Republic v County Executive Committee Member Environment Natural Resources and Urban Planning County Government of Kwale & another; Tajano Limited (Exparte Applicant) (Environment and Land Judicial Review Case E002 of 2024) [2024] KEELC 6823 (KLR) (16 October 2024) (Judgment)

Neutral citation: [2024] KEELC 6823 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KWALE

ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E002 OF 2024

AE DENA, J

OCTOBER 16, 2024

BETWEEN

REPUBLIC ..... APPLICANT

AND

COUNTY EXECUTIVE COMMITTEE MEMBER ENVIRONMENT NATURAL RESOURCES AND URBAN PLANNING COUNTY GOVERNMENT OF KWALE ..... 1ST RESPONDENT

COUNTY GOVERNMENT OF KWALE ..... 2ND RESPONDENT

AND

TAJANO LIMITED ..... EXPARTE APPLICANT

JUDGMENT

1. The Exparte Applicant Tajano Limited has brought the Notice of Motion subject of this ruling pursuant to the provisions of Order 53 Rule 3 of the Civil Procedure Rules 2010, Section 8[2] of the *Law Reform Act* Cap 26 and all the other enabling provisions of the law. Leave for filing the motion was granted by the court on 20/3/2024. The application seeks the following orders;

    1. That pursuant to Section 9[4] of the *Fair Administrative Action Act*, this honourable court be pleased to grant leave and or to exempt the Applicant from the requirement to exhaust the local remedy of first appealing to the County Physical and Land Use Planning Liaison Committee for the reason that the County government of Kwale has confirmed in writing that no Liaison Committee had been put in place as at 22nd February 2024.

2. That an order of certiorari be granted to remove from the Respondents to this Honourable court and quash the decision made by the 1st Respondent on 18th January 2024 contained in a letter dated 17th January 2024 revoking

    a. The development permission for change of user no DA/CU/01/04/2023 from residential[OPDH] to Residential [Multiple Dwelling Units] over title No Kwale/ Diani Beach Block/983 granted on 3rd July 2023 and

    b. The further decision revoking and development permission for construction of the boundary wall, guard house and road network; development permission no DA/ PB/06/09/2023 over title No Kwale/Diani Beach Block/983 granted on 8th September 2023

3. That an order of prohibition be granted prohibiting the Respondents from interfering with the applicants approved development permissions, use, construction, access, quiet possession and other necessary activities on the Applicant's property title No Kwale/Diani Beach Block/983 and in particular with respect to the Applicant's activities pursuant to; -

    a. The development permission for user no DA/CU/01/04/2023 from residential[OPDH] to Residential [Multiple Dwelling Units] over title no Kwale/ Diani Beach Block/983 granted on 3rd July 2023 and

    b. The further decision revoking and development permission for construction of the boundary wall, guard house and road network; development permission no DA/ PB/06/09/2023 over title no Kwale/Diani Beach Block/983 granted on 8th September 2023

4. That an order mandamus be granted compelling the Respondents including officers working for the 2nd Respondent, to issue a necessary letter or other documents and other necessary permissions appurtenant to the 2 development permissions expressly reversing the 1st Respondent's decision made on 18th January 2024 contained in the 1st respondents letter dated 17th January 2024 revoking the 2 development permissions granted to the Applicant for; -

    a. The development permission for user no DA/CU/01/04/2023 from residential[OPDH] to Residential [Multiple Dwelling Units] over title no Kwale/ Diani Beach Block/983 granted on 3rd July 2023 and

    b. The further decision revoking and development permission for construction of the boundary wall, guard house and road network; development permission No DA/ PB/06/09/2023 over title No Kwale/Diani Beach Block/983 granted on 8th September 2023

2. The application is premised upon grounds listed on its face and which the court has summarised into three main points as hereunder; -

    a. The appeal filed by the Exparte Applicant on 1/2/2024 before the County Physical Planning and Land Use Planning Liaison Committee has not been heard and determined for the reason that the 2nd Respondent had by 22/2/2024 not put a Liaison Committee in place. In view of this the Exparte Applicant is entitled to grant of leave/waiver under the Fair Administrative Actions Act Section 9[4].

b. That the Exparte Applicant has been denied a fair hearing and which includes a hearing prior to revocation of the 2 development permissions

c. That the reasons for revocation of the 2 development permissions are not justified and are a contravention of the provisions of the *Physical and Land Use planning Act* and Regulations.

3. The application is further supported by the statutory statement dated 6/3/2024 and the supporting affidavit of Jonathan Somen a director of the Exparte Applicant herein. It is stated therein that the exparte applicant is the registered owner of title No Kwale/Diani Beach Block/983 as evidenced by the lease dated 20/12/2007 and a certificate of official search dated 5/6/2023 in favour of the Exparte Applicant. That the property was purchased from one Charles Szlapak and who had purchased the same from one Johannes Theodorus Oberholzer. That before the sale to Charles Szlapak, the land had been converted to RLA and became Title No Kwale/Diani Beach Block/28. That the land was then registered as a leasehold for 99 years in favour of Charles Szlapak who subdivided it into Kwale/Diani Beach Block/982 and 983.

4. The Exparte Applicant states that this brief history confirms that they are the true owners of the suit property. That the land rates have been paid regularly without fail and further that in 2013 the High Court in HCC No 564 of 2011 ruled in favour of the Exparte Applicant in a land ownership case. That sometime in the year 2023 the exparte applicant decided to commence development of the property and undertook development permissions and applications to the County Government of Kwale and the Ministry of Lands. That through one Mr Abubakar Maddy the Exparte Applicant prepared a notice for change of user of the suit property from residential [OPDH] to residential [multiple dwelling] in the Daily Nation. That upon expiry of the 14 days' period from the advertisement date, the Exparte Applicant procured an official search and paid a fee of Kshs 22,000/-. The application for change of user form was then filed online with the 2nd Respondent whereby an invoice and receipt were generated as attached. At paragraph 18 of the affidavit, it is stated that the application for change of user was circulated to the various relevant agencies and no objection was made to the same. That the respondents later made their approval vide a letter dated 21/8/2023.

5. The Exparte Applicant further stated that after obtaining the change of user they proceeded to apply for permission to construct a boundary wall, a guard house and road network inside the property. The 2nd Respondent granted its approval on 8/9/2023 and payments for the building plan and septic tank were made. That another letter dated 14/9/2023 was issued again confirming the grant of the approvals and detailing the terms thereof. The Exparte Applicant then commenced construction and states that they had spent over Kshs 18million on the project to date. However, vide a letter dated 27/11/2023 the 2nd Respondent suspended the approvals granted for the construction.

6. Meanwhile at the suit property a group of people led by one Hassan Rashid Mzinga who claimed to be a board member from the Coast Development Authority had invaded the construction and threatened the contractor and workers hence stopping the work. That the group threatened to cause havoc if denied access to the land. That on 19/1/2024 the respondents sent an email to the exparte applicant revoking the 2 development permissions issued on 3/7/2023 and 8/9/2023. An appeal was lodged at the Physical Planning Liaison Committee of the county government of Kwale on 1/2/2024 but an email was received from one Ali Budzuma on 22/2/2024 in which he disclosed that the 2nd Respondent did not have a functioning liaison committee. It is these circumstances that have led to the filing of the current suit before court.

Response

7. In opposing the application, the Respondent filed a replying affidavit sworn on 5/4/24 by Ali A. Budzuma the County Director Physical Land Use & Planning of the 2nd Respondent. It is averred that although the Exparte Applicant appears to be the registered owner of the suit property Kwale/Diani Beach Block/983, the said registration is tainted and rooted in illegality. The deponent proceeds to give a brief history of the suit property to his knowledge. He states that the mother title to the suit property was Kwale/Diani Beach Block/28 whose title was issued for a term of 99 years on 1/1/1914. The same was subdivided in the year 1960 into Kwale/Diani Beach Block/982 and 983. That the mother title lease was set to expire on 1/1/2013 and has never been extended.

8. According to the 2nd Respondent, the subdivisions also expired on 1/1/2013 as they were hived from the mother title. That the exparte applicant is therefore holding onto an illegal tile as the same expired and its recourse lay in refund of the purchase price by the people who sold it the parcel. It is averred that the 2nd Respondent acknowledged the Exparte Applicants ownership of the parcel Kwale/Diani Beach Block/983 as a rateable owner and not as a legal owner of the same. The Respondents deny knowledge of the ruling in HCC No 564 of 2011 in relation to the Exparte Applicants ownership of the suit parcel and state that they were not parties to the same. That if anything the attached decree does not indicate the suit parcel number.

9. The Respondent states further that under Section 57[5] of the *Physical and Land Use Planning Act*, the 1st Respondent has the power to revoke development permission. That pursuant to Section 61[2] of the *Physical and Land Use Planning Act*, the 2nd Respondent approved the Exparte Applicants application for change of user based on 11 conditions which included ownership not being in dispute and breach of the conditions leading to termination. It is alleged that the Exparte Applicant has not paused its illegal construction on the ground despite receiving the notification of revocation. The alleged financial damage likely to be suffered is disputed and it is stated that the same cannot be attributed to the 2nd Respondent. It is averred that the letter dated 27/11/2023 suspending the approvals granted for construction as outlined at paragraph 27 of the affidavit was issued after due diligence and not any undue influence. The Respondents deny having any knowledge of a Mr Hassan Rashid Mzinga

10. It is admitted that an appeal over the 2nd Respondent's decision was made but the 2nd Respondent was yet to constitute a Liaison Committee to hear appeals. That the same has however been constituted and is ready to hear the appeal. That the Exparte Applicant has jumped the gun by failing to fully exhaust the laid down procedure of dispute resolution as per the principle of exhaustion. The Respondents maintain that the decision made vide the letter dated 17/1/2024 should be affirmed rather than quashed.

Supplementary Affidavit

11. The Exparte applicant filed a supplementary affidavit sworn by its Director David Somen in response to the replying affidavit sworn by Mr Ali Budzuma. It is averred that the ownership required to be exhibited to the Respondents by an applicant for a change of user is a certificate of search as per Regulation 15 of the Physical and Land Use Planning [General Development Permission and Control] Regulations of which the exparte applicant complied. That the respondent has no mandate or power to review the legality and validity of the title held by the Exparte Applicant.

12. At paragraph 5 of the affidavit, the Exparte Applicant outlines the history on ownership of the property in contention from the previous owners and their advocates. That based on the said history and which

is evidenced by documents annexed to the affidavit, the court is urged to overrule the reasons advanced by the respondents to justify the revocation of the two approvals earlier issued to the exparte applicant. It is further stated that no evidence has been placed before court to confirm that the Liaison Committee now exists and the same has been made without any factual foundations. That if anything the time within which the committee was to hear the exparte applicants appeal has already lapsed and the committee is time barred. The court is urged to grant the reliefs sought by the Exparte Applicants.

Submissions

13. The Judicial Review application was canvassed by way of written submissions. Parties also highlighted their submissions orally on 13/5/2024.

Applicants' submissions

14. The Exparte Applicant submissions are dated 24/4/2024 and identified three issues for determination namely; -

    1. Whether the Exparte Applicant is entitled to exemption from exhausting the Liaison Committee process

    2. Whether the Respondents violated the Fair Administrative process by revoking the two (2) development permissions granted to the Exparte Applicant on 3/7/2023 and 8/9/2023

    3. What are the reliefs available to the Exparte Applicant.

15. Referring to the Section 9(4) of the *Fair Administrative Action Act* it is submitted the court may in exceptional circumstances in the interest of justice exempt a person from the obligation to exhaust any remedy. The fact that there was no forum where the Exparte Applicants could be heard was a special circumstance meriting the exemption. It was efficacy to move the court. Reliance is placed in the Supreme Court case Nicholus Abidha V Attorney General & 7 Others (2023) KESC (KLR) and Court of Appeal in Whitehorse Investments Lt Vs Nairobi City County (2019) eKLR. That the jurisdiction of the Liaison Committee being statutorily timed for 14 and 30 days by sections 61(3) and 72(4) of *Physical and Land Use Planning Act*, 2019 (herein the Act) respectively had lapsed by effluxion of time at the time of filing these proceedings.

16. Citing section 4(3)(b) of the *Fair Administrative Action Act* it was submitted that the Respondents violated the administrative process by revoking the two (2) development permissions by failing to accord the Exparte Applicant any hearing, the 1st Respondent acted ultra vires her powers, was biased and arrived at an unreasonable decision no reasonable body would arrive at. No notice of whatsoever nature was served upon the Exparte Applicant as required by Sections 72 of the Act. The inquiries said to have been undertaken from the relevant administrative agencies did not involve the Ex Parte Applicant. Articles 47(1) and 50 of *the Constitution* are also cited as having been violated in this regard rendering the decision null and void. Reliance was placed in the Court of Appeal decisions in David Oloo Onyango Vs Attorney General (1987) eKLR and Judicial Service Commission Vs. Mbalu Mutava & Ano. (2015) eKLR

17. It is submitted that the Respondent acted ultra vires Regulation 28 of the Physical Land Use Planning (General Development Permission and Control) Regulations to the extent that the basis of the revocation was not made pursuant to Article 66(1) of *the Constitution* as to the interest of defence, public safety, order, morality of health. The basis was on disputed ownership of the suit property which the respondents lacked jurisdiction to determine. There was no evidence of any ongoing proceedings for revocation of the title or that the title had been revoked. That powers of the NLC to review title

donated by Section 15(3)(e) and 15(11) of the NLC Act lapsed after 5 years. The Respondent took up the role of investigator, judge and jury and therefore biased. Reliance is placed on Chadwick Okumu Vs. Capital Markets Authority (2018) eKLR.

18. It is submitted that the decision to revoke the approvals was unreasonable and defied all logic. Referring to the contents of a video clip filed in court showing incitement remarks by Hassan Rashid Mzinga and the actions of the 1st Respondent demonstrated abuse of power. The court is referred to Associated Provincial Picture Houses Ltd Vs. Wednesbury Corporation (1948) 1KB 223.

19. Additionally it was submitted that having a legitimate title to land, having made two applications that were approved, having made all the necessary payments to the 2nd Respondent the Exparte Applicant had a legitimate expectation that its development permissions would not be revoked except on genuine and legally justifiable reasons. The court is invited to grant the reliefs as prayed.

The Respondents submissions

20. These were dated 6/5/24. Citing Article 47 of *the Constitution*, sections 4(1) and 9 of the Fair Administrative Act the respondents identified the following issues for determination; -

    1. Jurisdiction

        a. Whether the court has jurisdiction to determine the matter under the doctrine of exhaustion

        b. The issues raised and to a large extent disputed by both parties and which issues and facts ultimately go into the merits of this case are best suited to be decided by a civil court and not through the restricted confines of Judicial review proceedings

    2. Whether the decision to revoke development permissions DA/CU/O1/O4/2003 and DA/PB/06/09/2023 was lawful, procedural in the circumstances

    3. No court of law should be used to sanction/sanitize any process or title to land founded on fraud, illegality or irregularity.

21. Citing the doctrine of exhaustion it is submitted that the proceedings herein are premature. That where there is a clear procedure for redress provided in *the constitution* or an Act of parliament, the same must be exhausted. Reliance is placed on the Court of Appeal ruling in Speaker of National Assembly Vs. Karume Civil application No 1992 of 1992 KECA 24 KLR. That the Respondent had confirmed the Liaison Committee had since been constituted. That since the orders for exemption were premised on the non-existence of the Liaison they should not be granted. It is for the court to direct that the Liaison Committee hears the Appeal and there was no time bar. That the contention that there was no fair hearing is premature because the Exparte applicant has not submitted to the statutory appeal mechanisms. That once revoked the Act provides a mechanism for a fair hearing before the Liaison Committee which was now in place.

22. It is further submitted that the approval letter was conditional in that ownership of the land must not be disputed. This condition was not unreasonable as it was replicated in all counties. It is submitted that section 57(5) of the Physical Planning and Land Use Act gives the 1st Respondent Power to revoke a development permission and there was no unreasonableness ,irrationality, illegality or breach of legitimate expectation. The grounds given go into the merits of the decision which is not the basis for judicial review which must look at the process deployed in arriving at the decision. The court was referred to *Republic Vs National Cohesion & Integration Commission, Chama Cha Mawakili Ltd JR Application E057 of 2022* KEHC 10206 KLR.

23. The CEC did not make a determination of the validity of the title. That all the CEC was required was to consult with her relevant departments on the grounds set out under Regulation 28 herein and give reasons for revocation. An aggrieved party is given a fair hearing on Appeal. That CEC was informed post facto about the irregularities and listing the information obtained from government agencies, it is submitted that the same cannot be said to be capricious. That due to the disputed title and the serious issues raised by the Respondent this was not a matter to be heard under JR since evidence cannot be tested. Evidence must be brought through an ordinary suit. That this is also contemplated under section 93 of the *Physical and Land Use Planning Act* which mandates that any disputes before the setting up of the Liaison committee be heard by the Environment and Land Court. Reliance is also placed on among others the cases of Supa Nova Limited and Another Vs District Land Registrar Mombasa & 2 Others, Kenya Anti-Corruption Commission (Interested Party) Civil Appeal no.98 of 2016 KECA 17 KLR; Republic Vs. National Land Commission and 3 Others Exparte Safeway's Limited (2017) eKLR and Redcliff Holdings Ltd Vs. Registrar of Titles & 2 Others (2017) eKLR The court is invited to disallow the application.

24. Citing the provisions of section 102 and 106 of the County Government Act it is submitted that the Respondents have been transparent in issuing the development permissions, and undertook a process of verifying the complaints raised by the community which was in tandem with law and common sense.

25. In rejoinder Mr. Mwangi submitted that the Respondents had already enforced without notice. That had notice been served it would have paved way for a hearing. Counsel reiterated that in the present case the Exparte Applicant was only dealing with an administrative decision and the Respondents cannot run away from their decision by demanding that the Exparte applicants should sue under normal suit. On requirement to attach title it was pointed that the Respondents did not give particulars of any other title which was in competition with the exparte applicants title and in the absence of which the decision is for quashing.

Analysis and Determination

26. The Court has considered the Exparte Applicant's application together with the statutory statement and the affidavits filed in support thereof. I have also considered the replying affidavit filed by the Respondents including the submissions by the advocates for the parties. The following are the issues for determination.

    a. Whether the Applicant's application is competently before this Court

    b. Whether the decision to revoke development permissions DA/CU/O1/O4/2023 and DA/PB/06/09/2023 was fair, lawful, procedural in the circumstances

    c. Whether the Applicant is entitled to the remedies it seeks.

    d. Who bears the costs of these proceedings

Whether the Applicant's application is competently before this Court

27. The jurisdiction of this court has been questioned by the Respondents. It is contended that the court's jurisdiction has been prematurely invoked by dint of the doctrine of exhaustion. This is for failure on the part of the Exparte Applicant to exhaust the appeal mechanism provided for under the Physical & Land Use Planning Act. On the other hand, the Exparte Applicant has made a proposition for exempting it from the requirement for exhausting the statutory remedy of first appealing to the County Physical and Land Use Planning Liaison Committee. The court must therefore determine if it is seized

of the requisite jurisdiction to hear the application before it. Should the answer be in the affirmative then it will proceed to consider the proposition to exempt before delving into the other issues.

28. I will highlight the functions of the said County Physical and Land Use Planning Liaison Committee and the mechanisms set out under the Physical & Land Use Planning Act 2019.

29. The functions of the Liaison Committee are stipulated under Section 78 of the *Physical and Land Use Planning Act* as follows:

> The functions of the County Physical and Land Use Planning Liaison Committee shall be to-
>
> (a) hear and determine complaints and claims made in respect to applications submitted to the planning authority in the county;
>
> (b) hear appeals against decisions made by the planning authority with respect to physical and land use development plans in the county;
>
> (c) advise the County Executive Committee Member on broad physical and land use planning policies, strategies and standards; and
>
> (d) hear appeals with respect to enforcement notices".

30. Section 61[3] of the *Physical and Land Use Planning Act* provides that an Applicant aggrieved by the decision of a County Executive Committee Member for development permission may appeal against the said decision to the County Physical and Land Use Planning Liaison Committee within 14 days of the decision by the County Executive Committee member.

31. Under section 72[3] of the *Physical and Land Use Planning Act*, any person aggrieved with an enforcement notice may also appeal to the County Physical and Land Use Planning Liaison Committee within 14 days of being served with the notice and the said appeal is to be heard within 30days.

32. It is the Exparte Applicants' case that having been aggrieved by the Respondents decision to suspend and cancel the approvals earlier issued to them, they opted to appeal. However, the Respondents informed them that the County Physical and Land Use Planning Liaison Committee was yet to be established. This position is reiterated by Ali A. Budzuma the 2nd Respondents, County Director Physical Land Use & Planning who swore the affidavit opposing the instant judicial review application. He deponed that at the time of suspending the approvals, the 2nd Respondent had not set up a committee to determine appeals. That a committee was now in place. He advises that the exparte applicant can now file its Appeal before it. The Respondents contend that exparte applicant has failed to exhaust the laid down procedure and is in blatant disregard of the principle of exhaustion.

33. The question of what invokes the doctrine of exhaustion before embarking on the Court process was discussed in the case of William Odhiambo Ramogi & 3 others vs Attorney General & 4 Others: Muslims for Human Rights & 2 Others (Interested parties) [2020] eKLR as follows:

> The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts..."

34. In International Centre for Policy and Conflict & 5 others vs. The Hon. Attorney General & 4 others [2013] eKLR____ the Court affirmed that thus; -

> Where there exist sufficed and adequate mechanisms to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted. In this regard, we refer to the decision in Re Francis Gitau Parsimei & others v. National Alliance Party and others Nairobi Petition No. 356 of 2012 (unreported) in which the Court emphasised the principle that: "where *the Constitution* and or a statute establishes a dispute resolution procedure, then that procedure must be used."
>
> Also see the Court of Appeal decision in Speaker of National Assembly Vs. Karume Civil Application No 1992 of 1992 KECA 24 KLR.

35. Arising from the above, the doctrine of exhaustion therefore imposes an obligation on parties to exhaust any alternative dispute resolution mechanism before embarking on a court process. I have already shown that the statutory requirement under the *Physical and Land Use Planning Act* is to appeal to the County Physical and Land Use Planning Liaison Committee before a matter is brought before the court. The Exparte Applicant in its submissions argues that the absence of the committee presented special circumstances for it to approach the court in the manner it has done. This then leads the court to the question under what circumstances exhaustion could be exempted.

36. The Exparte Applicants case is that the answer to the above lies in Section 9(4) of the *Fair Administrative Action Act*. They also cite case law in this regard. Section 9(4) of the *Fair Administrative Action Act* provides as follows; -

> Notwithstanding subsection 3, the High Court or 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.

37. I find it useful to also draw on how the courts have dealt with the question of exemption above. The Supreme Court of Kenya addressed itself on this subject in Nicholus Abidha V Attorney General & 7 Others (2023) KESC (KLR) thus; -

> Refence 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 litigants right to access justice while also recognising the efficiency and specificity that established alternative dispute resolution mechanisms can offer. That there is also section 9(4) of the *Fair Administrative Action Act* creates the exception that exhaustion of the administrative remedies may be exempted by a court in the interest of justice upon application by an aggrieved party.' Emphasis is mine.

38. In the case of William Odhiambo Ramogi & 3 others vs Attorney General & 4 Others: Muslims for Human Rights & 2 Others (Interested parties) [2020] eKLR the court stated thus;

> As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the

values enshrined in *the Constitution* or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised. Emphasis is mine.

39. Applying the above to the circumstances of the present case I would not fault the Exparte Applicant for invoking the jurisdiction of this court. The Exparte Applicant indeed first exercised their right to appeal and filed the appeal and which was annexed as part of their evidence in this court. It is not in dispute that Respondent informed them that the relevant Committee was not yet in place to hear the appeal. In the circumstances what other option did the Exparte Applicant have other than approaching the court to access justice. For me there was every reason in the interest of justice to approach the court as they were not reasonably expected to wait adinfinitum.

40. In any event the fact that the Respondents failed to set up the relevant liaison committee to determine disputes arising from decisions made under the purview of the *Physical and Land Use Planning Act* in itself was a violation of the exparte applicants right to access to justice through a hearing before the Committee and which is to begin and be concluded within the set timelines. The material on record indicates that by the time the letter dated 17/1/2024 suspending the construction of the boundary wall, the guard house and the road network was issued and by the time the instant judicial review proceedings were filed on 7/3/2024 the said committee had not been constituted by the Respondents.

41. The fact that there was no forum to hear the appeal presented a special circumstance in my view that merited the Exparte applicant to approach the court. I would on this basis alone exempt the applicants appropriately.

42. It is further submitted on behalf of the Exparte Applicant that the jurisdiction of the Liaison Committee herein being statutorily timed for 14 and 30 days by sections 61(3) and 72(4) of *Physical and Land Use Planning Act*, 2019 respectively had lapsed by effluxion of time at the time of filing these proceedings. The court was referred to the Court of Appeal decision in Aprim Consultants V Parliamentary Service Commission & Another (supra) which held that where a tribunals jurisdiction is timed, then once time lapses it ceases to have jurisdiction. The Court of Appeal in ADK Technologies Ltd in Consortium with *Computer Technologies Ltd v Public Procurement Administrative Review Board & 4 others (Civil Appeal E598 of 2021*) [2022] KECA 407 (KLR) (4 March 2022) (Judgment) referred to the Aprima case thus; -

> 10. In the Aprima case, the Court stated that section 175 was couched in mandatory terms. The Court expressed itself thus: "A perusal of section 175 of the Act reveals Parliament's unmistakable intention to constrict the time taken for the filing, hearing and determination of public procurement disputes in keeping with the Act's avowed intent and object of expeditious resolution of those disputes. Parliament was thus fully engaged and intentional in setting the timelines in the Section. But it did not stop there. In one of the rarer instances where all discretion is totally shut out, Parliament expressly enacted a consequence to follow default or failure to file or to decide within the prescribed times: the decision of the Board would crystallize and he invested with finality. Our reading of the Act is that the High Court was under an express duty to make its determination within the time prescribed. During such time did its jurisdiction exist, but it was a time-bound jurisdiction that ran out and ceased by effluxion of time. The moment the 45 days ended, the

jurisdiction also ended. Thus, any judgment returned outside time would be without jurisdiction and therefore a nullity, bereft of any force or effect in law.'

43. To me the same reasoning above applies with equal force to section sections 61(3) and 72(4) of *Physical and Land Use Planning Act*, 2019. I have reviewed these provisions and they are clearly time bound and are couched in mandatory obligatory terms as denoted by the use of the word 'shall'. I'm emboldened by the Court of Appeal holding and I would not hesitate to concur that the jurisdiction of the County Liaison Committee indeed had lapsed by the time of the filing of these proceedings effectively clothing this court with jurisdiction to exempt and entertain the matter before it.

44. Additionally while the court has a duty to bolster parties to exhaust and pursue alternative forums of dispute resolution where they are provided for by statute to enhance timely disposal of matters, the exhaustion doctrine is only applicable where the alternative forum is accessible, affordable, timely and effective. In the case of *Havi & 3 Others Vs. Njenga & 10 Others (Civil Appeal E044 of 2021*) (2022) KECA 928 (KLR) the court cited Dawda K. Jawara vs Gambia ACmHPR 147/95-149/96-A decision of the African Commission of Human and Peoples' Rights where it was held that:

> A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint [in its totality] ...the Governments assertion of non-exhaustion of local remedies will therefore be looked at in this light ...a remedy is considered available only if the applicant can make use of it in the circumstances of his case." Emphasis is mine

45. Arising from the foregoing and considering that the main reason for cancellation of the approvals is that the ownership of the land and or the title on which the developments were to be made is disputed the lease having expired, I don't see how a remedy would be available as the committee cannot pronounce itself on the legality of the title. Capacity would be an impediment. I will revisit this matter when discussing whether some of the reliefs can issue in the circumstances of this case.

46. Moreover I'm of the considered view that jurisdiction is acquired at the commencement of proceedings and not during the pendency of such proceedings. The liaison committee having not been in place in the first instance, the court was automatically veiled with jurisdiction by dint of the provisions of section 93 of the *Physical and Land Use Planning Act*. The said section stipulates as follows:

> All disputes relating to physical and land use planning, before establishment of the National and County Physical and Land Use Liaison Committees shall be heard and determined by the Environment and Land Court."

47. It follows therefore if the court was seized of jurisdiction at the commencement of the proceedings it could not be said to have lost it through the Respondents subsequent action of forming the liaison committee way after filing of the suit before this court.

48. Based on the foregoing discussions the court finds and holds that it has jurisdiction to entertain the instant suit, that the matter is properly before it and an exemption would be merited for the reasons already enumerated.

Whether the Respondents acted lawfully in revoking the two Development permissions granted to the Exparte Applicant.

49. Having resolved the jurisdictional issues I will proceed to discuss the decision to revoke the permissions that had been issued. It is not in dispute that two development permissions granted to the Exparte

Applicant were revoked. These proceedings have been commenced by way of Judicial Review. I will first consider this in the context of the purpose and nature of judicial review.

50. In the decided case of Municipal Council of Mombasa v. Republic & another [2002] eKLR the Court of Appeal stated as follows concerning judicial review:

> ... And as the Court has repeatedly said, judicial review is concerned with the decision - making process, not with the merits of the decision itself. Mr. Justice Waki clearly recognized this and stated so; so that in this matter, for example, the court would not be concerned with the issue of whether the increases in the fees and charges were or were not justified. The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decision; acting as an appeal court over the decision would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review..."

51. From the case law above there must a decision made by a public body through its officers. The County Government of Kwale is a public body which through its officer suspended and then revoked the development permissions the subject of these proceedings. Guided by the caselaw above the court must interrogate the decision by looking at whether the persons who made the decision had the power to do so and if yes where did they derive it from, how and or the manner in which the decision was arrived, did the decision affect any person and if yes were the affected persons heard before the said decision was made and the relevancy or otherwise the factors taken into account in arriving at the decision.

52. On the issue of authority or jurisdiction, it is not in dispute that the power to revoke a development permission is donated by section 57(5) of the Physical Planning and Land Use Act to the 1st Respondent. It provides; -

> 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.

53. The Respondents state that one of the conditions attached to the permission was that the ownership of the land should not be in dispute. That the fact that ownership is disputed amounted to a breach of the conditions for purposes of the above section. The Respondents state they were justified in revoking the permissions. But is important to note that the decision must be looked at in its totality. From the outset and arising from the case law cited above is that one of the objectives of Judicial review proceedings is that a party is accorded fair treatment. The Court of Appeal in the case of Republic Vs Kenya Revenue Authority Exparte Yaya Towers Limited (2008) eKLR, reiterated that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he/she has been subjected.

54. Coming to the how and whether the Exparte Applicants were accorded a hearing before the decision was made. It is the Exparte Applicants case that the Respondents violated their rights to Fair Administrative Action firstly by being denied a fair hearing and which includes a hearing prior to revocation of the development and change of user permissions earlier on issued by the Respondents.

Let me state that the right to be heard is a Constitutional right enshrined in Article 47 and 50 of *the Constitution* and Section 4 of the *Fair Administrative Action Act*.

55. Article 47(1) and (2) of *the Constitution* provides as follows;

    I. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

    II. 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

56. Section 4(3)(b) of the *Fair Administrative Action Act*, 2015 imports the rules of natural justice and provides as follows:-

    1. 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. an opportunity to be heard and to make representations in that regard;

57. I have perused the pleadings by the Exparte Applicant and which give a detailed narration of what transpired before this matter was escalated to the court. From the evidence on record, it is not in dispute that the Respondents granted the Exparte Applicant approvals to commence and continue with developments on the suit property. It is also not in dispute that the suspension of the approvals was communicated vide the letters dated 27/11/2023 and 17/1/2024, the Exparte Applicants were informed of the revocation of their approvals through a decision made on 18/1/2024. It has been demonstrated by the Exparte applicants that through their lawyers made pleas and beseeched the Respondents to reconsider and reverse their decision. Attached were letters dated 7/12/2023 by Paras D. Shah of Coulson Harney and 19/01/24 addressed to the Governor Kwale County by the firm of Macharia-Mwangi & Njeru. These letters did not elicit any response but the Respondent proceeded to revoke the permissions.

58. It is not disputed that the Respondents revoked the permissions for development earlier on granted to the Exparte Applicants without giving them prior notice. As such, having not been granted any opportunity to be heard before the issuance of the letters of revocation the Exparte Applicants right to fair administrative action was violated. A right to a fair hearing is one of the constituents of natural justice. I must insist that from the record no evidence was adduced by the Respondents to the contrary.

59. I further find support and guided by the following dictum of the court in *Republic v National Cohesion and Integration Commission; Chama Cha Mawakili Limited (Exparte) (Judicial Review Application E057 of 2022*) [2022] KEHC 10206 (KLR) (Judicial Review) (14 July 2022)

> Every administrator bestowed with statutory powers to make decisions or to take actions that adversely affected an individual or group of individuals was not to lose sight of the provisions of sections 4 and 5 of the FAAA and to specifically accord such person(s) notice of intended action, hear their views, consider all relevant matters, give reasons for the decision taken and inform them of the right and manner of appeal. The respondent did not follow due process before taking the impugned action. The applicant's rights enshrined in article 47 of *the Constitution* and operationalized through the FAAA were trampled upon.'

60. I will now look at the relevancy or otherwise of the factors taken into account in arriving at the decision. Section 57 of the Physical Planning and Land Use Act is on development permissions and donates the power to grant and revoke the same to the County Executive Committee member. Section 57 (5) is on revocation of development permission. It is to the effect that a permission may be revoked where the

applicant contravenes any provision of the Act or conditions imposed on a development permission for any justifiable cause. The court must therefore look at what is said to have been contravened and from both perspectives namely contravention of statutory requirements and conditions attached to the permission. For the later there is no contestation that the Exparte Applicant breached any statutory provisions. From the proceedings the Exparte Applicants were able to demonstrate they duly complied with all statutory requirements for grant of the permissions.

61. The Respondent rely on the breach of condition attached to the title. A look at the development permission for change of user gives 11 conditions but of relevance to these proceedings is condition No.1 that 'The ownership of the land is not in dispute.' But it is important to note that there is condition No. 2 which states; -

> That the approval does not confirm ownership of the land and that the County Government shall not be liable for any land disputes arising from the development permission granted.

62. My understanding of the above is that condition No. 1 and 2 must be read in tandem and cannot be delinked. I say so because condition number two is a disclaimer that would disqualify the Respondent from using condition number 1 as a basis to revoke a development permission. It therefore follows that the information they obtained as to the expiry of the lease would be irrelevant for purposes of revoking a permission since they have already 'washed their hands' off the matter as the proverbial Pontius Pilate of the bible did. Theirs was to wait for a dispute to arise and plead condition number 2 above but not to make it a reason for cancelation of the development permissions. Additionally, I found it difficult to apprehend how a dispute that emerges which is not the making of the Exparte Applicant would be a breach attributed to the Exparte Applicant. Clearly it cannot also be referred to as a breach.

63. The Respondents aver that the cancellation of the permissions for change of user and for development were informed by the fact that the title deed held by the Exparte Applicants and which is a lease has expired and is therefore illegal. The reasons are reiterated in the affidavit sworn by Ali A. Budzuma on 5/4/2024. It is deponed interalia that the Respondent established that the mother title was set to expire on 01/01/2013 and it was not extended. That effectively the title expired in 2013 and the Exparte applicant by law was holding onto a worthless title from which no legal right can flow and upon which no legal claim can be founded (See paragraph 11 of the Replying Affidavit). It is the Respondents case that this therefore breached the conditions attached to the approvals to the extent that ownership of the Applicants property was disputed.

64. The above clearly are the reasons of what informed the cancellation of the approvals. The depositions under paragraph 11 of the replying affidavit are terse and with finality. The Respondents state they acted by conducting their own due diligence and obtained Letters dated 15th December 2023 from the Ministry of lands public works housing and urban development state department of lands and physical planning, 20th December 2023 from the Ministry of lands public works housing and urban development state department of lands and physical planning and 21st July 2023 for the Ministry of lands public works housing and urban development , 3rd July 2023 from the County Director Physical And Land Use Planning. I have already stated this would be irrelevant factors to consider in revocation of a permission.

65. But I will also add that it is also the manner in which this information was used to arrive at the decision to revoke the permissions as can be seen from the depositions above including the fact that the person affected was not accorded an opportunity for a rejoinder.

66. Further I agree with the Applicants that the Respondents were unequivocal about the title being a useless paper. I had no doubt in my mind considering the depositions and even the contents of the letters listed above. The information could be true, but how can the Respondents adjudicate on a matter which clearly, they became conflicted when they stated in their letter dated 17th January 2024 that since the lease had expired and an application for extension or renewal had not been made since 2013 the land reverted to the County Government for Planning purposes. I agree with the Exparte Applicants they became the accuser, the investigator and the prosecutor at the same time and unilaterally proceeded to revoke the permission which is frownable.

67. I think the matter was handled with highhandedness. While the Respondents have distanced themselves from the 'invaders' on the ground, I had occasion to view and listen to the WhatsApp video clip recorded on 21/2/24 at 11:22 am presented by the Exparte Applicants and it was clear to me the Respondents had taken sides by feeding information to the gentleman identified as Mr. Hassan Rashid Mzinga who is seen on the suit property addressing the workers when these people did not raise any objections at the appropriate stages of public participation. At least none was brought to this court's attention. All the above did not create confidence in the court that natural justice and fairness was deployed in the handling of this matter.

68. The Exparte applicant in response furnished to the court a myriad of documents showing how they acquired the impugned title. It is no doubt the legality or authenticity of the title clearly is in question. Indeed, it is trite that a title is prima facie evidence of the ownership of the registered proprietor. However, it can be impeached under Sections 26 (1) (a) and (b) of the *Land Registration Act*. It is within the courts power to examine and confirm the authenticity of a title. This is ordinarily undertaken through the judicial process. The matter is before this court for review of the cancelation of the approvals and the legality of the title is given as the main reason for the said cancelation. No evidence has been placed before this court demonstrating the parties herein have engaged in a court process to establish the authenticity of the alleged illegal title specifically in light of the allegations of its expiry.

69. I noted the Exparte Applicants alluded to and attached a court order recorded in Mombasa High Court Petition No. 29 of 2013. Mr Budzuma in his replying affidavit states that the 2nd Respondent is a stranger to the same. That the consent was acknowledged to the extent that the Exparte Applicants were a rateable owner and not necessarily the legal owner thereof. The court did not have the benefit of the proceedings informing the consent. It is trite that a matter determined by way of consent is not a determination on merits. But I think the bottom line is that the Respondents have no authority to make a determination on legality of a title.

70. For the reasons above I would again fault the process and also add that the decision to revoke the two permissions was ultra vires. The Respondent had no legal authority to with finality impugn the title and make this a basis for the revocation of the permissions.

71. But having stated all the above I must face the reality that this dispute has clearly mutated into a land dispute ownership and has now gone beyond revocation of the development permissions. I think I must exercise restraint and avoid a merit review of the legality of the title. I will shortly demonstrate why I must do so.

72. In Republic v Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014] eKLR the court held that: -

> ...where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the court to determine the merits of two or

more different versions presented by the parties the court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore, judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. ..."

73. Arising from the above this court makes a finding that issues of authenticity and legality of the Exparte Applicants title are best left to another forum that is a normal civil suit where each party may ventilate their case and I respectfully agree with the Respondents submission in this regard Judicial review is not the appropriate forum.

Whether the Applicant is entitled to the remedies it seeks.

74. I will now embark on the main issue being whether the Judicial review in form of the prerogative orders of mandamus, Certiorari and Prohibition are available to the Ex – parte Applicant. I have already set out at the beginning of this judgement the reliefs sought in this judgement. With regard to the 1st prayer which sought exemption from exhausting the mechanism available, this court's finding was in the affirmative and finds no reason not to grant the said order.

75. A quick look at the above prerogative orders. In Republic v Principal Kadhi, Mombasa Ex-parties Alibhai Adamali Dar & 2 others; Murtaza Turabali Patel (Interested Party) [2022] eKLR the court stated thus; -

    27. The legal efficacy and scope of the statutory order of Mandamus, Prohibition and Certiorari are remedies granted by High Court to persons inferred by the exercise of administrative of judicial powers. These prerogative orders are only available against public bodies.....

    28. The prerogative writs of "Certiorari" derives from the Latin word "Certiorari" which means to be certified, informed, appraised or shown. Both in its embryonic days and today, the order, initially and prerogative writ was inferior courts and required the proceedings of that to be transferred to the High Court and examined for validity. It meant the decision would be quashed. From the Provisions of Order 53 of the Civil Procedure Rules the Applicant ought to move court within a period of six (6) months from the time the order, decree, judgment, conviction or other proceeding was made. The Order of "Prohibition" issues where there are assumption of unlawful jurisdiction or excess of jurisdiction. It's an order from the High Court directed to an inferior tribunal or body as in this case the Kadhi's Court. Its functions is to prohibit and/or forbids encroachment into jurisdiction and further to prevent the implementation of orders issued when there is lack of jurisdiction. The order of "Mandamus" is derived from the Latin word "Mandare" meaning to command. It is issued in cases where there is a duty of a public or a quasi-public nature or a duty imposed by statute, it compels the fulfilment of a duty where there is a lethargy on the part of a body or officer concerned.

    The court further stated

    31. .....In the book of "Administrative Law", Sir. W. Wade and C. Forsyth, Page 605 noted that:-

        I can see no difference in principle between Certiorari and Prohibition, except that the latter may be invoked at an earlier stage. If the proceedings establish that the body complained of is exceeding its jurisdiction by entertaining matters which

> would result in its final decision being subject to being brought up and quashed on certiorari. I think that prohibition will lie to restrain it from so exceeding its jurisdiction.
>
> Although prohibition was originally used to prevent tribunals from meddling with cases over which they had no jurisdiction, it was equally effective and equally often used, to prohibit the execution of some decision already taken but ultra vires. So long as the tribunal or administrative authority still had power to exercise as a consequence of the wrongful decision, the exercise of that power could be restrained by prohibition. Certiorari and prohibition frequently go hand in hand, as where certiorari is sought to quash the decision and prohibition to restrain its execution. But either remedy may be sought by itself."

76. Considering the above and now having found that the Respondent violated the Exparte Applicant's right to be heard and right to fair administrative action, would there be a reason for not granting the rest of the reliefs sought? It is established that the Judicial Review order of certiorari, Mandamus and prohibition are discretionary in nature. This therefore means that where the court finds that a public body or a person exercising public authority has exceeded its powers or has even acted in breach of the rules of Natural Justice, the court can still exercise its discretion to disallow the reliefs sought.

77. Author Ssekaana Musa in the book; Public Law in East Africa published by Law Africa, states at page 250:

> Judicial review is a discretionary jurisdiction. The prerogative remedies, the declaration and the injunction are all discretionary remedies with exception of habeas corpus which issues ex debito justitiae on proper grounds being shown. A court may in its discretion refuse to grant a remedy, even if the applicant can demonstrate that a public authority has acted unlawfully."
>
> Also see the persuasive decision of Justice S. Okongo in Judicial Review No. E003 of 2022 Kisumu Jacob Owiny Ojwang Vs County Land Registrar, Kisumu County & 2 Others

78. The court also carefully reviewed the rest of the reliefs sought. In view of my observations hereinabove that the validity of the title was not within the purview of the Respondents but a matter for consideration by the courts on merit. I had to satisfy myself that the grant of any of the prayers would not be construed to mean the courts validation of the impugned title and specifically the orders of mandamus which will result into resumption of the developments. Both parties have placed before court documents in support of their claims with regard to the validity of the title herein specifically expiry. The Exparte applicant has given a chronological and historical background of how they acquired title which they claim is prima facie proof of ownership. On the other hand, the letters presented from the government agencies seem to impugn the validity of the title and cannot be ignored either. All this information requires further interrogation to determine their truthfulness. I have introspected and I think that allowing the orders would still leave these serious conflicting issues unresolved and a recipe for a source of future conflicts including grant of future approvals.

79. The upshot of the above is that I'm inclined to exercise the discretion of this court against granting some of the orders sought by the Exparte applicant.

80. The court is also cognisant of the circumstances of this case and from the proceedings the ground status. The Exparte applicant is in possession of the suit property and has undertaken some developments and which they so far quantify at Kshs. 18 million. The contents of the WhatsApp video cannot be taken lightly as well. A court must do what it must. There is no doubt that this court

must intervene to protect the Exparte Applicant but at the same time preserve the suit property both in terms of the ground and the register. I'm also guided by the dictum in Nancy Makokha Baraza vs Judicial Service Commission & 9 Others [2012] eKLR____ where the Court expressed itself inter alia as follows:

> The New Constitution gives the court wide and unrestricted powers which are inclusive rather than exclusive and therefore allows the court to make appropriate orders and grant remedies as the situation demands and as the need arises."

81. The upshot of the foregoing is that the following orders issue to dispose of the Notice of Motion dated 27th March 2024.

    i. That pursuant to Section 9[4] of the *Fair Administrative Action Act*, this honourable court exempts the Applicant from the requirement to exhaust the local remedy of first appealing to the County Physical and Land Use Planning Liaison Committee.

    ii. That it is hereby declared that the Respondents acted unlawfully in revoking Development permissions DA/CU/O1/O4/2003 and DA/PB/06/09/2023 granted to the Exparte Applicant.

    iii. That parties to take the dispute to an appropriate forum where issues touching on the validity of the Exparte Applicant's title can be determined with finality. The fact that such proceedings would have been filed pursuant to the courts direction shall not take away any defence a party may have against the same.

    iv. That pending the determination in iii) above the status quo on the suit property as well as the register over title Number Kwale/Diani Beach Block/983 at the Kwale Lands Registry shall be maintained. The Respondents shall not interfere with the Exparte Applicants quiet possession. The Land Registrar Kwale shall not register any entries in respect of the said title Number Kwale/Diani Beach Block/983 detrimental to the interest of the Exparte Applicants.

    v. Each party to bear its own costs.

    Orders accordingly.

JUDGEMENT DATED SIGNED AND DELIVERED THIS 16TH DAY OF OCTOBER 2024.

A E DENA

JUDGE

Mr. Mwangi for the Exparte Applicants

Ms Gitau Holding brief for Mr Kibara for the 1st Respondent

Ms Asmaa Maftah – Court Assistant

HON. LADY JUSTICE A.E DENA