



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. JUDICIAL REVIEW NO. 55 OF 2018

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010 ARTICLES 2(1), 3(1), 10(1) (a), (2) (a) & (b), 19 (1), (2),

(3) (a), (c) 20(1) & (2), 21(1), 22, 23, 27 (1), (2), (4), (5), 28, 40 (1) (a), (b), (2), (3), 47(1) & (2), 64 (a), 73 (1) (a), (b),

(2) (b), 75 (a), (c), 159 (1), (2), (a), (e), 162 (1), (2), (b), 165 (5), (b), 236 (a), 258 (1) & 259 (1) (a), (b)

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS

UNDER ARTICLES 2(1), 3(1), 10(1) (a), (2) (a) & (b), 19 (1), (2), (3) (a), (c) 20(1) & (2), 21(1), 22, 23, 27 (1), (2), (4),

(5), 28, 40 (1) (a), (b), (2), (3), 47(1) & (2), 64 (a), 73 (1) (a), (b), (2) (b), 75 (a), (c), 159 (1), (2), (a), (e), 162 (1), (2),

(b), 165 (5), (b), 236 (a), 258 (1) & 259 (1) (a), (b) OF THE CONSTITUTION OF KENYA, 2010.

AND

IN THE MATTER OF:

- 1. THE PHYSICAL PLANNING ACT, NO. 6 1996 LAWS OF KENYA**
- 2. THE FAIR ADMINISTRATIVE ACTION ACT, NO. 4 OF 2015, LAWS OF KENYA**
- 3. ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010**
- 4. THE LAW REFORM (MISC. PROVISIONS) ACT**

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

ORDERS OF CERTIORARI AND PROHIBITION

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE COUNTY GOVERNMENT OF MACHAKOS.....RESPONDENT

AND

HOTEL CONNECTIONS LIMITED.....EX-PARTE APPLICANT

JUDGMENT

1. In the Notice of Motion dated 13th December, 2018, the Ex-parte Applicant (*the Applicant*) has prayed for the following reliefs:

a) An order of certiorari do issue to remove into this Court for quashing the enforcement notice dated 16th November, 2018 and served on the Ex- parte Applicant through its employee on the 21st November, 2018 at 12.30pm by the Mavoko Sub-County Physical Planner on behalf of the Respondent.

b) An order of prohibition do issue to forbid and prohibit the Respondent by itself or any of its agents/servants from implementing and or howsoever giving effect to the enforcement notice dated 16th November, 2018 and served on the Ex-parte Applicant through its employee on the 21st November, 2018 at 12.30pm by the Mavoko Sub-County Physical Planner on behalf of the Respondent and any such further and or subsequent notice issued in similar terms, import and purport.

c) An order of prohibition do issue to restrain the Respondent herein by itself, or any of its agents and/or servants from entering, alienating or otherwise howsoever interfering with the Ex- parte Applicant's hotel premises hotel on Land Title Number Athi River/Athi River Block 1/88, use, occupation or enjoyment of the premises on the basis of the said dated 16th November, 2018 and served on the Ex-parte Applicant through its employee on the 21st November, 2018 at 12.30pm by the Mavoko Sub-County Physical Planner on behalf of the Respondent and any such further and subsequent notice issued by or on behalf of the Respondent in similar terms, import and purport.

d) That the costs of this Application and incidentals to the Application be provided for.

2. The Applications is based on the grounds set out in the statutory statement dated 22nd November, 2018 and the Verifying Affidavit of the Ex-parte Applicant's Director. The Ex-parte Applicant's Director deponed that the Ex-parte Applicant is a Limited Liability Company engaged in hotel and related businesses at among others, Mlolongo, Athi River along the Nairobi-Mombasa Highway.

3. The Ex-parte Applicant's Director deponed that the other Director of the Company is Florence M. Mwangangi, who is his wife, and is an Advocate by profession and currently the Speaker of the Respondent's Assembly and that the Ex-parte Applicant is the registered owner of the property known as Athi River/Athi River Block 1/88 which is at Kyumbi on the Machakos-Nairobi Highway (*the suit property*).

4. It is the deposition of the Ex-parte Applicant's Director that the Ex- parte Applicant has been undertaking construction of hotel premises for the extension of its business on the said parcel of land since the year 2016 and that the construction has been going on the basis of the building permission given by the Respondent, among other relevant authorities.

5. According to the Ex-parte Applicant's Director, the purchase of the suit property and the construction is partly financed by commercial loans on account of which the Ex-parte Applicant is making monthly payments of over Kshs. 1.8 million and that the Ex-parte Applicant has on the ground workers who are paid nearly Kshs. 600,000 weekly yet the construction works have now been halted.

6. It is the Ex-parte Applicant's case that effective the month of October 2018, the Governor of the Respondent, namely Dr. Alfred Nganga Mutua and the servants/agents of the Respondent, at the instigation of the said Governor, have been threatening verbally to take unspecified action against the Ex-parte Applicant's said hotel premises to "*teach a lesson*" to the said Director of the Ex-parte Applicant, namely, Florence M. Mwangangi, the Speaker of the Respondent's Assembly, ostensibly for matters related to the discharge of the Assembly's oversight authority over the Executive arm of the Respondent which is headed by the said Governor.

7. The Ex-parte Applicant's Director deponed that in furtherance of the said unjustified harassment of the said Florence M. Mwangangi, a Director of the Ex-parte Applicant, and in blatant breach of the rules of natural justice, the relevant provisions of the Constitution and Statutes on the sanctity of title and ownership of property, on 21st November, 2018, at about 12.30pm, the agents/servants of the 2nd Respondent, at the behest and wrongful directives of the 1st Respondent, served one of the workers of the Ex-parte Applicant at the premises herein with a purported enforcement notice giving a notice expiring on the same date of 21st November, 2018 and which in effect was a 3-hour notice, directing a plethora of action to be taken within the said notice period.

8. It was deponed that the Respondent's actions with regard to the premises herein and or its interference with the premises through its agents are unconstitutional, illegal and uncalled for; that the Respondent's actions are actuated by ulterior motive, malice, ill-will and personal vendetta on the part of the Respondent's Governor towards the Director of the Ex-parte Applicant; that the Respondent's agents' actions are a blatant breach of the right to ownership of property and that the Respondent's agents' actions amount to denial of the Applicant the right to quiet possession and use of private property.

9. The Ex-parte Applicant's Director deponed that the impugned actions of the Respondent's agents amount to abuse of office on the part of the Respondent's employees and the Respondent's Governor who are misusing public offices to frustrate and harass a Director and shareholder of the Ex-parte Applicant, on account of the discharge of her role as Speaker of the Respondent's Assembly and further on account of the discharge of the Assembly's oversight role over the Respondent's Executive headed by the said Governor.

10. It was deponed that the 3-hour notice issued by the Respondent is a clear indication of biasness, unreasonableness, misfeasance of public office and denial of the rules of natural justice on the part of the Respondent in relation to the Ex-parte Applicant; that the decision to issue the enforcement notice dated 16th November, 2018 when the Ex-parte Applicant has complied with all the necessary laws is irrational, unconstitutional, illegal, improper and arrived at in bad faith and in gross breach of the principles of fair administrative action.

11. It is the deposition of the Ex-parte Applicant's Director that the Ex- parte Applicant will suffer injustice and irreparable loss should the Respondent proceed to implement the enforcement notice or any other notice similar and of the same import and purport and that where a body uses its power in a manifestly unreasonable manner, acts in bad faith, refuses to take relevant factors in making its decision or where it

bases its decision on irrelevant factors, the Court would intervene.

12. The Ex-parte Applicant's Director finally deponed that it is in the interest of justice that the Judicial Review orders sought herein do issue to avoid the real risk of abuse of due process and an obvious travesty of justice as there can be no decision within the meaning of the statute if there was anything done contrary to the essence of justice and that all quasi-judicial bodies, including the Respondent, must uphold the rules of natural justice and accord parties a fair hearing.

13. Although the Application was served on the Respondent, it did not file a response. The Application proceeded for hearing as undefended. The Ex-parte Applicant filed detailed written submissions and a list of authorities which I have considered. On the other hand, the Respondent did not file its submissions as directed by the court.

14. According to the Title Deed annexed on the Ex-parte Applicant's Director's Affidavit, the Ex-parte Applicant was registered as the proprietor of land known as Athi River/Athi River Block 1/88 which is located at Kyumbi along the Machakos-Nairobi Highway (*the suit property*) on 10th December, 2014.

15. It is not in dispute that the Ex-parte Applicant has been undertaking construction of hotel premises on the said parcel of land since the year 2016 with the approval of the Respondent, among other relevant authorities. The Ex-parte Applicant exhibited the architectural and structural drawings which were duly approved by the Respondent before the construction of the hotel on the suit premises commenced.

16. The undisputed evidence before this court shows that on 21st November, 2018 at about 12.30pm, the agents of the Respondent served one of the workers of the Ex-parte Applicant at the suit property with an enforcement notice giving a notice expiring on the same date of 21st November, 2018 and which in effect was a 3-hour notice, directing a plethora of action to be undertaken within the said notice period. The said notice stated partly as follows:

"You are hereby required to (a) stop further development with immediate effect (b) seek guidance from Mavoko Sub County and/your consultants on how you can regularize part of your development within a period of 1 (one) day from the date of this notice failing which the Mavoko Sub County may enter on the said land and execute the requirements outlined herein above and may recover as a civil debt in any court of competent jurisdiction from (sic) any related expenses incurred."

17. The perusal of the Enforcement Notice shows that the Notice was so unequivocal in its timelines as to be incapable of reasonable construction. Paragraph 3 states that the notice is for one (1) day from the date of the notice. The notice is dated 16th November, 2018. However, by the time the notice was delivered on 21st November, 2018, the one-day notice had already lapsed.

18. Paragraph 4 of the Enforcement Notice states that the Notice would take effect on the 21st day of November, 2018. 21st November, 2018 was the date the notice was expiring. An appeal under the Act was required to be filed before 21st November, 2018, which is the same date the notice was served on the Ex-parte Applicant's employee.

19. It is obvious that the enforcement notice was illegal, irregular and unreasonable. It did not only deny the Ex-parte Applicant the right to respond to it, but did not also afford the Ex-parte Applicant the opportunity to challenge it on Appeal.

20. The three-hour enforcement notice issued by the Respondent was an indication of bias, unreasonableness, misfeasance of public office and was against the rules of natural justice. The timelines given in the notice were so outrageous in their defiance of logic that no reasonable person who had applied his mind to the issue could have arrived at it (*See Associated Provincial Picture Houses Ltd vs. Wednesbury Corporation [1948]1 KB 223*).

21. Indeed, as correctly submitted by the Ex-parte Applicant's counsel, where an enforcement Notice is invalid, like in this case, Section 38 of the Physical Planning Act does not apply. This is the same position that was taken by the court in *Kiscoba Association (acting through John Maina - Chairman James Ndiba -Organizing Secretary) vs. Nairobi City County Government [2018] eKLR* in which the court held as follows:

"46. In my view for a notice to be deemed to be valid for the purposes of section 38 of the aforesaid Act, it must comply with certain requirements. The notice is required to specify the development alleged to have been carried out without development permission, or the conditions of the development permission alleged to have been contravened; such measures as may be required to be taken within the period specified in the notice to restore the land to its original condition before the development took place, or for securing compliance with those conditions, as the case may be; and may also require 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. It must also give the applicant reasonable time to comply therewith. A notice which is served to take effect immediately, as was the case here cannot amount to a valid notice. In this respect section 4(3)(a) of the Fair Administrative Action Act, 2015 provides:

"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 prior and adequate notice of the nature and reasons for the proposed administrative action."

22. In the case of *Republic vs. National Land Commission & another Ex-parte; Farmers Choice Limited [2020] eKLR*, the court held *inter alia* that:

"...Further circumstances under which orders of Judicial Review can be issued were elaborated by Justice Kasule in the Uganda

“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 the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provision of a law or its principles are instances of illegality....

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 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 to act 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 legislature instrument by which such authority exercises jurisdiction to make a decision. (Al-Mehidswi vs. Secretary of State for the Housing Department (1990) AC 876).”

23. The manner in which the decision to issue the enforcement notice was done by the Respondent satisfies all the conditions set out in the above cited cases for the grant of orders of Judicial Review. As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it. Elementary justice and the law demands that a person should be given full information on the case against him and reasonable opportunity to present a response.

24. This right is not limited only in cases of a hearing as in the case of a Court or before a Tribunal, but when taking administrative actions as well. (See *Donoghue vs. South Eastern Health Board [2005] 4 IR 217*).

25. Hilary Delany, in his book, *Judicial Review of Administrative Action*, Thomson Reuters 2nd edition, at page 272, notes that:

“Even where no actual hearing is to held in relation to the making of an administrative or quasi-judicial decision, an individual may be entitled to be informed that a decision which will have adverse consequences for him may be taken and to notification of the possible consequences of the decision...”

26. As correctly submitted by the Applicant’s counsel, Article 47 of the Constitution enshrines the right of every person to fair administrative action. Article 232 enunciates various values and principles of public service including ‘(c) responsive, prompt, effective, impartial and equitable provision of services’ and ‘(f) transparency and provision to the public of timely, accurate information...’

27. Fair and reasonable administrative action demands that every individual would be given a clear warning on the probable consequences of non-compliance with a decision before the same is taken.

28. In this case, the Ex-parte Applicant should in no uncertain terms have received information as to the implication of the letter dated 16th November, 2018 and served on it on 21st November, 2018, and the consequences of its failure to make good the payments demanded in the notice. That is not what happened in this case.

29. In view of the foregoing, the Ex-parte Applicant’s Application dated 13th December, 2018 is meritorious, and is allowed as follows:

a) An order of certiorari be and is hereby issued to remove into this Court for quashing the enforcement notice dated 16th November, 2018 and served on the Ex-parte Applicant through its employee on the 21st November, 2018 by the Mavoko Sub-County Physical Planner on behalf of the Respondent.

b) An order of prohibition be and is hereby issued forbidding and prohibiting the Respondent by itself or any of its agents/servants from implementing and or howsoever giving effect to the enforcement notice dated 16th November, 2018 and served on the Ex-parte Applicant through its employee on the 21st November, 2018 at by the Mavoko Sub-County Physical Planner on behalf of the Respondent and any such further and or subsequent notice issued in similar terms, import and purport.

c) An order of prohibition is hereby issued restraining the Respondent herein by itself, or any of its agents and/or servants from entering, alienating or otherwise howsoever interfering with the Ex-parte Applicant’s hotel premises on land Title Number Athi River/Athi River Block 1/88 use, occupation or enjoyment of the premises on the basis of the said enforcement notice dated 16th November, 2018 and served on the Ex-parte Applicant on the 21st November, 2018.

d) The costs of this Application to be paid by the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 30TH DAY OF APRIL, 2021.

O. A. ANGOTE

JUDGE