Gatabaki & 2 others (Suing as the Administrators of the Estate of the Late Dr. Samuel Mundati Gatabaki) v Director Planning Compliance & Enforcement, Nairobi City County Government (Environment and Land Judicial Review Case 3 of 2023) [2024] KEELC 3734 (KLR) (6 May 2024) (Judgment)

Neutral citation: [2024] KEELC 3734 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 3 OF 2023

JO MBOYA, J

MAY 6, 2024

[FORMERLY HCJR NO. E113 OF 2023]

BETWEEN

NANCY WANJA GATABAKI, JOSEPHINE BEATRICE GATHONI GATABAKI, AND SUSAN ESTHER WANGARI GATABAKI (SUING AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE DR. SAMUEL MUNDATI GATABAKI) ..... EXPARTE APPLICANT

AND

THE DIRECTOR PLANNING COMPLIANCE & ENFORCEMENT, NAIROBI CITY COUNTY GOVERNMENT ..... RESPONDENT

JUDGMENT

Introduction and Backkground

1. The Ex-parte Applicant herein who claims to be the lawful and legitimate proprietor of L.R No. 5980/1 [hereinafter referred to as the suit property] filed chamber summons application seeking for leave to commence Judicial Review proceedings in the nature of certiorari, prohibition and mandamus pertaining to and concerning the Enforcement Notice dated the 16th October 2023.

2. Pursuant to and upon the filing of the chamber summons application, same [Chamber Summons A pplication] was placed before this Honourable court on the 8th November 2023, whereupon the court proceeded to and granted a plethora of reliefs in favor of the Ex-Parte Applicant.

3. For coherence, the Honorable court granted Leave to and in favor of the Ex-Parte Applicant to take out and/or file Judicial Review proceedings in the nature of Certiorari, Prohibition and Mandamus. Furthermore, the court also directed that the Leave granted shall operate as an order of stay in respect

of the impugned Enforcement Notice, pending the hearing and determination of the substantive application.

4. Arising from the Leave [details in terms of the preceding paragraphs], the Ex-parte Applicant proceeded to and filed the substantive Notice of Motion Application dated the 20th November 2023 and in respect of which same [Ex-parte Applicant] has sought for the following reliefs;

   i. An order of Certiorari to remove into this court for purposes of being quashed the decision of the director Planning, Compliance and Enforcement, Nairobi City Council either directly or insubordinate persons acting in accordance with the general or specific instructions to forcefully remove the Ex-parte Applicants from all that parcel of land known as L.R No. 5980/1 situate at Kiambu Road, within Nairobi City County and the demolition of all permanent and semi-permanent structures installed thereon including but not limited to a petrol station, a car buzzer, a wine and spirit shop, a car wash and a car garage and all other assets belonging to the Ex-parte Applicant situated thereon.

   ii. An order of prohibition to issue prohibiting the Respondent from proceeding with the forceful Evictions of the Applicants from all that parcel of land.

   iii. That an order of Mandamus directed to the Respondent to act in accordance with the law and *the Constitution* of Kenya and to desist and/or vacate from the issue of determination of ownership of the land parcel number L.R 5980/1 situate along Kiambu Road within Nairobi City County vide the Enforcement Notice dated the 16th October 2023.

   iv. The costs of this Application be granted to the Ex-parte Applicants.

5. The substantive Notice of Motion before the court is premised on various grounds which have been enumerated at the foot thereof. Furthermore, the substantive application is [sic] indicated to be supported by the supporting affidavit of Nancy Wanja Gatabaki sworn on the 20th November 2023.

6. Be that as it may, it is instructive to point out that a substantive Notice of Motion Application, [like the one beforehand] is ordinarily not supported by a supporting affidavit. On the contrary, such an application is ordinarily premised on the statement of facts and the affidavit in verification of statement of facts filed alongside the chamber summons application for leave.

7. First forward, upon being served with the substantive application, the Respondent herein filed a Notice of preliminary objection dated the 16th November 2023; and in respect of which same [Respondent] contended that the Application beforehand was not only premature and misconceived, but that the Honorable court was also divested of the requisite jurisdiction to entertain same [application].

8. Suffice it to point out that the application beforehand came up for directions on the 6th February 2024 whereupon the Parties [Advocates for the Parties] covenanted to canvass bot the Application and the Notice of Preliminary objection simultaneously. In this regard, the court thereafter proceeded to and indeed issued directions to the effect that the application and the preliminary objection be canvassed and disposed of simultaneously.

9. Furthermore, the court also ventured forward and directed that the application and the preliminary objection be canvassed by way of written submissions, to filed and exchanged by the parties within circumscribed timeline.

10. Arising from the foregoing, the Ex-parte Applicant herein proceeded to and indeed filed written submissions dated the 21st February 2023 [which essentially should be the 21st February 2024]; whilst the Respondent filed written submissions dated the 14th March 2024.

11. For coherence, both sets of written submissions [details in terms of the preceding paragraphs] forms part of the record of the court.

Parties' Submissions:

a. Ex-party Applicants' Submissions:

12. The Ex-parte herein filed written submissions dated the 21st February 2023 [which essentially should be 21st February 2024] and in respect of which same has adopted the contents of the statement of facts; the affidavit in verification of the statement of facts; the grounds at the foot of the substantive application as well as the supporting affidavit thereto.

13. Furthermore, learned counsel for the Ex-parte Applicant has thereafter proceeded to and highlighted two [2] salient issues for consideration and determination by the Honourable court.

14. Firstly, learned counsel for the Ex-parte Applicants has submitted that the dispute [issue] before the court touches on and concerns land use planning and title to land, which falls within the Jurisdiction of the Environment and Land Court. In this regard, learned counsel for the Ex-parte Applicant has invited the court to take cognizance of the provisions of Article 162 [2][b] of *the Constitution* 2010; as read together with Section 13[2] of the *Environment and Land Court Act*, 2011.

15. Other than the foregoing, learned counsel for the Ex-parte Applicants has also submitted that there is an aspect of the dispute beforehand that touches on Eviction of the Ex-parte Applicants from the suit property, which forms the Ex-parte Applicants' place of abode [domicile]. In this respect, learned counsel for the Ex-parte Applicant has submitted that the impugned Enforcement Notice is intended to foster eviction, which does not fall within the mandate of the Respondent.

16. Arising from the foregoing, learned counsel for the Ex-parte Applicant has therefore submitted that the Honorable court herein [Environment and Land Court], is seized and bestowed with the requisite Jurisdiction to entertain and adjudicate upon the subject dispute.

17. To buttress the foregoing submissions, learned counsel for the Ex-parte Applicants has cited and relied upon inter=alia, the case of Dominic G Nganga & another vs Director General, National environment Management Authority & 4 Others [2020]eKLR; John Kabukuru Kibicho & Another vs County Government of Nakuru & 2 Others [2016]eKLR; Depar Ltd vs County Executive Committee Member for Lands, Housing, Physical Plain, Housing [2021]eKLR; Republic vs Kombo & 3 Others Ex-party Applicant [2008] 3KLR 478; Agatha Geruto Kimaswayi v Attorney general and 3 other and Taib Investment Ltd vs Fahim Salim Saaid & 5 Others [2016]eKLR, respectively.

18. Secondly, learned counsel for the Ex-parte Applicants has submitted that the impugned Enforcement Notice, which was issued by the Respondent herein was not only illegal and unlawful, but same was/ is ultra vires and thus same ought to be nullified by the court.

19. Furthermore, learned counsel for the Ex-Applicant has contended that the Respondent herein failed to accord the Ex-parte Applicant an opportunity to be heard, as pertains to the developments situate on the suit property and occupation thereof, prior to the issuance of the impugned Enforcement Notice.

20. Additionally, it was the submissions of learned counsel for the Ex-parte Applicant that the impugned Enforcement Notice did not grant to and/or afford the Ex-parte Applicant an opportunity to challenge same [Enforcement notice] before any established forum and/or before the court, or at all.

21. Arising from the foregoing, learned counsel for the Ex-parte Applicant has therefore submitted that the impugned notices is wrought and replete of illegalities, irrationality and procedural impropriety; which thus vitiate the validity of the Enforcement Notice.

22. Premised on the foregoing, learned counsel for the Ex-parte Applicant has thus invited the Honourable court to find and hold that the Ex-parte Applicants have placed before the court and/or demonstrated the requisite basis to warrant the grant of the orders of Judicial Review in the nature of certiorari, prohibition and mandamus, in the manner sought at the foot of the substantive Notice of Motion.

23. To this end, learned counsel for the Ex-parte Applicants has cited and relied on inter-alia, the holding in the case of Municipal Council of Mombasa vs Republic, Ex-party Umoja Consultant Ltd [2007]eKLR ; Pastoli vs Kabale District Local Government Council & Others [2008]2EA and Republic vs Kenya National Examination Council ex-party Geoffrey Gathenji & Others [1996]eKLR, respectively.

24. Finally, learned counsel for the Ex-parte Applicants has submitted that the Respondent herein being a State Organ is subject to *the Constitution* and the Rule of Law and hence same ought to abide by and observe the Due process of the law.

25. In a nutshell, learned counsel for the Ex-parte Applicants has thus invited the Honourable court to find and hold that the facts attendant to the subject matter warrants the grant and/or issuance of the orders of Judicial Review sought.

26. Furthermore, learned counsel for the Ex-parte Applicants has also invited the court to proceed and grant costs of the suit [substantive notice of motion] unto the Ex-Parte Applicant.

b. Respondents' Submissions:

27. The Respondent herein filed written submissions dated the 14th March 2024; and in respect of which same [Respondent] has raised, highlighted and canvassed three [3] issues for consideration by the Honourable court.

28. First and foremost, learned counsel for the Respondent has submitted that the dispute before hand touches on and concerns an Enforcement Notice which was issued by the Respondent on the 16th October 2023; and hence, any challenge to the said Enforcement Notice ought to have been mounted in accordance with the provisions of Section 72 of the *Physical and Land Use Planning Act*, 2019

29. In particular, learned counsel submitted that by dint of the provisions of the *Physical and Land Use Planning Act*, 2019, it was incumbent upon the Ex-parte Applicant to lodge an appeal before the County Physical and Land Use Planning Liaison Committee and not to approach the Jurisdiction of the court.

30. Premised on the foregoing, learned counsel for the Respondent has submitted that where there is established a dispute resolution mechanism vide statute, then it behooves any Party [the Ex-parte Applicants not excepted] to exhaust the established mechanism before approaching the seat of Justice.

31. In short, learned counsel for the Respondent has invited the court to find and hold that the suit/ proceedings beforehand are prohibited by dint of the Doctrine of exhaustion.

32. In support of the foregoing submissions, learned counsel for the Respondent has cited and relied upon inter-alia the holding in the case of Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & Others [2012]eKLR, County Government of Turkana vs National Land Commission &

Another [2019]eKLR and Secretary, County Public Service Board & Another vs Hulbhai Gedi Abdille [2017]eKLR, respectively.

33. Secondly, learned counsel for the Respondent has submitted that the proceedings beforehand, which have [sic] been taken contrary to Section 72 [3] of the *Physical and Land Use Planning Act*, 2019, constitutes and amounts to an abuse of the due process of the court.

34. Thirdly, learned counsel for the Respondent has also submitted that the suit property, which is the subject of the instant proceedings does not belong to the Ex-parte Applicants and hence, the Ex-parte Applicants do not have any lawful rights to and in respect thereto.

35. In particular, learned counsel for the Respondent has submitted that there is evidence that the suit property, namely, L.R No. 5980/1, was set aside and was to be surrendered to the Government of Kenya free of charge. In this regard, counsel has contended that insofar as the suit property was set aside for surrender, the Ex-parte Applicants herein stands divested on any rights to and in respect of the suit property.

36. Alternatively, learned counsel for the Respondent has also submitted that the suit property herein was also [sic] sold to Muga Developers Limited and was subsequently the subject of proceedings vide Nairobi HCC No. 252 of 2011 and hence the Ex-parte Applicants herein cannot be heard to lay a claim to and in respect of the suit property.

37. Owing to the foregoing, learned counsel for the Respondent has therefore invited the court to find and hold that the Ex-parte Applicants herein are not seized of and or bestowed with any legitimate rights to and in respect of the suit property, capable of being vindicated vide the current Judicial Review proceedings.

38. Learned counsel for the Respondent has added that Judicial Review orders [like the ones beforehand] are discretionary in nature and hence same ought not to be granted where the conduct of a Party is less then equitable.

39. To support the foregoing submissions, learned counsel has cited and relied on inter-alia the case of Alice Anyanzua vs Kwhisero Land Dispute Tribunal & 2 Others [2018]eKLR and Republic vs Chief Magistrate, Milimani Commercial Court and 2 Others ; Ex-parte Fredrick Bett [2022]eKLR, respectively.

40. In a nutshell, learned counsel for the Respondent has therefore implored the Honourable court to find and hold that the subject proceedings are not only premature and misconceived; but same are also devoid of merits.

41. Consequently and in this regard, the court has been invited to dismiss the suit [proceedings] with costs to the Respondent.

Issue For Determination:

42. Having appraised [reviewed] the contents of the substantive Notice of Motion; as well as the Notice of Preliminary objection filed in response thereto; and having considered the written submissions filed by and on behalf of the Parties, the following issues do crystalize [emerge] and are thus worthy of determination;

    i. Whether this Honorable court is seized and/or possessed of the requisite Jurisdiction to entertain and/or adjudicate upon the subject proceedings.

ii. Whether the Ex-parte Applicants have placed before the court sufficient material to warrant the grant [issuance] of the orders sought or otherwise.

iii. What reliefs, if any; ought to be granted.

Analysis And Determination

Issue Number 1 Whether this Honorable court is seized and/or possessed of the requisite jurisdiction to entertain and/or adjudicate upon the subject proceedings.

43. The learned counsel for the Respondent filed and/or took out a Notice of preliminary objection dated the 16th November 2023 and wherein same [Respondent] has contended that the Enforcement Notice beforehand, ought to have been challenged in accordance with the provisions of Section 72[3] of the *Physical and Land Use Planning Act*, 2019.

44. Furthermore, learned counsel for the Respondent has submitted that any person, the Ex-parte Applicants not excepted, were obliged to file an Appeal before the County Planning Liaison Committee and not to approach the court in the first instance.

45. Pertinently, learned counsel for the Respondent has highlighted the import and tenor of the Doctrine of exhaustion and thereafter invited the Honourable court to find and hold that the Ex-parte Applicants herein have failed to exhaust all the remedies prescribed under the law. In this respect, counsel has thus contended that the suit beforehand is premature and misconceived.

46. On the other hand, learned counsel for the Ex-parte Applicants has submitted that the issue beforehand touches on and concerns Land Use and Planning as well as ownership to land and hence, the dispute falls with the Jurisdiction of the court [Environment and Land Court] and not otherwise

47. Additionally, learned counsel for the Ex-parte Applicants has also submitted that the Enforcement Notice under reference also touches on and concerns unlawful eviction of the Ex-parte Applicants from the suit property, wherein the Ex-parte Applicants reside and/or domicile.

48. Arising from the foregoing, learned counsel for the Ex-parte Applicants has thus contended that the issues raised at the foot of the Enforcement Notice, falls squarely within the mandate and Jurisdiction of the court [Environment and Land Court] and thus the court ought to assume jurisdiction and to entertain the suit, with a view to vindicating the Ex-parte Applicants Fundamental rights and freedoms.

49. Having considered the rival submissions by and on behalf of the respective parties, I beg to take the following position;

50. Firstly, there is no gainsaying that the Environment and Land Court is seized of and clothed with the requisite Jurisdiction to entertain and adjudicate upon all matters concerning land use and planning, land administration and management as well as title to land. [See the Provisions of Article 162[2][b] of *the Constitution* 2010; as read together with the provisions of Section 13[2] of the *Environment and Land Court Act*, 2011].

51. On the other hand, it is also important to point out that even though the Environment and Land Court is vested with the requisite jurisdiction and mandate to entertain the various dispute[s], in terms of the various provisions alluded to herein before, it is important to observe that the Doctrine of exhaustion, has been found and held to be a sound Doctrine and principle of the law. [See Republic vs NEMA Ex-party Sound Equipment Ltd [2011]eKLR; Geoffrey Gathenji & Others vs Stanley Munga Henry & Others [2015]eKLR and Bethwel Allon Omondi Okal vs Telcom Kenya Ltd [2017]Eklr], respectively.

52. On the other hand, it is not lost on this court that even though the Doctrine of exhaustion is a sound doctrine and has variously been adopted and relied on by the court, there are instances where the court has found that a party, the Ex-parte Applicants herein not excepted, can access the Jurisdiction of the court, without recourse to the existing dispute resolution mechanism provided for under an Act of Parliament.

53. Arising from the foregoing, the question that this court must therefore engage with is whether or not the existence of an alternative dispute resolution mechanism, namely, an appeal to the County Physical and Planning Liaison Committee, deprives and/or divest the court of the requisite Jurisdiction, either in the manner contended by the Respondent or otherwise.

54. To my mind, the existence of an alternative dispute resolution mechanism, including an appeal to the County Physical and Planning Liaison Committee, does not deprive the court of the requisite Jurisdiction. In this regard, the submissions by learned counsel for the Respondent that this court has no Jurisdiction to entertain the subject proceedings is erroneous and misleading.

55. To the contrary, the correct legal position is that the existence of alternative dispute resolution mechanism under statute only postpones the invocation of the Jurisdiction of the court, but does not deprive the court of the requisite Jurisdiction. For good measure, the existence of an alternative dispute resolution mechanism makes the court a port of last resort and not the port of first call. [See Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] Eklr].

56. On the other hand, it is also settled law that even where there exist[s] an alternative dispute resolution mechanism, a party [the Ex-parte Applicant not excepted] can still approach a court of law, if the circumstances of the case are such that an effective and efficacious remedy can only be procured before the court and not otherwise.

57. Nevertheless, it suffices to point out that in such a scenario, [details in terms of the preceding paragraph], the claimant must implead and establish the peculiar and exceptional circumstances underpinning the direct invocation of the Jurisdiction of the court. [See William Odhiambo Ramogi & 2 others -v- Attorney General & 6 Others, Mombasa High Court Petition No.159 of 2018 [2020] eKLR].

58. Guided by the principles which I have highlighted herein before, it is my finding and holding that even though there does exists an alternative dispute resolution mechanism under Section 72[3] of the *Physical and Land Use Planning Act*, 2019; there exists exceptional and peculiar circumstances that takes the subject matter outside the scope and mandate of the County Physical and Planning Liaison Committee.

59. To start with, the impugned Enforcement Notice dated the 16th October 2023 did not grant to the Ex-parte Applicants any opportunity and/or latitude within which to ventilate their grievances, [if any] to the County Physical and Planning Liaison Committee or at all.

60. Suffice it to point out that the impugned Enforcement Notice intimated to the Ex-parte Applicants that same were obligated to remove [sic] the illegal structures and to vacate the suit land with immediate effect. Surely, such kind of a notice breaches and violates the Ex-parte Applicants' constitutional rights to Fair Administrative Action.[See Article 47 of *the Constitution* 2010].

61. Secondly, the impugned Enforcement notice also indicated that though the Ex-parte Applicant had a right to approach the County Physical and Planning Liaison Committee, however same had zero days, to exercise such right. In this regard, it is evident that the impugned enforcement notice deprived and

denied the Ex-parte Applicants of their Right of access to Justice. [See Article 48 of *the Constitution* 2010].

62. Thirdly, it is also evident from the face of the impugned Enforcement Notice that the Respondent herein was also desirous to evict the Ex-parte Applicants from the suit property, which arguably belongs to the Ex-parte Applicants.

63. Pertinently, the question that does arise is whether the Respondent herein has the legal mandate and/ or competence to undertake Eviction or at all.

64. Additionally, it is not lost on the court that even if the Respondent had the competence to issue a vacation [eviction notice] [which is not the case], then same needed to comply with the provisions of the law underpinning [sic] eviction. See Section 152 of The *Land Act*, 2012 [2016].

65. Lastly, I hold the view that given the gravity of the issues raised at the foot of the Enforcement notice and the consequences that were to arise therefrom and coupled with the evident breach of the Ex-parte Applicants rights of access to justice, it would not have been appropriate for the Ex-parte Applicants to approach the County Physical and Planning Liaison Committee, in the manner contended by the Respondent.

66. At any rate, it is not lost on the court that the County Physical and Planning Liaison Committee, not being a court of law, could not issue an injunction or conservatory order or otherwise.

67. Furthermore, the issues that underpin the subject suit hinge on breach and/or violation of various Constitutional rights and thus the Ex-parte Applicants rightfully chose to approach the Environment and Land court for the vindication and protection of their fundamental rights and freedoms. [see the provisions of Article 70 of *the Constitution*, 2010]

68. Before departing from the subject issue, it is appropriate to highlight and take cognizance of the holding of the Supreme Court [the apex court] in the case of *Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) (Petition E007 of 2023*) [2023] KESC 113 (KLR) (28 December 2023) (Judgment), where the court stated and held as hereunder;

> 100. In addressing the conundrum placed before us, we must remind ourselves that, what is in dispute before this Court is the applicability of these provisions to the appellant's claim and not the true meaning of the provisions of either EMCA or the *Energy Act*. This is because the provisions of EMCA or the *Energy Act* do not expressly oust the jurisdiction of the ELC in respect of the procedure for the determination of disputes that involve the management of the environment or issues of petroleum and energy.
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> In the ordinary course of events, the ELC still has original jurisdiction over the matters that are handled by NEMA, unless such jurisdiction is specifically and expressly ousted in a constitutionally compliant manner. The same holds true for proceedings under the *Energy Act*. In so saying, we are persuaded by the finding of the Court of Appeal in Kenya Revenue Authority & 2 others vs Darasa Investments Ltd [2018] eKLR which held as follows:"What then, is the consequence, if any, of the respondent's failure to invoke the alternative remedies? As appreciated by the parties, availability of an alternative remedy is not a bar to judicial review proceedings. It is only in exceptional cases that the High Court can entertain judicial review proceedings where such alternative remedies are not exhausted.
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> This position is fortified by the decisions of this court in Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 Others [2017] eKLR and Kenya Revenue Authority & 5 others v Keroche Industries Limited CA No 2 of 2008.

Perhaps that is why the legislature at section 9(4) of the *Fair Administrative Action Act* stipulates that:"Notwithstanding subsection (3), the High Court or a subordinate court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.Our reading of the above provision reveals that contrary to the appellant's contention, the High Court or a subordinate court may on its own motion or pursuant to an application by the concerned party, exempt such a party from exhausting the alternative remedy."

101. Reference to the High Court above must be read mutatis mutandis with jurisdiction conferred on courts of equal status to it including the ELC. Section 9(2) of the *Fair Administrative Action Act*, we must add, provides that where there exist internal mechanisms for the resolution of a dispute, the court will not review the administrative action until the internal dispute mechanism has been exhausted. As we had earlier stated, in our view, that fact notwithstanding, there is nothing that precludes the adoption of a nuanced approach, that safeguards a litigant's right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms can offer. That is also why Section 9(4) of the *Fair Administrative Action Act* creates the exception that exhaustion of administrative remedies may be exempted by a court in the interest of justice upon application by an aggrieved party.

69. Furthermore, the court [Supreme Court] ventured forward and stated thus;

104. Having considered the above complaints, we reiterate our earlier finding in this judgment that the mandate and jurisdiction to determine these questions lie with the ELC under Articles 22, 23(3) and 162(2)(b) of *the Constitution* as read with Section 4(1) of the Environment and *Land Act*. We say so because neither the NET, EPRA nor EPT have the jurisdiction to determine alleged violations of *the Constitution*. That right to access the court for redress of alleged constitutional violations, should not be impeded or stifled in a manner that frustrates the enforcement of fundamental rights and freedoms. We say this persuaded by the elegant reasoning in William Odhiambo Ramogi & 3 others v Attorney General & 6 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR where the High Court [Achode (as she then was), Nyamweya (as she then was), & Ogola, JJ] stated: "In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court." [Emphasis ours].

70. Arising from the succinct exposition of the law discernable from the decision [supra], I find and hold that the Honorable court herein is seized and possessed of the requisite Jurisdiction to entertain the subject proceedings, which essentially seek the orders of Judicial Review.

71. On the other hand, I find and hold that the preliminary objection by and on behalf of the Respondent, which espouse[s] the position that this Honorable court was/is devoid of the requisite Jurisdiction to entertain the subject proceedings, is devoid of merits.

72. Simply put, my answer to issue number one [1] is that the Honorable court is seized of the requisite Jurisdiction to entertain and adjudicate upon the subject proceedings and hence I shall proceed to interrogate the merit[s] or otherwise of the substantive application.

Issue Number 2 Whether the Ex-parte Applicants have placed before the court sufficient material to warrant the grant [issuance] of the orders sought or otherwise.

73. It is instructive to note that the proceedings before the court touch on and/or concern the issuance of Judicial Review orders in the nature of certiorari, prohibition and mandamus, respectively.

74. To the extent that the proceedings before the court touch on and concerns the grant of orders of Judicial Review, it is imperative to state and point out that whoever seeks such orders must place before the court evidence to demonstrate that the actions by the Respondent, which are complained against are either ex-facie illegal, irrational and/or devoid of procedural impropriety.

75. Without belaboring the point, it suffices to point out that the circumstances under which the orders for Judicial Review can and often do issue were highlighted [elaborated] in the case of Pastoli vs Kabale Local Government Council [2008] 2EA, where the court stated and held thus;

> "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."

76. Other than the foregoing position, the parameters and contours to be satisfied before the orders for Judicial Review can issue were also discussed by the Court of Appeal in the case of Republic vs. Kenya National Examinations Council ex parte Gathenji & Others, Civil Appeal No. 266 of 1996 thus:

> That now brings us to the question we started with, namely, the efficacy and scope of mandamus, prohibition of certiorari. These remedies are only available against public bodies such as the Council in this case. What does an ORDER OF PROHIBITION do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice.
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> It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See HALSBURY'S LAW OF ENGLAND, 4th Edition, Vol.1 at pg.37 paragraph 128. When those principles are applied to the present case, the Council obviously has the power or jurisdiction to cancel the results of an examination. The question is how, not whether, that power is to be exercised. If the

Council of prohibition would be ineffectual against the conviction because such an order would not quash the conviction. The conviction could be quashed either on an appeal or by an order of certiorari.

The point we are making is that an order of prohibition is powerless against a decision which has already been made before such an order is issued. Such an order can only prevent the making of a decision. That, in our understanding, is the efficacy and scope of an order of prohibition. The next issue we must deal with is this: What is the scope and efficacy of an ORDER OF MANDAMUS? Once again we turn to HALSBURY'S LAW OF ENGLAND, 4th Edition Volume 1 at page 111 FROM PARAGRAPH 89.

That learned treatise says:-

> "The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual." At paragraph 90 headed "the mandate" it is stated:
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> "The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way."

77. Having taken into account the circumstances that must be considered before the orders of Judicial Review can issues and/or be granted, it is now apposite to venture forward and interrogate whether the Ex-parte Applicant[s] have met and/or satisfied the set threshold.

78. Firstly, there is no gainsaying that the impugned Enforcement notice did not grant to and in favor of the Ex-parte Applicants any reasonable timeline or at all, to undertake the offensive directions alluded to and enumerated in the body thereof.

79. Barring repetition, it is not lost on the court that the Respondent sought to have the Ex-parte Applicants to remove what [sic] were contended to be illegal structures forthwith. However, it is imperative to state that what was purported to be the illegal structures were indeed permanent developments inter-alia an operational Petrol [Gas] station.

80. To my mind, any administrative decision like the one beforehand, ought to abide by and comply with the Due process of the law which includes, inter-alia, issuance of reasonable notice.

81. As pertains to the ingredients that underpin the Concept of Due process, it suffices to cite, adopt and reiterate the holding of the Court of Appeal in the case of The Speaker, Kisumu County Assembly & Others vs The Clerk, Kisumu County Assembly Service Board & Others [2015]eKLR, where the court stated and held thus;

72. Due process is a fundamental aspect of the rule of law. Due process is the right to a fair hearing. The right to a fair hearing encapsulated in the audi alteram partem rule (no person should be condemned unheard) and founded on the well-established principles of natural justice, is not a privilege to be graciously accorded by courts or any quasi-judicial body to parties before them. As is clear from Articles 47 and 50 of our Constitution, it is a constitutional imperative.

73. Whereas the right to a fair hearing varies from one case to another depending on the subject of the matter in issue, its irreducible minimum is now well settled. In granting that right, the court or the administrative body or person concerned should not make it a charade by taking perfunctory actions for the sake of running through the motions to be seen to have complied with it. The person charged is entitled to what, in legal parlance is referred to as the right to "notice and hearing." That means he must be given written notice which must contain substantial information with sufficient details to enable him ascertain the nature of the allegations against him. The notice must also allow sufficient time to interrogate the allegations and seek legal counsel where necessary.

82. Secondly, the impugned Enforcement Notice also did not afford and/or grant to the Ex-parte Applicants any latitude to access a court of law or any other dispute resolution forum or at all. For coherence, the Respondent herein seem[s] to have imagined that same [Respondent] are above the law and that beyond same there is no other forum to vindicate the rights of the Ex-parte Applicants.

83. Surely, if the Respondent were alive to the provisions of the *Physical and Land Use Planning Act*, 2019 and Articles 10, 27, 47, 48 and 50 of *the Constitution* 2010; same would have availed the Ex-parte Applicants some latitude to pursue their right of access to Justice.

84. Other than the foregoing, there is also no gainsaying that the Respondent was also seeking to have the Ex-parte Applicant vacate their [Ex-parte Applicants'] own land, which is synonymous with eviction.

85. However, there is no gainsaying that the Respondent herein is not seized of the mandate and/or competence to issue an Eviction notice or at all. In any event, even where a particular body is seized of and invested with the right to issue an Eviction notice, the law requires reasonable timelines. [See Section 152 of The *land Act*, 2012[2016].

86. Arising from the foregoing, it is crystal clear that the impugned actions by and on behalf of the Respondent, were not only ultra vires but same were wrought with illegality, irrationality and procedural impropriety.

87. In the circumstances, it is my finding and holding that the Ex-parte Applicants herein have demonstrated and placed before the Honorable court credible evidence [basis] to warrant the issuance of designated orders.

88. At any rate, it is apposite to point out that the Respondent herein, like all state organs and officers, are obligated to adhere to and comply with the provisions of *the Constitution*. [See Article 10[1] and 19[2] of *the Constitution* 2010].

Issue Number 3 What reliefs, if any; ought to be granted.

89. Having found and held that the Ex-parte Applicants herein have indeed established and demonstrated the requisite circumstances to warrant the intervention of the court, the next question and/or issue relates to the nature of reliefs that ought to be granted.

90. Whilst discussing issue number two [2] herein above, the court has found and held that the impugned Enforcement notice is indeed wrought with illegalities and in any event was issued without due regard to the law and *the constitution*.

91. Simply put, the impugned enforcement notice was issued ultra vires.

92. Insofar as the impugned enforcement notice was issued ultra vires and in any event in contravention of various provisions of *the Constitution*, it then means that same [enforcement notice] cannot be left to stand. For good measure, same [enforcement notice] is a candidate for quashing.

93. Arising from the foregoing, I am duly convinced and persuaded that the Ex-parte Applicants are entitled to the order of certiorari, whose import and tenor is to quash a decision and/or administrative action, taken in excess of Jurisdiction and in contravention of the law.

94. Similarly, I am persuaded that the Respondent herein, who appears to have penchant for disregard of the law and *the Constitution* [taking into account] the contents of the impugned enforcement notice, may very well revert back and issue a similar enforcement notice. In this regard, it suffices to state that a prohibitory order is also merited.

95. Nevertheless, as concerns the prayer for mandamus, I am afraid that same is superfluous and academic. For good measure, once the impugned enforcement notice is quashed and a prohibitory order issued, then it means that the rights and interests of the Ex-parte Applicants are duly vindicated.

96. At any rate, it is not lost on the court that the import and tenor of the mandamus being sought is so elementary, insofar as all State organs and persons, the Respondent not excepted, are enjoined [obligated] to adhere to and comply with the law as well as *the constitution*.

97. Consequently, what shall be the purposes of an order by the court that the Respondent herein should comply with the law and *the constitution*, whilst discharging her statutory mandate and/or function; yet, that is an obligation that lies at the door step of all and sundry.

98. In my humble view, court orders are neither sought for nor issued in vanity. In this regard, I am not persuaded that an order for mandamus suffices to issue in favor of the Ex-parte Applicants, either as sought or at all.

Final Disposition:

99. Flowing from the discussion [details in terms of the preceding paragraphs] it must have become crystal clear that the Ex-parte Applicants herein have indeed proved and established that the impugned enforcement notice dated the 16th October 2023, was not only ultra vires, but was also illegal, irrational and wrought with procedural impropriety.

100. Conversely, it is also evident that the Notice of preliminary objection dated the 16th November 2023; propagated by and on behalf of the Respondent was/is misconceived and in any event devoid of merits.

101. Consequently and in view of the foregoing, the substantive Notice of Motion dated the 28th November 2023; be and is hereby allowed in the following terms;

    i. An order in the nature of Certiorari be and is hereby issued to remove into this court for purposes of being quashed the decision of the director Planning, Compliance and Enforcement, Nairobi City Council either directly or insubordinate persons acting in accordance with the general or specific instructions to forcefully remove the Ex-parte Applicants from all that parcel of land known as L.R No. 5980/1 situate at Kiambu Road, within Nairobi City County and the demolition of all permanent and semi-permanent

structures installed thereon including but not limited to a petrol station, a car bazzarr, a wine and spirit shop, a car wash and a car garage and all other assets belonging to the Ex-parte Applicant situated thereon.

ii. For the avoidance of doubt, the impugned Enforcement notice [details in terms of clause [1] hereof], be and is hereby quashed.

iii. An order in the nature of Prohibition be and is hereby issued prohibiting the Respondent from proceeding with [sic] the forceful demolitions of the structures on the suit property and evictions of the Applicants from all that parcel of land.

iv. The Preliminary objection dated the 16th November 2023 be and is hereby dismissed with costs to the Ex-parte Applicants.

v. Costs of the substantive Notice of Motion to be borne by the Respondent

vi. Any other order not expressly granted is hereby declined.

102. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF MAY, 2024.

OGUTTU MBOYA,

JUDGE.

In the presence of:

Benson – Court Assistant

Mr. Gatheru Gathemia and Mr. Patrick Ndambiri for the Ex-Parte Applicants.

Mr. Ntoogo for the Respondent.