REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL APPEAL NO. 86 OF 2019

ABDILLE ABDIAZIZ SABRIYE.....APPELLANT

VERSUS

NAIROBI CITY COUNTY.....RESPONDENT

JUDGEMENT

1. The background to this dispute is that the Appellant claims to be the owner of the shops erected on land reference number 36/II/66 ("the Suit Property") on 6th Street, Eastleigh Nairobi where he was operating his business. He claimed that in 2003 he obtained approvals from the Respondent to construct on the Suit Property and no notice was ever issued to him to stop the construction. That 16 years after completing the construction in accordance with the plans approved by the Respondent, it issued an enforcement notice dated 2/7/2019 notifying him that his shops should be removed or they would be demolished by the Respondent on the allegation that they were built on the road reserve without the Respondent's approval. He maintained that the shops did not encroach on the road reserve.

2. Upon service of the enforcement notice, the Appellant filed **Milimani CMC ELC Case No. 5109 of 2019** seeking a permanent injunction to restrain the Respondent from entering or interfering with his business on the Suit Property, or demolishing the building or evicting the Appellant or interfering with his quiet and peaceful occupation of the Suit Property.

3. Contemporaneously with the filing of the suit on 15/7/2019, the Appellant filed an application for injunction to restrain the Respondent from dealing with the Suit Property pending hearing and determination of his suit. The Respondent filed a notice of preliminary objection on 25/7/2019 on the grounds that under the Physical Planning Act, the court lacked jurisdiction the court lacked jurisdiction to entertain a claim on an enforcement notice and that the Appellant had failed to abide by the doctrine of exhaustion laid out in the Physical Planning Act in respect of the Respondent's enforcement notice dated 2/7/2019. The Respondent added that the Appellant had acted in breach of Section 9 (4) of the Fair Administrative Action Act when he invoked a relief under Order 40 of the Civil Procedure Rules.

4. Parties filed submissions on the preliminary objection and in the ruling dated 9/10/2019, the Honourable Mr. P. Muholi, Senior Resident Magistrate upheld the preliminary objection and struck out the Appellant's application dated 12/7/2019. The Learned Magistrate observed in his ruling that the Appellant filed lengthy submissions dealing with the substance of the application without addressing the preliminary objection. The Appellant filed an appeal on 5/11/2019 faulting the Learned Magistrate for upholding the preliminary objection on the question of jurisdiction. He faulted the Magistrate for failing to consider the evidence, legal arguments and judicial authorities which he presented in opposition to preliminary objection. The Learned Magistrate was also faulted for failing to consider that the Appellant had obtained approval on 24/9/2003 and as such the enforcement notice was an afterthought. The Appellant faulted the Learned Magistrate for considering the Respondent's preliminary objection in arriving at his ruling. The Appellant sought to have this court make a finding that the Senior Resident Magistrate Court had jurisdiction to hear and determine the suit before it.

5. The Appellant filed the application dated 6/11/2019 seeking stay of execution of the ruling of the Senior Resident Magistrate in **CMCC No. 5109 of 2019** delivered on 9/10/2019 pending hearing and determination of the appeal. The application was supported by the Appellant's affidavit sworn on 4/11/2019.

6. The Respondent filed a notice of preliminary objection on 22/11/2019 contending that this court was divested of jurisdiction to entertain an appeal from a subordinate court challenging an enforcement notice under Section 38 (4) of the Physical Planning Act. The Respondent contended that an appeal to the High Court could only lie under Section 38 (6) of the Physical Planning Act on an appeal under Section 33 of the Physical Planning Act emanating from the National Liaison Committee, which was established under Section 13 of the Physical Planning Act. The Respondent contended that this appeal and the application dated 4/11/2019 ought to be struck out and dismissed with costs to the Respondent. The Respondent added that the Appellant had failed to abide by the doctrine of exhaustion laid out in the Physical Planning Act in respect of the enforcement notice dated 2/7/2019 and urged that this court should not entertain the appeal based on the enforcement notice. The Respondent reiterated that the Appellant had breached Section 9 (4) of the Fair Administrative Actions Act.

7. The court gave orders on 21/11/2019 for the status quo to be maintained and that there would be no demolition of the structures on the Suit Property until the appeal was heard and determined.

8. Parties filed submissions which the court has considered. The Appellant submitted that the Respondent authorised him to construct shops on the Suit Property subject to him fulfilling certain conditions one of which was to obtain an approved plan which he obtained from the Respondent on 24/9/2003. By a notice dated 2/7/2019, the Respondent notified the Appellant that his shops were to be removed from the Suit Property or would be demolished for being built on a road reserve without the Respondent's approval. The Appellant claimed that contrary to the Respondent's allegations, the shops were constructed in 2003 after he obtained consent and approval from the Respondent. The Appellant maintained that the enforcement notice was null and void because the Respondent did not raise any objection to the development on the Suit Property at the time the shops were built in 2003 and maintained that the shops did not encroach on any road reserve.

9. The Appellant submitted that he was the beneficial owner of the shops or the structures built on the Suit Property having been authorised by the owner of the land to develop it and after obtaining approval from the Respondent. He relied on the case of **Deluxe Motors Limited v City Council of Nairobi [2009] eKLR** in which the court found that there was justification for an applicant to go to court and complain that the Respondent was infringing on his property rights because the Respondent and approved and sanctioned the construction only to claim infringement of the statute 12 years later. In that case, the court granted an interim injunction in that suit. Appellant also relied on the case of **Anju Chanandin v City Council of Nairobi & Another [2019] eKLR** in which the court addressed its mind to Section 30 of the Physical Planning Act and found that the developments by the Plaintiff were approved and that the enforcement notice was issued without any justification and was unlawful.

10. The Appellant also relied on the case of **Registered Trustees of Redeemed Gospel Church v Yusuf Ibrahim & Another [2013] eKLR** where the court observed that it was alive to the position that parties should exhaust all statutory and alternative procedures for redress before moving the court for remedies. It added that the existence of those statutory or alternative remedies did not oust the jurisdiction of the court and the court would defer to those remedies when they were applicable or appropriate. The court found that the procedures under the Physical Planning Act would not be adequate to address the issue of ownership raised in the suit and hence the court was properly seized of those suits.

11. The Applicant also relied on the **case of Rhumba Kinuthia v County Government of Kiambu [2015] eKLR** where the court found that it had the jurisdiction to hear the matter and dismissed the preliminary objection because it was persuaded that the Plaintiff could not seek redress from the Liaison Committee. The court noted that Section 38 of the Physical Planning Act was couched in mandatory terms.

12. The Respondent submitted that the Appellant sought to challenge its statutory intervention by way of enforcement notice issued under the Physical Planning Act and that the Magistrate's court was divested of jurisdiction by the Constitution and the Physical Planning Act and that the court could not make any order for injunction both in the application and the plaint; nor could it hear the complaint about the Respondent's enforcement notice dated 2/7/2019 as the Appellant sought.

13. The Respondent maintained that the Appellant's suit before the Magistrate's court constituted an abuse of the court process and stood no chance of success. It submitted that Section 38 (1) of the Physical Planning Act expressly granted it statutory power to issue an enforcement notice and faulted the Appellant for not invoking or exhausting the dispute resolution mechanisms prescribed in Section 15 and 38 of the Physical Planning Act. It maintained that there was nothing unlawful or irregular regarding the enforcement notice dated 2/7/2019 that it issued. It urged that this court could not on appeal aid and assist the Appellant to avoid the laid down procedures in the Physical Planning Act and the Fair Administrative Actions Act.

14. The Respondent submitted that this court was bound by the decision of the Court of Appeal in **Whitehorse Investment Limited v Nairobi City County Government [2019] eKLR.** The Respondent pointed out that none of the decisions relied on by the Appellant emanated from the Court of Appeal on the application and procedure of enforcement notices.

15. The Respondent maintained that the Learned Magistrate properly applied the law. The Respondent relied on the case of **Kimani Wanyoike v Electrol Commission of Kenya Civil Appeal of 1995** in which the court ruled that where a law prescribed the redress for any particular grievance the procedure prescribed by the Constitution or an act of Parliament should be strictly followed. It also relied on the case of **International Center for Policy and Conflict and 5 Others v Attorney General and 5 Others [2013] eKLR** in which the court held that where sufficient and adequate mechanisms to deal with a specific dispute by other designated constitutional organs exist, the jurisdiction of the court should not be invoked until such mechanisms had been exhausted.

16. The Respondent contended that the Appellant failed to abide by the laid down mechanisms for challenging enforcement notice issued by the Respondent under the Physical Planning Act and pointed out that an automatic stay of execution would issue once an appeal was lodged with the Liaison Committee under the Physical Planning Act. It submitted that the issue of the Liaison Committee and the efficacy of that appeal process were dealt with extensively by the Court of Appeal in the ***Whitehorse case.***

17. The Respondent maintained that since the Appellant failed to appeal against its enforcement notice, this court could not convert itself into a forum of appeal. It submitted that the Appellant had failed to demonstrate that he exhausted the dispute resolution mechanisms prescribed in the Physical Planning Act in relation to the Respondent's enforcement notice. The Respondent maintained that this court lacked jurisdiction because of the Appellant's failure to abide by the Physical Planning Act to challenge the Respondent's enforcement notice.

18. The issues for determination in this appeal are whether the court has jurisdiction to hear this appeal and if it should grant the orders sought in the appeal. The Respondent maintained that this court lacked jurisdiction to entertain this appeal under the Physical Planning Act. The court will first deal with the issue of whether it has jurisdiction to hear this appeal. Under Section 65 of the Civil Procedure Act, an appeal lies to the High Court and by extension, the Environment and Land Court (ELC) where it has jurisdiction, from any original decree or part of a decree of a subordinate court on a question of law or fact. Section 2 of the Civil Procedure Act defines a decree as a formal expression which so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and could be preliminary or final. It also includes the striking out of a plaint. In this appeal, the Appellant challenged the order of the Learned Magistrate which basically struck out the suit he filed before the magistrate's court on the ground that he failed to exhaust the appeal mechanisms under the Physical Planning Act. By finding that the court did not have jurisdiction regarding the enforcement notice, the Magistrate's Court essentially determined the Appellant's rights with regard to his suit challenging the enforcement notice.

19. Part VIII of the Civil Procedure Act deals with appeals to the High Court and Court of Appeal. Section 79 B of the Act stipulates that before an appeal from a subordinate court to the High Court is heard, the High Court should peruse the appeal and if the judge considers that there are no sufficient grounds for interfering with the decree, part of the decree or order appeal against, the judge may reject the appeal summarily. In this courts view, this is the procedure that the Respondent should have followed in urging the court to summarily dismiss the appeal. It was improper therefore for the Respondent to file a notice of preliminary objection in the appeal objecting to the jurisdiction of this court because the court has jurisdiction to hear the appeal under Section 65 of the Civil Procedure Act.

20. Section 78 of the Civil Procedure Act empowers the court to deal with appeals by either determining the case finally; remanding the case; framing the issues and referring them for trial; taking additional evidence or requiring the evidence to be taken; or ordering a new trial. Order 42 of the Civil Procedure Rules deals with appeals. Rule 1 sets out the form the memorandum of appeal is to take while Rule 2 requires that a certified copy of the decree or the order appealed against should be filed with the memorandum of appeal or as soon as possible within the time the court may order but that the court need not consider whether to reject an appeal summarily under Section 79 B of the Act until the certified copy is filed.

21. In essence this means that the court cannot summarily consider whether to reject an appeal until a certified copy of a decree or order appealed against has been filed before the court. The certified copy of the decree or order appealed against usually forms part of the record of appeal. Until the Appellant filed his record of appeal, this court could not consider whether to summarily reject the appeal under Section 79 B of the Act. Rule 13 (1) enjoins the Appellant to cause the appeal to be listed for the taking of directions before a judge. Any objection to the jurisdiction of the appellate court should be raised before the judge gives directions under this rule. The objection raised by the Respondent on the jurisdiction of this court is not the objection contemplated by Order 42 Rule 13 (2) of the Civil Procedure Rules. This court had jurisdiction to deal with the appeal and the Respondent's notice of preliminary objection fails.

22. Turning to the issue of the orders sought in this appeal, the Appellant's contention was that the Learned Magistrate erred when he found that he did not have jurisdiction to deal with the Appellant's claim because the Appellant had not exhausted the remedies described under the Physical Planning Act. The Respondent relied on the Court of Appeal decision in **Whitehorse Investments Limited v Nairobi City County [2019] eKLR** in which the court extensively dealt with the issue of the Liaison Committee and the efficacy of the appeal process under the Physical Planning Act. Despite the Respondent quoting and reproducing excerpts of that decision, it did not attach a copy of the Court of Appeal decision to the authorities attached to its submissions but instead submitted to the court the decision of Eboso J. in **ELC J.R. Case No. 12 of 2018- Whitehorse Investments Limited v Nairobi City County Government** from which that appeal arose. This court nevertheless looked at the Court of Appeal decision.

23. In **Whitehorse Investments Limited v Nairobi City County [2019] eKLR,** the Court of Appeal reiterated the legal position that where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it was only in exceptional circumstances that an order for judicial review would be granted. In determining whether a matter was exceptional, it was necessary for the court to examine the suitability of the statutory tribunal in the context of the particular case and ask itself whether the statutory body had the powers to determine the issue at hand.

24. The court observed that the issues in dispute were purely matters of building planning and ensuing development of a hotel within the County of Nairobi that were entirely covered under the Physical Planning Act. Further, that there was no good reason given as why the appellant failed to pursue that avenue. The court noted that the Physical Planning Act had protection mechanisms inbuilt within it to protect the property from any adverse actions envisaged by the enforcement notice.

25. The Appellant urged that having approved his building plans in 2003, the Respondent ought not to have issued the enforcement notice on 2/7/2019 claiming that his shops were on a road reserve. Looking at the approval which the Respondent gave to Kibindyo Asai dated 24/9/2003, it was given on certain conditions including a certificate of occupation being obtained before occupation and the plot not constituting part of disputed private land or public utility allocations. The approval made reference to Sections 36, 41 and 52 of the Physical Planning Act.

26. What the court understood the Appellant to be urging was that after giving approval for the development in 2003, the Respondent could not turn around and challenge his development after sixteen years. Section 38(1) of the repealed Physical Planning Act allowed the local authority to serve an enforcement notice after giving development permission. The section read as follows:

> "*when it comes to the notice of a local authority that the development has been or is being carried out after the commencement of this Act without the required development permission having been obtained, or that any of the conditions of a development permission granted under this Act has not been complied with, the local authority may serve an enforcement notice on the owner, occupier or developer of the land."*

27. That provision empowered the Respondent to issue an enforcement notice even after granting approval where any of the conditions of the development permission was not complied with. The words used in the statute was *"when it came to the notice of the local authority*". Ideally the Respondent would have been expected to inspect the developments it had approved on a regular basis and not wait for 16 years to notice that the conditions it gave in the development permission were not complied with. Based on the condition in the approval regarding the plot not constituting part of public utility allocation, the Respondent may very well argue that the Appellant failed to comply with the conditions for the development permission if indeed the shops are on a road reserve. The Respondent's challenge of a development that was undertaken based on approval it gave 16 years earlier smacks of bad faith and unreasonableness but since the Act did not set a time limit within which the Respondent had to issue the enforcement notices, then it cannot be faulted for issuing an enforcement notice 16 years after it granted approval.

28. Being bound by the decision of the Court of Appeal in **Whitehorse Investments Limited v Nairobi City County [2019] eKLR**, this court upholds the finding of the Learned Magistrate given on 9/10/2019. The appeal is dismissed with costs to the Respondent.

DELIVERED VIRTUALLY AT NAIROBI THIS 1ST DAY OF MARCH 2021.

K. BOR

JUDGE

In the presence of: -

Mr. Hassan Lakhicha for the Appellant

Mr. V. Owuor- Court Assistant

No appearance for the Respondent