitution*. The status of fair administrative action in Kenya's constitutional and jurisprudential framework was discussed by Onguto, J in Kenya Human Rights Commission vs Non-Governmental Organizations Co-ordination Board [2016] eKLR a case in which the powers of the same Respondent were in question. The learned Judge (may his soul RIP) expressed himself inter alia as follows:

> " As to what constitutes fair administrative action, the court in President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others (CCT16/98) 2000 (1) SA 1, stated thus:
>
> "Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of

power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades..." [Emphasis supplied]

Thus, a person whose interests and rights are likely to be affected by an administrative action has a reasonable expectation that they will be given a hearing before any adverse action is taken as well as reasons for the adverse administrative action as provided under Article 47 (2) of *the Constitution*. Generally, one expects that all the precepts of natural justices are to be observed before a decision affecting his substantive rights or interest is reached. It is however also clear that in exercising its powers to superintend bodies and tribunals with a view to ensuring that Article 47 is promoted the court is not limited to the traditional judicial review grounds. The *Fair Administrative Action Act*, 2015 must be viewed in that light.

The Petitioner also alleges violation of its right to fair hearing. Article 50(1) of *the Constitution* makes provision for fair hearing. The Article is to the effect that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

The right to fair hearing is evidently closely intertwined with fair administrative action. The often-cited case of Ridge vs. Baldwin [1964] AC 40 restated the right to fair hearing as a rule of universal application in the case of administrative acts or decisions affecting rights. In his speech to the House of Lords in 1911, Lord Loreburn aptly put is as a 'duty lying upon everyone who decides anything' that may adversely affect legal rights.

Halsbury Laws of England, 5th Edition 2010 Vol. 61 at para 639 on the right to be heard states that:

"The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alteram partem rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court."

I would state that it now appears that the court, effectively has a duty to look into not only the merits and legality of the decision made due to the requirement of "reasonable" action under Article 47, but also the process and procedure adopted due to the requirement of following all precepts of natural justice under both Articles 47 and 50 (1) of *the Constitution*. The court proceeding under Article 47 of *the Constitution* is expected not only to pore over the process but also ensure that in substance there is justice to the petitioner. The traditional common law principles of judicial review are, in other words, not the only decisive factor.

It may sound like stretching the precincts of traditional judicial review, but clearly by *the Constitution* providing for a "reasonable" administrative action and also enjoining decision makers to provide reasons, the constitutional scheme was to entrench the blazing trend where courts were already going into merits of decisions by innovatively applying such principles like proportionality and legitimate expectation. I must however confess that the

line appears pretty thin and, perhaps, more discourse is required on the subject of traditional judicial review and the now entrenched substantive constitutional judicial review."

24. Thus, the Respondent having approved the construction of the houses it now declared unsafe had a duty to act fairly. It failed to do so in issuing the enforcement action against the Applicants without stating reasons for the decision in accordance with article 47(2) of *the Constitution*.

> " If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action."

25. With regard to whether the prayers sought should be granted, in the case of Republic v Public Procurement Administrative Review Board & 2 Others Ex Parte Rongo University [2018] Eklr it was held that;

> " the grant of orders of certiorari, mandamus and prohibition is discretionary. The court is entitled to take into account the nature of the process against which judicial review is sought and satisfy itself that there is reasonable basis to justify the orders sought."

26. It is my view and I so hold that in this case, grant of the orders sought would be efficacious and more importantly promote the principles of justice specifically guarantee that every person has the right to a fair hearing as enshrined in Article 50(1) and right to enjoy their property as granted in article 40 of *the Constitution*. These rights should not be violated without reasons and or justifications and which in this case has not been provided by the Respondent. Though the Respondent has the mandate to ensure compliance with planning matters and therefore issue notices to safeguard occupants must exercise such powers procedurally within the law.

27. Therefore, having acted in excess of its powers, this court does grant the orders sought to undo the illegality. The application is allowed and the following reliefs issued:

    a. An Order of Certiorari is issued quashing the enforcement notices issued by the Respondent's Director of Planning and Compliance dated 3rd September, 2024 to the Applicants.

    b. An Order of Prohibition is granted prohibiting the Respondent, their agents, representatives or any other person acting under their instructions from proceeding with and effecting the enforcement notices dated 3rd September, 2024 as against the Applicants.

    c. Costs of these proceedings to the Applicants.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF JUNE, 2025

A. OMOLLO

JUDGE