



Harji Govind Runda Cockatoos Limited v County Director of Physical Planning & another (Environment and Land Judicial Review Case E004 of 2023) [2024] KEELC 7418 (KLR) (4 November 2024) (Judgment)

Neutral citation: [2024] KEELC 7418 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E004 OF 2023**

LL NAIKUNI, J

NOVEMBER 4, 2024

IN THE MATTER OF: AN APPLICATION BY HARJI GOVIND RUDA & COCKATOOS LTD FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF: PLOT NO XVII/187 KIZINGO

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA

BETWEEN

HARJI GOVIND RUNDA COCKATOOS LIMITED APPLICANT

AND

COUNTY DIRECTOR OF PHYSICAL PLANNING 1ST RESPONDENT

MOMBASA COUNTY GOVERNMENT 2ND RESPONDENT

JUDGMENT

I. Preliminaries.

1. This is a Judgement pertaining to a Judicial Review suit instituted by the Ex – Parte Applicants – Harji Govind Runda and Cockatoos Limited against the Respondent herein. To begin with, the Applicants filed a Chamber summons dated 25th October, 2023 under the provision of Section 8(2) of the Law Reforms Act, Chapter 26 of the Laws of Kenya and Order 53 Rule (1) of the Civil Procedure Rules, 2010.



2. Subsequently, he filed and served substantive motion as required by the law. Despite of service, the Respondent declined to file any responses leaving the Court to make a determination of the matter on its own merit.

II. The Applicants case.

3. Through the substantive motion, the Applicants sought for the following prayers:
 - a. Spent.
 - b. That this Honourable Court be pleased to grant leave to the Applicant herein to apply for an order of certiorari to bring before this Court and quash the 1st Respondent decision to vacate Plot No. XXVI/187, Kizingo communicated in the notice dated 19th October, 2023 to the detriment of the Applicants herein and general residents of plot no XXVI/187 Kizingo.
 - c. That this honorable court be pleased to grant leave to the Applicant herein to apply for an order of certiorari to bring before this Court and quash the enforcement notice dated 23rd October, 2023 issued by the 1st Respondent.
 - d. Spent.
 - e. Spent.
 - f. That the grant of leave to operate as a stay of the decision of the Respondents issued on 19th and 23rd October, 2023 respectively.
 - g. Spent.
4. The application by the Applicant herein was premised on the grounds, testimonial facts and averments made out under the 10 Paragraphed Verifying Affidavit of – Harji Govind Ruda, the 1st Applicant herein sworn and dated 25th October, 2023 with seven (7) annexures marked “A to G”. The Applicant averred that: -
 - a. The 2nd Applicant was and still is the registered owner and developer of various apartments on Mombasa plot no. XXVI/187 Kizingo.
 - b. However, the said developer had long sold various apartments regarding the said land and issued several sub - leases for the individual apartments. (annexed in the affidavit and marked as “B” was a copy of the requisite occupational permits for the flats).
 - c. The 2nd Applicant has also obtained requisite permission for electricity supply from the relevant statutory corporate body.(annexed in the affidavit and marked as “C” was a copy of correspondence from Kenya power).
 - d. On 19th October 2023 the 1st Respondent acting on behalf of the 2nd Respondent issued with impunity what it purported to be a three-day notice to the 2nd Applicant ordering all the residents of Mombasa plot no. XXVI/187, Kizingo to vacate the premises over alleged power transformer faults. (annexed in the affidavit and marked as “D” was a copy of the notice).
 - e. Further on 23rd October, 2023 the 1st Respondent acting on behalf of the 2nd Respondent again issued what was purported to be an enforcement notice in relation to a power transformer structure. This time the letter was addressed to the 1st Applicant. (annexed herewith and marked as “E” was a copy of the notice).



- f. It was clear from the said notices that the Respondents intended to move with speed to evict and or substantially interfere with the residents quiet and exclusive possession of the said property with a view to harassing the 1st Applicant herein for a collateral purpose.
 - g. The collateral purpose of the Respondents is demonstrated through the harassment, arrest and subsequent charging of the 2nd Applicants employee with the offence of failing to seek permit for repair and painting works while the said employee was not an employee for the sub-contractor who was carrying out the impugned painting and repair works.(annexed in the affidavit and marked as “F” and “G” were copies of the offence charged on Dhiren Halai an employee of the 2nd Applicant as well as permit issued to Tinting as Associates in connection with the painting works).
5. The Applicants also filed a statutory statement under the provision of Order 53 Rule 1 (2) of the Civil Procedure Rules 2010 where the Applicants contended the decisions dated 19th October, 2023 and 23rd October, 2023 by the County Director of Physical Planning to vacate and evict the Applicants and the residents from the building on plot known as XXVI/187 Kizingo.
6. On the reliefs sought (Judicial Review by way of): -
- a. An order of certiorari to remove into the High Court for the purpose of its being quashed the decision made on 19th October, 2023 by the County Director of Physical Planning to evict the Applicants and residents of building on plot no XXVI/187 by ordering them to vacate the said premises based on a power transformer fault which issue lies squarely within the mandate of the Energy and Petroleum Regulatory Authority under the [Energy Act 2019](#).
 - b. An order of certiorari to remove into the High Court for the purpose of its being quashed the decision made on 23rd October, 2023 by the County Director of Physical Planning to interfere with the Applicants and resident’s quiet possession of building on plot no XXVI/187 based on a power transformer fault which issue lies squarely within the mandate of the Energy and Petroleum Regulatory Authority under the [Energy Act 2019](#).
 - c. A declaration that the decision and conduct of the Respondents and in particular, the issuance of notice dated 19th October, 2023 is ultra vires, unlawful, wednesbury unreasonable, unfair, manifestly unjust and in blatant disregard to the rules of natural justice.
 - d. A declaration that the decision and conduct of the Respondents and in particular, the issuance of notice dated 23rd October, 2023 is ultra vires, unlawful, wednesbury unreasonable, unfair, manifestly unjust and in blatant disregards to the rules of natural justice.
 - e. That further or in the alternative damages arising from the matters herein and interest thereon.
 - f. An order for costs herein plus interest.
7. The Applicants relied on the grounds upon which reliefs which were sought: -
- i. That the Applicant herein was the Director of Cockatoos Limited the 2nd Applicant and was a law-abiding citizen living and working for gain in Mombasa County.
 - ii. That the second Applicant was the registered owner and developer of various apartments on Mombasa plot no. XXVI/187 Kizingo.
 - iii. That however, the said developer had long sold various apartments regarding the said land and issued several sub - leases for the individual apartments.



- iv. That on 19th October 2023 the 1st Respondent acting on behalf of the 2nd Respondent issued with impunity what it purported to be a three-day notice to the 2nd Applicant ordering all the residents of Mombasa plot no. XXVI/187, Kizingo to vacate the premises over alleged power transformer faults.
 - v. That further on 23rd October, 2023 the 1st Respondent acting on behalf of the 2nd Respondent again issued what it purported to be an enforcement notice in relation to a power transformer structure. This time the letter was addressed to the 1st Applicant.
 - vi. That it is clear from the said notices that the Respondents intend to move with speed to evict and or substantially interfere with the residents quiet and exclusive possession of the said property with a view to harassing the 1st Applicant herein for a collateral purpose which is not disclosed.
 - vii. That the collateral purpose of the Respondents is demonstrated through the harassment, arrest and subsequent charging of the 2nd Applicants employee with the offence of failing to seek permits for work while the said employee is not an employee for the sub-contractor who was carrying out the impugned repair works.
8. The Statutory statement was supported by a 10 paragraphed verifying affidavit by Harji Govind Ruda, the 1st Applicant herein and the Director of Cockatoos Limited the 2nd Applicant who reiterated the contents of the statutory statement.

III. Submissions

9. On 16th September, 2024 the Honourable Court directed that the Judicial Review Application should be disposed of by way of written submissions. Unfortunately, by the time of penning down the Judgement the Honorable Court had not as yet accessed the submissions. Pursuant to that a Judgment date was reserved on 4th November, 2024 by Court accordingly.

IV. Analysis & Determination

10. I have carefully assessment the Judicial review application brought to this Honourable Court by the Applicants, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes. As already indicated above, despite of all the directions made by Court, the Respondent declined to file any responses leaving the Court to make a determination of the matter on its own merit.
11. For the Honourable Court to reach an informed, reasonable, fair and Equitable decision, it has crystalized the subject matter into three (3) salient issues for analysis. These are as follows: -
- a. Whether the Judicial review suit instituted by the Applicants meets the threshold of such a suit and has merit whatsoever?
 - b. Whether the parties are entitled to the prerogative reliefs sought.
 - c. Who will bear the costs of the suit.

Issue No. a). Whether the Judicial review suit instituted by the Applicants meets the threshold of such a suit and has merit whatsoever?

12. Under this Sub – heading, the Honourable Court will deliberate on the merits of the Judicial review case instituted by the Applicants under the already set out provisions of the Law. But before that, the Court will extrapolate on the brief facts of the case for ease of reference.



Brief facts

13. From the filed pleadings, the brief facts of the case are summarized in the verifying affidavit by the Applicants 2nd Applicant was and still is the registered owner and developer of various apartments on Mombasa plot no. XXVI/187 Kizingo. However, the said developer had long sold various apartments regarding the said land and issued several sub - leases for the individual apartments. (annexed in the affidavit and marked as “B” was a copy of the requisite occupational permits for the flats). The 2nd Applicant has also obtained requisite permission for electricity supply from the relevant statutory corporate body. (annexed in the affidavit and marked as “C” was a copy of correspondence from Kenya power).
14. On 19th October 2023 the 1st Respondent acting on behalf of the 2nd Respondent issued with impunity what it purported to be a three-day notice to the 2nd Applicant ordering all the residents of Mombasa plot no. XXVI/187, Kizingo to vacate the premises over alleged power transformer faults. (annexed in the affidavit and marked as “D” was a copy of the notice). Further on 23rd October, 2023 the 1st Respondent acting on behalf of the 2nd Respondent again issued what was purported to be an enforcement notice in relation to a power transformer structure. This time the letter was addressed to the 1st Applicant.
15. It was clear from the said notices that the Respondents intended to move with speed to evict and or substantially interfere with the residents quiet and exclusive possession of the said property with a view to harassing the 1st Applicant herein for a collateral purpose. The collateral purpose of the Respondents is demonstrated through the harassment, arrest and subsequent charging of the 2nd Applicants employee with the offence of failing to seek permit for repair and painting works while the said employee was not an employee for the sub-contractor who was carrying out the impugned painting and repair works.(annexed in the affidavit and marked as “F” and “G” were copies of the offence charged on Dhiren Halai an employee of the 2nd Applicant as well as permit issued to Tinting as Associates in connection with the painting works)
16. Now turning to the issues of analysis under this Sub – titles. Judicial review jurisdiction, was discussed in the Ugandan case of “Pastoli – Versus - Kabale District Local Government Council & Others, (2008) 2 EA 300”, that: -

“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: See Council of Civil Service Union v Minister for the Civil Service [1985] AC 2; and also Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, Miscellaneous Application Number 643 of 2005 (UR). 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 provisions 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: Re An Application by Bukoba Gymkhana Club [1963] EA 478 at page 479 paragraph “E”. 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 or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules



expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876).”

17. First and foremost, it is important to appreciate the meaning of Judicial Review. The concept is based on the fact that administrative excesses must be checked through Judicial intervention. Administrative law relates to decision of offices or organs of Central Government or Public Authorities which may affect the rights or liberties of the citizens and which are enforceable in or organized by the courts of law. Therefore, judicial review is an integral component of administration law.
18. In our legal parlance and jurisprudence, Judicial review is now entrenched as a constitutional principle pursuant to the provisions of Article 47 of *the Constitution*, which provides for the right to fair administrative action, and Section 7 of the *Fair Administrative Action Act* in this regard provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision.
19. In the case of “*Republic – Versus - County Director of Education, Nairobi & 4 others Ex-parte Abdukadir Elmi Robleh* [2018] eKLR” learned judge observed as follows in paragraph 27 of his judgment;

“In my view the notice contemplated under Article 47 of *the Constitution* as read with Section 4(3) of the *Fair Administrative Action Act* must not only be prior to the decision but must also be adequate and must disclose the nature and reasons for the proposed administrative action.”
20. Article 47 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.”
21. 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 be given full information on the case against him and given reasonable opportunity to present a response. 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 – Versus - South Eastern Health Board* [2005] 4 IR 217”). 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 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.”
22. It is also founded under the provisions of Order 53 Rules 1 to 7 of the Civil Procedure Rules 2010 where the Prerogative orders of “Mandamus”, “Prohibition” and “Certiorari” are issued. The provision of Order 53 Rule 2 of the Civil Procedure Rules as read with Section 9 (3) of the *Law Reform Act* provides for the time limits within which an application can be filed.



23. The provision of Order 53 Rule 2 of the Civil Procedure Rules provides that: -

“Leave shall be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, unless the application for leave is made not later than 6 months after the date of the proceedings or such shorter period as may be described by any Act; and where the proceeding is subject to appeal and a time is limited by the law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”

24. provides that: -

“In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings, for purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceedings or such period as may be prescribed under any written law...”

25. Primarily, the provisions of Sections 8 and 9 of the *Law Reform Act* Cap. 26 of the Laws of Kenya where the Provisions of Order 53 of the Civil Procedure Rules 2010 was borrowed from the case of *Farmers Bus Services – Versus - Transport Licensing Appeals Tribunal (1975) E.A. 523*. And upon the promulgation of *the Constitution* of Kenya in 2010 Article 47 of *the Constitution* of Kenya introduced the Provisions of Fair Administration of justice and later on the legislation of “the Fair Administration of Action Act of 2012” which is the statutory framework governing judicial review and the Administrative law in Kenya currently.

26. 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.

27. In a nutshell Judicial Review is the means by which High Court judges scrutinize public law functions intervening as a matter of discretion to quash, prevent, require and/or classify not because they disagree with the judgment but so as to right a recognizable public law wrong. This public law wrong could be unlawfulness, Wednesbury unreasonableness or irrationality, unfair hearing, ultra vires bad faith, unfairness, made or arrived at out of excess powers (ultra vires) biasness, capriciousness or un Judicially.

28. In an application for Judicial review the Applicant must be a person with a sufficient interest – (Locus Standi) and who commences proceedings promptly. To support this legal concept on judicial review, I have made in depth references to several literature review and court decisions – “Pharmaceutical manufacturers Association of South Africa in re- ex parte president of Republic of South Africa - 2000 S.A. 674 CC at 33 Republic – Versus - Speaker of the Senate and Another Ex-parte Afrison Export Import Limited 2018 eKLR Republic –Versus- Stanley Mambo Amuti (2018) eKLR.”; the *Kenya National Examination Council – Versus - Republic (Ex - Parte - Geoffrey Gathenji & Another Nairobi Civil Appeal No. 266 of 1996*.



29. In the case of “Pastoli – Versus - Kabale District & others (2008) 2 E.A. 300” the court set out the duty of a court in Judicial Review applications as follows: -

“In order to succeed in an application for judicial review, the Applicant has to show that the decision or the act complained of is tainted with illegality, irrationality and procedural impropriety.....Illegality is when the decision making authority commits an error of law in the process of taking or making the act the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provisions of 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 would have made such a decision is usually in defiance of logic and acceptable moral standards.....Procedural impropriety is when there is a failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non -observance of the rules of natural justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.”

30. In the case of “Municipal Council of Mombasa – Versus - Republic Umoja Consultants Ltd Civil Appeal No 185 of 2007 (2002) eKLR” the Court of Appeal held that: -

“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 power i.e. jurisdiction to make it. Were the provisions affected by the decision heard before it was made. In making the decision, did the decision maker take into account relevant matters or did they 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 decider. Acting as an appeal court over the decider would involve going into the merits of the decision itself – such as whether this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of judicial review.”

31. It is important to remember in every case 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 has been subjected and that it is not part of that purpose to substitute the opinion of the court or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See Halsbury’s Laws of England 4th Edition Vol (1)(1) Para 60.

32. 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.”

33. The provision of Order 53 Rules 3 & 4 of the Civil Procedure Rules, 2010 lay the procedure when seeking the prerogative orders of judicial review being Mandamus, Prohibition and Certiorari. To support my proposition, I am guided by the “Civil Appeal No.266 of 1996 Kenya National Examination Council – Versus - Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others [1997]”, the Court of Appeal addressed its mind to efficacy and purport of the order of certiorari and prohibition. On certiorari the court had this to say;

“Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reasons.”

34. In the case of “Municipal Council of Mombasa – Versus - Republic Umoja Consultants Limited Civil Appeal No. 185 2007 (2002) eKLR the court of appeal set out the parameters in applications for Judicial Review and held that: -

“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 power i.e. jurisdiction to make it. Were the provisions affected by the decision heard before it was made. In making the decision, did the decision maker take into account relevant matters or did the 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 decider. Acting as an appeal court over the decider would involve going into the merits of the decision itself – such as whether this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of Judicial Review.”

35. In the instant case, the Applicants have sought all the above one out of the three known the writ prerogative Orders – Certiorari. As stated above, this court has powers under Sections 8 and 9 of the Law Reform Act, Cap. 26 of the Laws of Kenya to issue prerogative writ of Certiorari, which brings into this court to quash a decision which is ultra vires. Certiorari looks at the past. The provision of Section 8 of the Law Reform Act, also provides for a writ of prohibition which primarily prohibits a tribunals, judicial bodies or subordinate courts from doing or taking an action in excess of its jurisdiction.
36. The impugned enforcement notice was issued on 19th October 2023 and 23rd October, 2023 and the Judicial Review Application seeking certiorari as filed is dated 25th October, 2023 which is within the 6 months from the time the order, decree, judgment, conviction or other proceeding was made; the Application is against a decision of an administrative body being the Respondents.

Issue No. b). Whether the parties are entitled to the prerogative reliefs sought.

37. Under this Sub – heading, having clearly set out the principles on Judicial review above, the Honourable Court now wishes to apply them onto the instant case. In so doing, the Court has considered the Applicant’s notice of motion, the Statutory Statement, the Verifying Affidavit, the exhibits annexed to the verifying affidavit on record and is of the opinion that the issues arising for determination is whether or not the County Director of Physical Planning acted in ultra vires of his powers hence making the decision unlawful and irregular. As earlier stated, the grievance of the Applicants arose when a County Director of Physical Planning, Mombasa acting on behalf of the 2nd Respondent issued with impunity what it purported to be a three-day notice to the 2nd Applicant



ordering all the residents of Mombasa plot no. XXVI/187, Kizingo to vacate the premises over alleged power transformer faults which vacation he claims was ultra vires, irregular and unlawful.

38. Further on 23rd October, 2023 the 1st Respondent acting on behalf of the 2nd Respondent again issued what was purported to be an enforcement notice in relation to a power transformer structure. This time the letter was addressed to the 1st Applicant. He argued that it was clear from the said notices that the Respondents intended to move with speed to evict and or substantially interfere with the residents quiet and exclusive possession of the said property with a view to harassing the 1st Applicant herein for a collateral purpose. The Court has a task to adjudicate on this aspect of facts and Law and was the Enforcement notice by the Respondent procedurally fair and proper.

39. To determine the above question, with regards to procedural fairness, it was held in “Pastoli – Versus - Kabale District Local Government Council and Others [Supra]” that procedural impropriety is one of the grounds upon which a Court would be entitled to grant judicial review orders and according to the court:

“Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

40. Legally speaking, the Respondents are under an obligation to afford a person who stands to be adversely affected by its decision an opportunity of being heard before such a decision is arrived at. In this case, the applicant has exhibited letters of allotments in favour of its members. The validity of the same is not challenged since no replying affidavit has been filed. Similarly, the issue whether the allotted plots are not the same as those against which the enforcement notices were issued cannot be determined without a replying affidavit. It follows that the applicant’s averments must be taken on their face value.

41. The subject enforcement notice dated 19th October, 2023 was addressed to the to the 2nd Applicant and the second one dated 23rd October, 2023 was addressed to the 1st Applicant. According to the said notices the applicants were required to vacate immediately. According to the Applicants it was clear from the said notices that the Respondents intend to move with speed to evict and or substantially interfere with the residents quiet and exclusive possession of the said property with a view to harassing the 1st Applicant herein for a collateral purpose. Although there was a mention of 72 hours, the word “immediately” renders the said 72 hours superfluous.

42. The provision of Section 38 of the Physical & Land Use Planning Act, Cap 286 Laws of Kenya provided as follows:

“(1) When it comes to the notice of a local authority that the development of land 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.

(2) An enforcement notice shall specify the development alleged to have been carried out without development permission, or the conditions of the development permission alleged to have been contravened and 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 in particular such enforcement notice may 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.

- (3) Unless an appeal has been lodged under subsection (4) an enforcement notice shall take effect after the expiration of such period as may be specified in the notice.
- (4) If a person on whom an enforcement notice has been served under subsection (1) is aggrieved by the notice the may within the period specified in the notice appeal to the relevant liaison committee under section 13.

43. Before the Respondents can determine whether a person encroached onto where power transformers structures or onto another person's property and hence needs to remove the same, it is my view and I so hold that the Respondents ought first to afford the person concerned an opportunity of addressing the issue before issuing an enforcement notice. There is no such evidence on record.

44. 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.

45. It must also give the Applicants 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 the provision of 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.

46. In the foregoing premises the inescapable conclusion I come to is that the Respondents' action was tainted with procedural impropriety. It follows that this application is merited and warrants the grant of the certiorari orders and other reliefs sought.

ISSUE No. Who will bear the costs of the suit

47. It is now well established that the issue of costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of a legal action or proceedings in any litigation. The proviso of the provision of Section 27 (1) of the *Civil Procedure Act*, Cap 21 provides as follows: -

“Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and give all the necessary



directions for the purposes aforesaid; and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of those powers;

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise direct.”

48. On this legal point, I seek refuge from the cases of: - “Republic – Versus - Rosemary Wairimu Munene, Ex-Parte Applicant – Versus - Ihururu Dairy Farmers Co - operative Society Ltd this court held as follows: -

“The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”

49. Further, I am guided by the following passage from the Halsbury’s Laws of England; 4th Edition (Re-issue), {2010}, Vol.10. para 16:

“The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice”

50. Still on the same subject Mr. Justice (Retired) Kuloba in ‘Judicial Hints on Civil Procedure, 2nd Edition, (Nairobi) Law Africa) 2011’, page 94 stated: -

“Costs are (awarded at) the unfettered discretion of the court, subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, but they must follow the event unless the court has good reason to order otherwise.....”

51. With respect to the instant application, the Honourable Court has found that the application by the Applicants is meritorious. Thus, the Applicants are entitled to costs of the suit. The costs will borne by the 1st and 2nd Respondents accordingly.

V. Conclusion & findings

52. Ultimately, having caused the analysis of the framed issues, on Preponderance of Probabilities and the balance of convenience, the Honourable Court grants the following specific orders: -

- a. That judgement be and is hereby partly entered in favour of the Applicants as per the Judicial Review Application dated 25th October, 2023 under the following terms and conditions:-
 - i. An order of certiorari be and is hereby made removing into the High Court for the purpose of its being quashed the decision made on 19th October, 2023 by the County Director of Physical Planning to evict the Applicants and residents of building on plot no XXVI/187 by ordering them to vacate the said premises based on a power transformer fault which issue lies squarely within the mandate of the Energy and Petroleum Regulatory Authority under the [Energy Act](#) 2019.



- ii. An order of certiorari be and is hereby made removing into the High Court for the purpose of its being quashed the decision made on 23rd October, 2023 by the County Director of Physical Planning to interfere with the Applicants and resident's quiet possession of building on plot no XXVI/187 based on a power transformer fault which issue lies squarely within the mandate of the Energy and Petroleum Regulatory Authority under the Energy Act 2019.
- iii. A declaration be and is hereby made that the decision and conduct of the Respondents and in particular, the issuance of notice dated 19th October, 2023 is ultra vires, unlawful, Wednesbury unreasonable, unfair, manifestly unjust and in blatant disregard to the rules of natural justice.
- iv. A declaration be and is hereby made that the decision and conduct of the Respondents and in particular, the issuance of notice dated 23rd October, 2023 is ultra vires, unlawful, Wednesbury unreasonable, unfair, manifestly unjust and in blatant disregards to the rules of natural justice.

b. That the costs of the suit to be awarded to the Applicants to be bore by the Respondents jointly.

It is so ordered accordingly.

JUDGEMENT DELIVERED THROUGH MICRO – SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 4TH DAY OF NOVEMBER 2024.

.....

HON. MR. JUSTICE L. L. NAIKUNI,

ENVIRONMENT AND LAND COURT AT MOMBASA

Judgement delivered in the presence of: -

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. M/s. Madowo Advocate holding brief for Mr. Borona Advocate for the Ex - Parte Applicants.
- c. No appearance for the Respondents.

