



**Maina v Director, Physical & Land Use Planning,– Kiambu County Government & another (Petition E005 of 2022) [2024] KEELC 5120 (KLR) (4 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5120 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
PETITION E005 OF 2022**

**JG KEMEI, J**

**JULY 4, 2024**

**IN THE MATTER OF ARTICLES 291) & (4), 3(1), 10, 22, 23, 27, 28,  
40, 47, 50, 165(3), 258 & 259 OF THE CONSTITUTION OF KENYA  
IN THE MATTER OF CONTRAVENTION OF RIGHTS AND  
FUNDAMENTAL FREEDOMS UNDER ARTICLES 19, 20, 21,  
22, 23, 27, 28, 40, 47 & 50 OF THE CONSTITUTION OF KENYA**

**BETWEEN**

**SUSAN WANJIKU MAINA ..... PETITIONER**

**AND**

**DIRECTOR, PHYSICAL & LAND USE PLANNING,– KIAMBU COUNTY  
GOVERNMENT ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY EXECUTIVE, COMMITTEE MEMBER, LANDS, HOUSING,  
PHYSICAL PLANNING, MUNICIPAL ADMINISTRATION & URBAN  
DEVELOPMENT KIAMBU COUNTY GOVERNMENT ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Petitioner moved the Court by way of a Petition dated 15/5/2022 seeking the following orders:-
  - a. A declaration that the purported revocation of the Petitioner’s development permissions is unconstitutional and a violation of the Petitioner’s right to fair administrative action.
  - b. A declaration that Enforcement Notice No. 00776 dated 11<sup>th</sup> January 2022 directing the Petitioner to stop further construction and seek reapproval of development permissions is unconstitutional and a violation of the Petitioner’s right to fair administrative action.
  - c. A declaration that the failure by the Respondents to make available the statutory forum of adjudicating appeals against their impugned actions constitutes a violation of the Petitioner’s



right to fair administrative action that is expeditious, efficient, lawful and procedurally fair and her right to access justice.

- d. A Judicial Review order of CERTIORARI calling into this Court and quashing the entire decision issued by the Respondents vide Enforcement Notice No. 00776 dated 11<sup>th</sup> January 2022 directing the Petitioner to stop further construction and seek reapproval of development permissions.
  - e. A Judicial Review order of CERTIORARI calling into this Court and quashing the entire decision issued by the Respondents to cancel existing development approvals and permits issued to the Petitioner.
  - f. A Judicial Review order of PROHIBITION restraining the Respondents, by themselves or their agents from stopping or in any manner whatsoever interfering with ongoing construction works on LR No. RUIRU KIU BLOCK 3/2060 PLOT NO. 955 KAHAWA SUKARI.
  - g. Damages for violation of the Petitioner's constitutional rights.
  - h. Any other relief that the Court may deem fit to grant.
2. The Petitioner avers that she is the proprietor of Parcel No. Ruiru Kiu Block 3/2060 Plot No. 955 Kahawa Sukari upon which she is developing a 5 bedroomed massionette.
  3. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents are established directorate and offices under the Physical Planning and Land Use Act and Article 183 of Constitution of Kenya and Section 35 of County Government Act 2012 respectively in the County Government of Kiambu.
  4. The Petitioner has based her Petition on various provisions of *the Constitution* of Kenya to wit; Articles 2, 3, 10, 19, 20, 22, 23(1) (3), 27, 40, 43, 47, 47(2), 48, 50, 73, 163 (3), 165(3), 165(6), 232, 258 & 259.
  5. In addition, the Petitioner also cited the statutory provisions of Fair Administrative Actions Act and the Physical & Land Use Planning Act.
  6. The Petition is based on facts relied on and the alleged Constitutional provisions violated as well as the Affidavit in Support sworn on 17/5/2022.
  7. On 31/5/2024 the Petitioner in the absence of the Respondents elected to canvass the Petition by way of written submissions.
  8. The written submissions of the Petitioner were filed by the firm of Mbugua Nganga & Co. Advocates.
  9. The Petitioner avers that she received an enforcement notice No. 00776 on 11/1/2022 requiring her to immediately stop further development and seek development permission, despite having applied and obtained a development permit before for the construction of the 5 bedroomed massionette. That notwithstanding, the Petitioner resubmitted her architectural drawings for reapproval as required by the enforcement notice. That todate the Respondent has failed to respond to her resubmitted architectural plans.
  10. That the impugned enforcement notice revoked her development permission and construction permit stopping her approved construction works. Consequently her right to fair administrative action was breached by the Respondents in failing to: give adequate notice and reasons for the adverse action; avail opportunity to be heard and make representation before the adverse action was taken; give information material and evidence relied upon to make the decision or taking the administrative action; notify the Petitioner of any right to a review or internal appeal against the administrative decision; avail the



statutory forum for adjudicating appeals against their impugned actions since the Liaison Committee does not exist.

11. The Petitioner further submitted that the enforcement notice is unreasonable and ought to be reviewed for reasons that: the development was approved by the Respondents for the construction of a 5 bedroomed maisonette which means a flat with rooms on 2 floors within a building and that the Petitioner complied with the development permission and developed a 5-bedroom maisonette.
12. As to whether the Petitioner's rights were violated the Petitioner submitted in the affirmative.
13. That the Respondent with no notice or an opportunity to be heard revoked the development permission contrary to her right to fair administrative actions entrenched in Article 47 of *the Constitution* of Kenya read together with Section 4 of Fair Administrative Actions Act.
14. Relying on the case of Republic Vs. County Government of Laikipia Exparte Mohamed Asafa Woche [2020] eKLR, the Petitioner contended that the enforcement notice further violated her right to fair administrative action when the Respondents failed to provide an avenue for the Petitioner to appeal thus violating her right to be heard.
15. It was further submitted by the Petitioner that the actions of the Respondents were made at the behest of Kahawa Sukari Welfare Association and Kahawa Sukari Limited (third party) since the Respondents have abdicated their statutory functions to private entities unknown in law.
16. As to whether the Petitioner is entitled to the reliefs sought, the Petitioner argues that the enforcement notice and the decision to stop the construction is unconstitutional and a violation to her rights and urged the Court to quash it for the reasons that despite resubmission of approvals, the Respondents have ignored her letter dated 20/1/2022. That because of its silence the Petitioner submitted that she is entitled to the benefit of Section 58(6) of *Physical and Land Use Planning Act* (PLUPA) which states as follows:-

“Where an Applicant does not receive a written response for development permission within 60 days such permission shall be assumed to have been given in terms of this Act.”
17. That the Petitioner is entitled to Judicial Review order of prohibition restraining the Respondents by themselves or their agents from stopping or in any manner interfering with the construction of the house. The Court was urged to grant compensation thereof for the disruption which prejudiced her hence the prayer for damages for violation of her right in the sum of Kshs. 700,000/-.

### **Determination**

18. Having considered the Petition, the written submissions the key issue for determination is whether the Petition has merit.
19. It is not in dispute that the Respondents failed to controvert the Petition notwithstanding service of the same. That said the Petitioner retains the burden to proof her case and the burden is not lessened because the other side has not shown up for the legal contest.
20. It is not been disputed that the Petitioner is the registered owner of the suit land.
21. Given the above background, I shall now examine the constitutional provisions read together with the statutory provisions in the FAAA and PLUPA relevant to this case.



22. Article 47 of *the Constitution* states as follows:-

- “(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
2. 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.
3. Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
- (a) a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and (b) promote efficient administration.”

23. The constitutional provisions above have been codified in Section 4 of the Fair Administrative Actions Act as follows:-

- “1. Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
2. Every person has the right to be given written reasons for any administrative action that is taken against him.
3. Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-
- a. prior and adequate notice of the nature and reasons for the proposed administrative action;
- b. an opportunity to be heard and to make representations in that regard;
- c. notice of a right to a review or internal appeal against an administrative decision, where applicable;
- d. a statement of reasons pursuant to Section 6;
- e. notice of the right to legal representation, where applicable;
- f. notice of the right to cross-examine or where applicable; or
- g. information, materials and evidence to be relied upon in making the decision or taking the administrative action.
4. The administrator shall accord the person against whom administrative action is taken an opportunity to-
- a. attend proceedings, in person or in the company of an expert of his choice;
- b. be heard;
- c. cross-examine persons who give adverse evidence against him; and
- d. request for an adjournment of the proceedings, where necessary to ensure a fair hearing.



5. Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.
6. Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 41 of the Constitution, the administrator may act in accordance with that different.”
24. Section 2 of Fair Administrative Actions Act (FAA) defines administrative action as follows:-
- “Administrative action’ includes –
- (i) The powers, functions and duties exercised by authorities or quasi-judicial tribunals; or
  - (ii) Any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;
- ‘administrator’ means ‘a person who takes an administrative action or who makes an administrative decision.”
25. The Court agrees with the Petitioner that the enforcement notice is an administrative action within the meaning of Section 2 of Fair Administrative Actions Act. Section 4 of the FAAA provides that the administrative action ought to be such as is expeditious, efficient lawful and procedurally fair.
26. In the case of Kenya Human Rights Commission Vs. Non-Governmental Organisations Co-Ordination Board [2016] eKLR the Court stated as follows:-
- “The right to fair hearing is evidently closely intertwined with fair administrative action. The oft 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 it 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.”
27. The principles of natural justice were affirmed in the case of Local Government Board Vs Arlidge (1915) A.C 120, 132-133 where the Court held that;
- “...those whose duty it is to decide must act judicially. They must deal with the question referred to them without bias and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must come to the spirit and with the sense of responsibility of the tribunal whose duty it is to meet out justice”.



28. In the case of Sceneries Limited Vs National Land Commission (2017) eKLR, the Court held that;

“... Failure to give proper notice is in itself a denial of natural justice and fairness ...”

29. The PLUPA Act has built constitutional safeguards with respect to the right to a fair administrative action. It also laid down a framework to be followed in applying for development permission and equally a dispute resolution structure in the event of disputes between the body mandated to issue development permission and the development proponent (developer).

30. Section 57 of PUPA provides as follows;

(1)	A person shall not carry out development within a county without a development permission granted by the respective county executive committee member.
(2)	A person who commences any development without obtaining development permission 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.
(3)	A county executive committee member shall require a person who has commenced a development without obtaining development permission to restore the land on which the development is taking place to its original condition or as near to its original condition as is possible and that such restoration shall take place within ninety days.
(4)	Where a person who is required to do so fails to comply with the provisions of subsection (3), the relevant county executive committee member may undertake to restore the land as required and shall recover the cost of the restoration from the person required to undertake the restoration.



(5)	A county executive committee member may revoke development permission if the applicant has contravened any provision of this Act or conditions imposed on the development permission for any justifiable cause.
(6)	A county executive committee member may modify the conditions imposed on development permission where circumstances require it or for any justifiable cause.”

33. Section 58 of PLUPA details the procedure for applying for development permission, the documents, the uses to which the land shall be put, provision of easement if applicable and the population density among others.
34. It is the Petitioner’s case that she sought and obtained a building permit as shown by the notification of approval for architectural drawings for single dwelling dated 5/7/2021. On the said 5/7/2021 the Planning Department issued a letter of authority to commence construction. This letter also advised the Petitioner that her application had been assessed and found to be satisfactory for tabling in the forthcoming County Planning Technical Committee for approval and that in the meantime she was authorized to commence site preparation as she awaited for the final approval within 14 days. Sure to its word, the construction permit was approved and communicated to the Petitioner on 7/7/2021 with the necessary building approval conditions requiring the Petitioner to comply.
35. In all the 3 documents cited in paragraph 20 above the nature or type of the house being constructed was a 5 bedrooms maisonette on the suit land.
36. It has not been disputed that the Petitioner duly paid for the approvals to the Respondents and as well as to the estate Association as evidenced by the receipts on record issued by the County Government of Kiambu and the Kahawa Sukari Limited and Kahawa Sukari Residents Plot Owners Welfare Association for plan approval fees. It is not disputed that the suit land is situated within the larger Kahawa Sukari estate scheme.
37. It would appear that all was well until 11/1/2022 when the Petitioner was issued with an enforcement Notice No. S No. 00776 christened “2<sup>nd</sup> enforcement notice.” The Petitioner has not disclosed to this Court whether there was an earlier notice issued to her, suffice to state that this is the notice she is aggrieved with.
38. The impugned notice was issued on the grounds that the development was carried out contrary to Section 57(1) of the PLUPA and that the nature of the development on the ground was a multi-dwelling development without development permission contrary to PLUPA and the building code.
39. Further the impugned notice accused the Petitioner of developing upto 1<sup>st</sup> floor without development permission and required the Petitioner to; stop further construction immediately; seek development permission afresh; and thirdly failure to which she reinstates the ground to its original state. The notice indicates that it was served upon the foreman and pinned at the gate.



40. Following the issuance of the impugned notice the Petitioner penned a letter dated 20/1/2022 in the following terms:-

“PROPOSED DEVELOPMENT ON PLOT 3/2060

DR SUSAN MAINA

COMMENTS

- a. Our understanding is that the current approval is cancelled and hence this is a fresh approval.
- b. Submit a copy of As-built current
- c. Submit a second copy superimposing the new proposal on the As-built.
- d. Attach a copy of the Bye-laws clearing indicating with calculations abiding with zonal requirements (bye-law copies from our office or Kahawa Sukari office)
- e. Ensure that no works proceeds on that site until you get a fresh construction permit.

NOT APPROVED.

Sign ..... 20/01/22.”

41. Attached to the said impugned notice were the comments dated 20/1/2022 as follows:-

“Charles M. Mugambi

Sub-County Planner – Ruiru

Land, Housing, Physical Planning, Municipal Administration &

Urban Development

Box 2344-00900

Kiambu, Kenya

I refer to your letter dated 19<sup>th</sup> January 2022, Ref: KCG/LHPP/RRU/01/09/01.

I wish to state that I had already complied with the first requirement of the said notice (11.1.2022) which was “Stop further construction immediately.”

I hereby attach the architectural drawings addressing the second requirement which was “Kindly seek for development permission” for reapproval as per your letter dated 19.1.2022.

Thank you.

Dr. Susan Maina

CC:

Chairman Kahawa Sukari Residents Association

Subcounty Administrator – Ruiru

Director –LHPP

CECM –LHPPMAUD.”

42. The import of this letter dated 20/1/2022 is that the Respondent directed the Petitioner to seek reapprovals based on the as built structure on the ground.



43. In response the Petitioner wrote back to the Respondents informing it that she had complied with the stopping order in the impugned enforcement notice. Vide the letter dated 20/1/2022 the Petitioner attached architectural drawings seeking for development permission reapproval as per the letter of the County Government dated 19/1/2022. It is instructive to note that neither parties to this petition annexed this letter dated 19/1/2022 for the benefit of the court. The letter by the Petitioner dated 20/1/2022 is addressed to the Chairman Kahawa Sukari Residents Association.
44. It is the Petitioner's case that despite complying with resubmission of the architectural plans, the Respondents ignored, neglected and or refused to respond to her todate.
45. The Petitioner led unchallenged evidence that there was no notice or reasons supplied to her for the issuance of stoppage order. She reiterated that the development was a 2 storey building and had complied fully with the conditions of the building permit.
46. It is the Petitioners case that the absence of fair administrative action triggered the filing of the Petition on the basis that no prior and adequate notice was given for the administrative action. That the Petitioner was not given an opportunity to be heard as the Liaison Committee was nonexistent. In addition, that there was no evidence or material availed to the Petitioner, the basis of the decision or the basis of administrative action; there was no internal process of review afforded to the Petitioner.
47. The above grounds have undoubtedly not been controverted by the Respondents.
48. Section 72 of the PLUPA states as follows: -

“72.

- (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.”
49. The impugned notice states that the development is a multi-dwelling building without development permission and that the said building was constructed upto 1<sup>st</sup> floor without development permission. The Court finds that the reason for the issuance of the said impugned notice was disclosed in the said notice. A keen look at the development permission describes the house as a 5 bedroom massionette. The petitioner contends that a massionette is a construction with two floors. The fact that the Petitioner complied with the resubmission of the architectural plans shows that she understood what a multi dwelling development was.
50. Did the notice comply with the law? An enforcement notice under the Act should specify the development alleged to contravene the development permit. As stated under para 47 of this Judgment, it is clear that the notice was complaint in that respect. The said notice provided the petitioner with three measures to undertake; first, stoppage of the construction, secondly reapply for development permit and failure to the above reinstate the ground to its original state. Though the respondents specified the measures to be taken it failed to state the time frame within which the petitioner was to attend to the measures prescribed in the notice contrary to Section 72(1) (b) of the Act.
51. That notwithstanding the Petitioner indeed complied with the measures in a period of 9 days from the impugned enforcement notice by resubmitting the architectural drawings seeking development permission for reapproval as per the Respondent’s letter of 19/1/2022. By the time the suit was filed which was 4 months down the line the respondents had yet to respond to the petitioner.
52. The Court finds that the impugned notice did not give the Petitioner time to take measures to rectify the action complained of; even after partial compliance, the Respondent failed to communicate its decision on the resubmitted architectural drawings.
53. It is therefore the Petitioner’s submission that the lack of response from the Respondent prejudiced her and left her in the dark while the works had been stopped.
54. It is on record that by the time the Petitioner filed this Petition the Respondent was yet to operationalize the Liaison Committee thus the Petitioner was not provided with a forum for her dispute / grievance to be heard. Not affording the Petitioner the right to be heard therefore violated the principal of natural justice as guaranteed in Art 47 read together with Section 4 of the FAAA.
55. In the end I find that the Respondents actions were unlawful and unprocedural. The Respondent was obliged in law to afford the Petitioner time to take remedial actions by specifying the time in which those actions ought to have been taken. The impugned notice was not only general but open ended. In any event the Respondents failure to communicate their decision to the Petitioner following partial compliance was unprocedural and contrary to Section 4 of the Fair Administrative Actions Act.
56. With respect to orders of prohibition, the Court finds that this order may not serve any purpose given that the findings of the court on the impugned notice. For purposes of clarity, the Respondents retain their right to issue compliant notices under PLUPA if need be but are estopped from proceeding under the impugned notices.



57. The Petitioner has submitted that it suffered loss in the sum of Kshs. 700,000/- as damages for violation of the right to fair administrative action. The court finds that the Petitioner failed to particularise and proof the damages if any. This limb is disallowed.

### **Final orders for disposal**

58. Consequently, I find the Petition partially succeeds and I grant the following orders: -

- a. A declaration that the purported revocation of the Petitioner's development permissions is unconstitutional and a violation of the Petitioner's right to fair administrative action.
- b. A declaration that Enforcement Notice No. 00776 dated 11<sup>th</sup> January 2022 directing the Petitioner to stop further construction and seek reapproval of development permissions is unconstitutional and a violation of the Petitioner's right to fair administrative action.
- c. A declaration that the failure by the Respondents to make available the statutory forum of adjudicating appeals against their impugned actions constitutes a violation of the Petitioner's right to fair administrative action that is expeditious, efficient, lawful and procedurally fair and her right to access justice.
- d. A Judicial Review order of CERTIORARI calling into this Court and quashing the entire decision issued by the Respondents vide Enforcement Notice No. 00776 dated 11<sup>th</sup> January 2022 directing the Petitioner to stop further construction and seek reapproval of development permissions.
- e. An order of Judicial Review order of CERTIORARI calling into this Court and quashing the entire decision issued by the Respondents to cancel existing development approvals and permits issued to the Petitioner.
- f. An order of PROHIBITION is disallowed.
- g. Damages for violation of the Petitioner's constitutional rights is not proven. It is disallowed.
- h. I make no orders as to costs

59. Orders accordingly.

DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 4<sup>TH</sup> DAY OF JULY, 2024.

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Oreng'e for Petitioner

1<sup>st</sup> and 2<sup>nd</sup> Respondents – Absent but served

Court Assistants – Phyllis

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