REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC JR CASE NO. 10 OF 2020

REPUBLIC.....APPLICANT

VERSUS

COUNTY GOVERNMENT OF MOMBASA.....RESPONDENT

AND

FAHMI HUSSEIN SWALEH.....INTERESTED PARTY

AND

EMDUND KIRIGHA MALUSHA.....EX-PARTE APPLICANT

JUDGEMENT

This judicial review application is brought under Order 53 Rule 3 3(1) of the Civil Procedure Rules and Section 8 of the Law Reform Act, Cap 26 of the Laws of Kenya seeking the following orders;

1. That this Honourable court be pleased to grant the exparte applicant order of Certiorari to remove to his Honourable court, for purposes of quashing, the respondent, for purposes of quashing, the respondent's notice dated 19th November, 2020 addressed to the Exparte Applicant directing him to demolish a structure erected on his land within seven (7) days from the said date.

2. That the costs of this application be provided for

It is based on the facts that the ex-parte applicant is the registered owner of PLOT NO. MSA/BLOCK XVI/1404, which plot is fully developed, while the interested party owns the neigbouring Parcel No. Msa/Block XVI/1406. That the respondent on what appears to be a complainant by the interested party, issued the exparte applicant with a notice dated 19th November, 2020 requiring him to demolish an unspecified structure on his plot within seven (7) days from the said date on the ground of trespass. The said decision was made pursuant to a complaint which was never communicated to the exparte applicant, and without hearing him, and done so on the office tables without visiting the disputed site, thus, not only condemning the exparte applicant unheard, but also doing so in ignorance of the actual facts on the ground. The respondent has no power to declare with finality, as in the case herein, that a party has trespassed, especially over a disputed boundary which has not been fixed by the land registrar. In proceedings to condemn the exparte applicant as trespasser, moreso without any slightest investigation, the respondent acted ultra vires its powers. By proceeding to believe the interested party's complaint without interrogating it by way of inquiry, and acting upon it in manner aforesaid, the respondent abdicated its role as an impartial arbiter and ventured into the field of sentimentalism, thereby coming up with a decision which openly manifest undue favour contrary to rule against bias which requires, among others. That justice must not be done, but must seen to be done, and that the essence of natural justice is good conscience in a given situation, nothing more or nothing less. That Judicial Review is the only appropriate and effective remedy.

The Respondent submits that he considered both the survey report, its inspection report and the building plans issued in 1994 before issuing the said enforcement notice. That judicial review is concerned with the manner in which a decision is made i.e. the decision-making process and not the decision itself. Therefore, the decision maker has to have the authority to make the decision, the proper process has to be adhered to and lastly, it has to be within the confines of the law. In so submitting they relied on the case of Konton Trading Limited vs Kenya Revenue Authority & 3 Others (2018)eKLR JR APP No. 646 of 2017. Court held thus:

> *In Judicial Review proceedings the court can only determine the process, not the merits of the decision…any one of which would render an administrative decision and/or action ultra vires. These grounds are: illegality, irrationality and procedural impropriety ….illegality is divided into two categories: those that, if proved, mean that the pubic authority was not empowered to take action or make the decision it did; and those that relate to whether the authority exercised its discretion properly.*

That abiding by the principles in the Konton case above, it follows that to challenge the decision making process, it is vital to establish that the decision is ultra vires. The ex parte applicant's in his grounds in the notice of motion application dated 10th December, 2020 states that the issuance of the notice was ultra vires. The respondent's mandate to issue the same has to be established. It is their submission that the respondent had the mandate to issue the notice and adhered to the processed provided for in the physical and land use planning act prior to issuing the notice. They submit that the applicant has failed to prove its case beyond the required standards and urge the court to dismiss the same with costs to the respondent.

This court has carefully considered the application and the submissions therein. In Republic vs Kenya Revenue Authority & Another Ex-Parte Tradewise Agencies (2013) eKLR, para. 21 G.V. Odunga, J. in quoting from Pastoli vs. Kabale District Local Government Council and Others (2008) 2 EA 300 observed 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...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 are 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* "

In Republic vs. Kenya Revenue Authority ex parte Yaya Towers Limited (2008) eKLR it was held that the remedy of judicial review is concerned with the reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself.

The decision whether or not to grant judicial review orders is an exercise of discretion. As stated in Halsbury's Laws of England 4th Edition Vol. II page 805 paragraph 1508, the Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining and the discretion of the court being a judicial one must be exercised on the evidence of sound legal principles.

In Republic vs. Judicial Service Commission of Kenya Ex Parte Stephen S. Pareno Nairobi HCMA No. 1025 of 2003 (2004) 1 KLR 203, it was held that judicial review orders are discretionary and not guaranteed hence even if the case falls into one of the categories where judicial review will lie the court is not bound to grant it and what orders the court will make depends upon the circumstances of the case.

Judicial review is a discretionary remedy. They are prerogative remedies. It is in the orders to quash, prohibit or compel. In the Kenya legal system, the said prerogative remedies may be obtained under Order 53 of the Civil Procedure Rules (2010) and the Law Reform Act, Cap 26, Laws of Kenya (Part VI of the Act). It has been noted that judicial review proceedings as envisaged under Order 53 of the Civil Procedure Rules are a special procedure; which are invoked whenever orders of certiorari (quash), mandamus (mandamus) or prohibition are sought in either criminal or civil proceedings - See Welamondi vs The Chairman, Electoral Commission of Kenya (2002) 1 KLR,

> *"..... in exercising powers under Order 53, the court is exercising neither civil or criminal jurisdiction in sense of the word. It is exercising sui generis ....."*

In the case of Republic vs Chairperson Business Premises Rent Tribunal & another Ex-parte Keiyo Housing Cooperative Society Ltd & Another (2014) eKLR it was held that;

> "*Being discretionary remedies, judicial review orders will only issue based on various considerations by the court and peculiar circumstances of each case. In the book "Judicial Remedies in Public Law" by Clive Olive, it is noted that "there are varieties of considerations discernible in the case law which are relevant to the exercise of the judicial discretion to refuse a remedy. Some are related to the conduct of the claimant, such as delay or waiver; others are related to the circumstances of the particular case, such as the fact that a remedy would be of no practical effect. Other considerations relate to the particular nature of public law where the court may need to have regard to the wider public interest as well as the interest of the claimant in obtaining an effective remedy."*

In Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others, Civil Application No. 307/2003, Omolo JA stated as follows;

> "*The courts expressly recognize that they are manned by human beings who are by nature fallible, and that a decision of a court may well be shown to be wrong either on the basis of existing law or on the basis of some newly discovered fact which, had it been available at the time the decision was made, might well have made the decision go the other way."*

Be that as it may, this application is based on the grounds that the decision of the respondent on 19th November 2020 was an illegality.

In the case of *Speaker of National Assembly vs Karume 1992 KLR the Court held that;*

> *"Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament,*

that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."

Also the Court of Appeal provided the constitutional rationale and basis for the doctrine in *Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 others* 2015 eKLR It stated that;

> *"It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews… The exhaustion doctrine is a sound one and 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...This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution*."

In the case of *Matter of the Mui Coal Basin Local Community 2015 eKLR the court held that;*

> *"The reasoning is based on the sound Constitutional policy embodied in Article 159 of the Constitution: that of a matrix dispute resolution system in the country. Our Constitution creates a policy that requires that courts respect the principle of fitting the fuss to the forum even while creating what Supreme Court Justice J.B. Ojwang' has felicitously called an "Ascendant Judiciary." The Constitution does not create an Imperial Judiciary zealously fuelled by tenets of legal-centrism and a need to legally cognize every social, economic or financial problem in spite of the availability of better-suited mechanisms for comprehending and dealing with the issues entailed. Instead, the Constitution creates a Constitutional preference for other mechanisms for dispute resolution – including statutory regimes – in certain cases..."*

The **Physical Planning Act No. 6 of 1996** has since been replaced by the **Physical and Land Use Planning Act No. 13 of 2019,** which repealed it under **Section 91**. The new Act has a commencement date of 5th August, 2019. The **Physical and Land Use Planning Act** has provided for the Physical and Land Use Planning Liaison Committees and the appeal processes at **Part VI, Sections 73 to 89** and for enforcement notices at **Section 72**. As pointed out above, the dispute herein relates to discharge of powers conferred to the public authorities established under the Physical and Land Use Planning Act, and in particular, the power to issue enforcement notices which notice was issued on the 19th November 2020. It is clear from the foregoing cited provisions of the law that Local authorities (in the circumstances of this case read County Governments), have power to issue enforcement notices on land owners or occupiers of land within their area of jurisdiction. It is also clear that the Act provides the procedure of challenging such a notice by an aggrieved person and the consequences of failure to challenge the notice.

In the circumstances of this case, the applicants who did not file an appeal against the enforcement notice as by law required. I find no evidence capable of proving that the applicant filed an appeal or made attempts to file an appeal as by law required which were frustrated by the respondent. I agree with respondent's submissions that she neither acted in excess of her powers nor acted illegally to warrant issuance of the orders sought. Section 9(4) of the Fair Administrative Actions Act provides as follows:

> *"(4) Notwithstanding subsection (3), the High Court or a 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."*

The decision sought to be challenged was made under *Section 72* of the *Physical and Land Use Planning Act.* As such, there is prescribed procedure of challenging such a decision under the said Act. By dint of *Section 72(3)* the respondent ought to have first lodged an appeal against the said suspension to the relevant County Physical and Land Use Planning Committee. The Committee shall then hear and determine within 14 days. I see no exceptional circumstances in this matter to bypass the said Committee.

The Physical and Land Use Planning Act, 2019 contains the steps the ex-parte Applicant ought to take before approaching this court for judicial review. Undoubtedly, the ex-parte Applicant is dissatisfied with the enforcement notice issued by the Respondent under Section 72 of the Act. Section 80 thereof states that being aggrieved, the ex-parte Applicant has recourse to the County Physical and Land Use Planning Liaison Committee. It is clear that no such appeal was registered. Had that been done, then the ex-parte Applicant could have raised his concerns on procedural impropriety in the issuance of the enforcement notice or illegality thereof with the production requisite evidence.

Be that as it may, the applicant submitted that the said notice/decision was made pursuant to a complaint which was never communicated to the exparte applicant and without hearing him and done in the office without visiting the site hence condemning the applicant unheard. The respondent submitted that he did visit the site on the 18th November 2020 and he confirmed that the exparte applicant had encroached into the neighbouring plot. He produced the said photographs as evidence.

In view of the above, I find that this suit offends the doctrine of exhaustion of remedies provided in a statute. It follows that the applicant's application for Judicial Review orders offends the mandatory provisions of section 9 (3) (4) of the Fair Administration Act. In addition, and without prejudice to the above, the applicant has not established any grounds for this court to grant the Judicial Review Orders of *Certiorari.* In conclusion therefore, the applicant's application dated 10th December 2020 is hereby dismissed with costs to the Respondent.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 9TH NOVEMBER 2021.

N.A. MATHEKA

JUDGE