Pierre Loporte Limited v Kilifi County Government (Miscellaneous Judicial Review 3 of 2019) [2023] KEELC 16002 (KLR) (6 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16002 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

MISCELLANEOUS JUDICIAL REVIEW 3 OF 2019

MAO ODENY, J

MARCH 6, 2023

N THE MATTER OF: AN APPLICATION FOR LEAVE TO COMMENCE PROCEEDINGS IN THE NATURE OF JUDICIAL REVIEW FOR ORDERS OF MANDAMUS AND PROHIBITION

AND

IN THE MATTER OF: THE FAIR ADMINISTRATION ACT, 2015

BETWEEN

PIERRE LOPORTE LIMITED ..... APPLICANT

AND

KILIFI COUNTY GOVERNMENT ..... RESPONDENT

JUDGMENT

1. The *ex parte* applicant upon being granted leave on April 4, 2019, instituted these judicial review proceedings by way of a notice of motion dated April 9, 2019 brought under section 9 of the *Law Reform Act*, section 7, 10(1) and 11 of the *Fair Administrative Action Act* and order 53 rule 3 (1) and (2) of the *Civil Procedure Rules* and sought the following orders: -

    a. An order of *mandamus* ordering and compelling the respondent to immediately and unconditionally issue the applicant with all building approvals to enable the applicant develop its property, all that land parcel known as plot 887 Watamu, Kilifi (title No 35142) the suit property herein.

    b. An order of prohibition against the respondent prohibiting its officers, employees, servants and any other person under its control from interfering in whatever way or manner with the

applicant's quiet possession of all that land parcel known as plot 887 Watamu, Kilifi (title No 35142) the suit property herein.

c. Costs and other incidentals be borne by the respondent.

d. Any such order or relief as the honourable court may deem just, fit and appropriate in the circumstances of this matter.

2. The application was supported by the grounds set out in the statutory statement and verifying affidavit of Roberto Lenzi who stated that he purchased the plot 887 Watamu, Kilifi (title No 35142) on March 20, 2002, from one Justus Omari for a sum of Kshs 2,000,000/-.

3. That the suit property was as a result of subdivision of plot 70 Watamu and that the applicant's efforts to develop the suit property have been frustrated by the respondent who has since refused to grant the applicant relevant building approvals citing reasons that the suit property is public land.

4. The applicant further averred that he has been paying land rates and rent to the respondent since 2002 and that the respondent's engineer at one point vide a notice dated October 17, 2014, approved and granted the applicant permission to erect a barbed wire fence around the suit property which was halted on September 14, 2015 by the area chief Watamu.

5. It was the applicant's case that the respondent's action of claiming that the suit property is public property in the absence of a court's decision and not granting the applicant an opportunity to be heard is grossly unfair and unreasonable.

6. The respondent filed a replying affidavit sworn on June 10, 2019 by Erick Randu, assistant director department of physical planning and urban development, Kilifi denied the existence of any application of approval submitted by the applicant and narrated the procedure of acquiring such approvals.

7. Mr Randu deponed that the said plot No 70 was at all material times set aside for public use and reserved for administration use as illustrated in the annexed Physical Development Plan (PDP) dated November 5, 1975 and Watamu survey plan of 1976 and therefore subdivision could not have been legally done for such reasons.

8. Counsel agreed to file written submissions which were duly filed.

Applicant's Submissions

9. To explain the scope and grounds to be considered in judicial review, counsel for the applicant relied on numerous cases namely, *Pastoli v Kabale District Local Government Council & others* [2008] 2 EA 300; *Republic v the Commissioner of Lands exparte Lake Flowers Limited* Nairobi HCMISC APP No 1235 of 1998; *Republic v Commissioner of Customs Services exparte Imperial Bank Limited* [2015] eKLR; *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 HL; *Republic v Public Procurement Administrative Review Board exparte Syner-Chemie* [2016] eKLR; *Republic v Speaker of the Senate of the Senate & another exparte Afrison Export Import Limited & another* [2018] eKLR.

10. Counsel submitted that judicial review is a claim by which the court is asked to review the lawfulness of an enactment, or decision, action or failure to act in the exercise of a public function.

11. It was counsel's further submission that the respondent's continued demand and receipt of payment of land rent and rates for the 17 years, bestowed legitimate expectation on the part of the applicant and relied on the cases of *Keroche Industries Limited v Kenya Revenue Authority & 5 others* [2007] eKLR; *Republic v Attorney General & another ex-parte Waswa & 2 others* [2005] 1KLR 280 where the court held that legitimate expectation is based not only on ensuring that legitimate expectations by the

parties are not thwarted , but on a higher public interest beneficial to all which is the value or need to hold authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration.

12. Ms Asli submitted that having explained how the applicant acquired the suit property and that it had no knowledge of the allegation that the same was public land, the applicant should be treated as a *bona fide* purchaser for value without notice as was described in the case of *Katende v Haridar & Company Limited* [2008] 2 EA 173.

13. Counsel further submitted that under article 47 (2) of the *Constitution* of Kenya and section 4 (2) of the *Fair Administrative Act*, the respondent was under a duty to give reasons as to why it declined to grant the approvals, a duty which they failed to discharge. That silence was not a substitute for written reasons and counsel relied on the case of *Serah Mweru Muhu v Commissioner of Lands & 2 other* [2014] eKLR and urged the court to grant the orders as prayed.

Respondent's Submissions

14. Counsel for the respondent identified four three issues for determination as follows:

    a. Whether the respondent made a decision capable of attracting judicial review orders.

    b. Whether an order of *mandamus* is available to compel the respondent to issue development and/or building plan approvals to the *ex parte* applicant.

    c. Whether any and/or all the orders sought are available to the *ex parte* applicant in the circumstances.

15. On the issue whether the respondent made a decision capable of attracting judicial review orders, counsel submitted that the mandate of approving building and development plans squarely lies with the director in the department of physical planning and urban development pursuant to sections 31, 32 and 33 of the *Physical Planning Act* (cap 286) of the Laws of Kenya which counsel restated which I need not reproduce.

16. Counsel therefore submitted that any person requiring development and/or building plan approval shall make an application for approval of development plans to the director in the department of physical planning and urban development vide a duly filled requisite PPA 1 form as prescribed in the fourth schedule of the *Physical Planning Act* (cap 286) of the Laws of Kenya.

17. It was counsel's submission that once such an application for approval of development and/or building plans is received and an initial assessment has been done, the applicant is invited to pay the prescribed fee which varies depending on the type of development and the specific zone in which the property is located and the size of the property in question.

18. Ms Jadi submitted that subsequently, the director is mandated to notify the applicant of its decision in writing within thirty (30) days of the decision being made and shall therein specify the conditions, if any, attached to the application for development and/or building plans as being approved, approved with conditions or in the case for refusal to approve, the grounds necessitating refusal.

19. It was counsel's submission that the applicant has not exhibited any application for approval of development plans for perimeter wall as envisaged under section 31 of the *Physical Planning Act* and further that even if there was an application for approval for development and/or building plans, there is no evidence that the applicant has asked for it to be considered and the director has failed and/or refused to consider.

20. That the applicant's purported application for boundary wall dated December 10, 2004 exhibited as RL-4 indicates an incomplete document with no approval from the defunct municipal council of Malindi.

21. It was counsel's submission that the director, physical planning and urban development department was never called to consider any application submitted by the applicant, therefore judicial review orders cannot issue and relied on the case of *Republic v City Council of Nairobi & Anor ex-parte Shital Bhandari* [2015] eKLR where the court held that a public officer cannot be compelled to do something when there was no evidence of refusal or at the very least apparent refusal on the part of the public officer to do the thing and even if such refusal has been shown it must also be shown to be unlawful.

22. Counsel also submitted that an order of mandamus will issue to compel a public officer to perform a statutory duty but will not issue to compel an officer to perform the duty in a certain way and relied on the case of *Republic v City Council of Nairobi & another ex parte Shital Bhandari* [supra].

23. Ms Jadi further submitted that the respondent being the custodian of land reserved for public use under article 62 of the *Constitution*, it reserves the right to institute proceedings against the applicant, and therefore, an order for prohibition against the respondent would curtail that right and relied on the case of *Republic v Senior Registrar of Titles ex parte Brookside Court Limited* [2012] eKLR.

24. Counsel finally submitted that the issues touching on ownership and sanctity of title cannot be addressed in this judicial review forum and urged the court to dismiss the application with costs.

Analysis And Determination

25. The issue for determination is as follows; -

    a. Whether the applicant is entitled to an order of *mandamus* and prohibition as prayed.

26. In the case of *Kenya National Examination Council v Republic ex parte Geoffrey Gathenji Njoroge & 9 others* [1997] eKLR the Court of Appeal set out the scope of orders of *mandamus* as follows: -

> "...That now brings us to the question we started with, namely, the efficacy and scope of mandamus, prohibition of certiorari. These remedies are only available against public bodies such as the council in this case. What does an order of prohibition do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings... The point we are making is that an order of prohibition is powerless against a decision which has already been made before such an order is issued. Such an order can only prevent the making of a decision. That, in our understanding, is the efficacy and scope of an order of prohibition.
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> ...The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of

redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way...These principles mean that an order of mandamus compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of mandamus compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done..."

27. Similarly in the case of *Republic v County Government of Machakos & another ex-parte Elijah Waweru Mathare & another* [2015] eKLR Odunga J (as he then was) explained as follows:

> " It is not in doubt that the decision whether or not to issue development plan is an exercise of discretion on the part of the 1st respondent. In such circumstances the court is only entitled to interfere with the exercise of discretion in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See *Republic v Minister for Home Affairs and others ex parte Sitamze* Nairobi HCCC No 1652 of 2004 [2008] 2 EA 323.
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> 13. However when it comes to orders of mandamus, on the authority of *Republic v Kenya National Examinations Council ex parte Gathenji & others* (supra) where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way. In my view whereas the 1st respondent is under an obligation to consider an application for approval of a development plan, this court cannot, however, by way of an order of mandamus compel the 1st respondent to issue such a plan as the court can only compel the 1st respondents to consider the same and make a decision one way or the other but not in a particular manner. However the 1st respondent is obliged under article 47(2) to furnish the applicant with written reasons after considering the application where the decision is likely to adversely affect the applicants. Where no reasons are given and the decision arrived at adversely affects the applicants the court would as well be entitled to conclude that there were no good reasons for exercising the discretion in the manner it was exercised. However, as was held in *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd* Civil Appeal No 185 of 2001 the court would be entitled to interfere where in making the decision the decision maker fails to take into account relevant matters or takes into account irrelevant matters.

28. Article 47 of the *Constitution* of Kenya, 2010 provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Further that 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.

29. Subsequently, parliament enacted the *Fair Administrative Action Act*, 2015 which this application is anchored.

30. From the pleadings and annexures, the respondent's county engineer through the notification letter dated October 17, 2014, granted approval to the applicant for construction of the proposed barbed wire fence, which the applicant stated that he was not able to actualize due to the frustrations occasioned by the area chief and locals. Further that approvals for development were not granted which gave rise to this application.

31. It was the respondent's case that the approval was denied due to the fact that the suit property was public land. The law requires that reasons must be given in writing for the refusal to grant approvals and having perused the documents relied on by both parties, there is no evidence that there was any written reasons or explanation for the respondent's actions as expected in compliance with article 47 and section 4 of Fair Administrative Act.

32. In the case of Uganda case *Pastoli v Kabale District Local Government Council & others* [supra] where the court aptly restated that for an applicant to succeed in an application for judicial review, they must show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety. The court further explained as follows:

> "...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 a law or its principles are instances of illegality. It is, for example, illegality, where a chief administrative officer of a district interdicts a public servant on the direction of the district executive committee, when the powers to do so are vested by law in the district service commission...irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...procedural impropriety is when there is 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."

33. It should be noted that the decision whether or not to approve development plans is discretionary on the part of the respondent but the exercise of that discretion must be done taking into consideration the rules of natural justice.

34. The decision maker must not abuse such discretion, should be guided by the law and the must not use the discretion for purposes other than the one donated by the parent Act and come to a fair decision.

35. On the issue whether an order of mandamus can issue in the circumstances, in the case of *Republic v County Director-Physical Planning Department- Kiambu County & 3 others ex-parte Shainaz Shamshudin J. Jamal & another* [2016] eKLR the court held that:

> " From the above detailed holding, it is clear that an order of *mandamus* cannot issue to quash a decision. It can only be sought to compel the exercise of discretion in a certain manner. And where the decision has already been made, unless the decision is quashed, *mandamus* would not be an efficacious remedy. Further, *mandamus* cannot be sought in a manner as to achieve what ought to have been sought by way of certiorari since the period for seeking the latter is restricted by statute.
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> 119. With respect to the prayer for prohibition, the said remedy can only prevent the making of a contemplated decision. In other words, prohibition ought not to be issued in the nature of declaration but is directed at a contemplated action. Unless therefore the applicant shows that the respondent contemplates an action in the circumstances under which orders of judicial review may be granted, the court will not readily issue an order of prohibition."

36. In the current case the applicant had not been granted approval for development of the suit plot and the act of denying to grant such approval without reasons falls short of the provisions of article 47 of the *Constitution* and section 4 of the *Fair Administrative Act*.

37. The court is also cognizant of the fact that the respondent has the discretion as to the mode of performing the duty and therefore an order of *mandamus* cannot direct the performance of that duty in a specific way.

38. It follows that the court can only direct that the respondent considers the application for approval of the development plan and not to compel *vide* an order of mandamus to issue such a plan as the respondent must also follow the laid down procedures under sections 31, 32 and 33 of the *Physical Planning Act*.

39. On the issue whether the applicant is entitled to an order of prohibition, as earlier stated, prohibition can only prevent the making of a contemplated decision and ought not to be issued in the nature of declaration but is directed at a contemplated action.

40. The order of prohibition is issued at this stage will stall the application and approval process of the respondent hence not granted.

41. The upshot is that 1 am therefore persuaded that the applicant is entitled to an order of *mandamus* compelling the respondent to consider the applicant's application for approval of the development plan and furnish the applicant with reasons thereof, in the event that the said decision is adverse, within 30 days from the date of this order.

42. I see no basis for granting an order for prohibition at this stage. Cost be awarded to the applicant.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 6TH DAY OF MARCH, 2023.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of

Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.