REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC MISC.APPLICATION NO. 664 0F 2013

IBRAHIM KHALIF MOHAMED

AHMED HASSAN MURSAL

SHEIK ABDI RAHMAN MURSAL

ABDI GAFAR YUNIS SHEIK ALI

ALI KALA DIDO

MOHAMED HAJI OSMAN

ALI NOOR MAALIM ISMAIL

(Suing as TRUSTEES OF NURUL ISLAM

AND OMAR AL FAROOQ INSTITUTE TRUST).....APPLICANT

VERSUS

1. MINISTER OF STATE FOR PROVINCIAL

ADMINISTRATION AND INTERNAL SECURITY.....1ST RESPONDENT

2. PERMANENT SECRETARY MINISTRY OF STATE FOR

PROVINCIAL ADMINISTRATION AND INTERNAL SECURITY.....2ND RESPONDENT

3. MINISTER OF STATE FOR DEFENCE.....3RD RESPONDENT

4. THE KENYA AIRFORCE COMMANDANT EASTLEIGH AIR BASE....4TH RESPONDENT

5. THE HON. ATTORNEY GENERAL.....5TH RESPONDENT

JUDGMENT

1. What is before this court is a judicial review application that was filed in the High Court at Nairobi on 19th December, 2011 as Misc. Civil Application No. 105 of 2011. The application was transferred to this court in 2013 and given its current number.

2. The application was filed pursuant to leave that was granted on 30th November, 2011. In the application the Applicants sought the following orders;

a) An order for certiorari to remove into this honourable court for quashing the decision by the Respondents to demolish buildings within 12 metres from the boundary and fence of Moi Air Base and buildings within 30 metres with more than two (2) floors.

b) An order of prohibition to prohibit the Respondents from demolishing the Applicants' buildings which are more than 30 metres from the boundary and fence of Moi Air Base belonging to the Applicants on Land Reference Numbers 36/111/109, 36/111/110 and 36/111/218 Eastleigh, Nairobi.

c) Such orders and directions as this Honourable court may deem fit and just to grant.

d) That the cost of this application be provided.

Applicants' case:

3. The Applicants' application is based on the Statutory Statement dated 29th November, 2011 and a Verifying Affidavit sworn by Ahmed Hassan Mursal on the same date.

4. The Applicants averred that they were the trustees of Nurul Islam and Omar Al Farooq Institute Trust (hereinafter referred to only as "the trust"). The Applicants averred that in their capacity as trustees of the trust, they were registered as the proprietors of L.R No. 36/11/274(hereinafter referred to as "the suit property") on which stood a four storey building consisting of twenty-four fully occupied flats and one clinic on the ground floor (hereinafter referred to as "the building") valued at approximately Kshs. 200,000,000/- in the open market.

5. The Applicants averred that the suit property was more than 50 metres from the boundary and fence of Moi Eastleigh Airbase.

6. The Applicants averred further that the building was put up with the full knowledge and with written approval of the City Council of Nairobi which approved the architectural drawings in respect thereof.

7. The Applicants averred that on the 22nd November, 2011, bulldozers under the supervision of Police Officers from Kenya Air Force started demolishing buildings standing near the perimeter fence of Moi Eastleigh Airbase, Nairobi which had been marked in red paint and no one had notified them as to why the said buildings were being demolished.

8. The Applicants averred that the building was amongst those which were marked with red paint for demolition.

9. The Applicants averred that that there were over 160 employees working in the building and demolishing the same would render them without any livelihood.

10. The Applicants averred that the impending demolition of the building was unlawful and amounted to arbitrary deprivation by the state of its property contrary to Article 40(3) of the Kenya Constitution.

11. The Applicants averred that if carried out, the said demolition would result in enormous loss and damage including loss of income of Kshs.300, 000/- earned from the building that was being used for the benefit and welfare of 500 orphans at Mandera Islamic Centre in Mandera.

12. The Applicants averred that they never received any verbal or written communication or any notice whatsoever from the Respondents with regard to their decision to demolish all buildings on parcels of land lying within 12 metres from the boundary of the Eastleigh Air base or any building with more than 2 floors within 30 metres from the said boundary.

13. The Applicants averred that the decision to demolish the building is contrary to the law and was made without due process.

14. The Applicants averred that the said decision was unreasonable, oppressive, arbitrary, capricious and as such null and void.

15. The Applicants averred that the said decision of the Respondents was in excess of their jurisdiction, amounted to an abuse of process, contrary to public policy and not reasonably justifiable in a democratic society.

The Respondents' case:

16. The Respondents did not file a replying affidavit even after leave was granted to them and time extended for that purpose on several occasions. They chose to oppose the application only on points of law through grounds of opposition dated 28th December, 2011.

17. In their grounds of opposition filed 6th January, 2012, the Respondents stated that the application was misconceived and offended Order 53 Rule 2 of the Civil Procedure Rules.

18. The Respondents averred that notice of intended demolition was issued and that the application as drawn offended public policy and was made with the sole intention of having individual gain which cannot override public aspiration.

19. The Respondents contended further that the application as drawn was contrary to the need for maintenance of public security and that the suit property was a security threat to the country and Kenya Defence forces.

20. The Respondents contended that the application as made was contrary to the Physical Planning Act and the zoning of the area and that the decision to carry out the demolition was made for social good and for upholding the country's defence.

The submissions:

21. The application was argued by way of written submissions. The Applicants filed their submissions on 22nd February, 2012 while the Respondents did not file submissions even after time was extended for them several times to do so. In their submissions, the Applicants reiterated the contents of their verifying affidavit and statutory statement that I have highlighted above.

Determination:

22. As mentioned earlier in this judgment, the applicant has sought orders of Certiorari and Prohibition. In the book, H. W. Wade and C. F. Forsyth, Administrative Law, 10th Edition, the authors have stated as follows at page 509 on the remedies of Certiorari and Prohibition:

> **"The quashing order and prohibiting order are complementing remedies, based upon common law principles …..A quashing order issues to quash a decision which is ultravires. A prohibiting order issues to forbid some act or decision which will be ultravires. A quashing order looks to the past, a prohibiting order to the future."**

In Kenya National Examination Council *v* Republic, Ex-parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR, the court stated as follows on the scope and efficacy of remedies of Prohibition and Certiorari:

> **"…. prohibition is an order from the High Court directed to an inferior tribunal or body which prohibits that tribunal or body to continue proceedings in excess of its jurisdiction or in contravention of the laws of the land…. 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."**

23. In OJSC Power Machines Limited, Trans Century Limited, and Civicon Limited (Consortium) *v* Public Procurement Administrative Review Board Kenya & 2 others NRB CA 28 of 2016 (2017) eKLR, the Court of Appeal stated as follows:

> **"The law on the jurisdiction of the High Court to entertain judicial review proceedings are encapsulated in several decisions, some of which were cited before us while the learned Judge applied others in his judgment. The law, from these decisions is to the following effect;**
>
> **That the purpose of judicial review is to ensure that a party receives fair treatment in the hands of public bodies; that it is the purpose of judicial review to ensure that the public body, after according fair treatment to a party, reaches on a matter which it is authorized by law to decide for itself, a conclusion which is correct in the eyes of the court in a judicial review proceeding. Put another way, judicial review is concerned with the decision making process, not with the merits of the decision itself. In that regard, the court will concern itself with such issues as to whether the public body in making the decision being challenged had the jurisdiction, whether the persons affected by the decision were heard before the decision was made and whether in making the decision, the public body took into account irrelevant matters or did not take into account relevant matters".**

24. In the book; Public Law in East Africa published by Law Africa, the author Ssekaana Musa has stated as follows 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."**

It is on the foregoing principles that the applicants' application falls for consideration.

25. Since the Respondents did not file an affidavit in response to the application, the facts giving rise to the application are not disputed. It is not disputed that the Applicants are the registered owners of the suit property on which they have put up a building valued at approximately Kshs. 200,000,000/-. It is not disputed that the building on the suit property is more than 30 metres from the boundary and fence of Moi Eastleigh Airbase. It is not disputed that the Respondents had marked buildings for demolition and had started demolishing buildings within 12 metres from the boundary and fence of Eastleigh Airbase and buildings within 30 metres from the said boundary and fence but with more than two floors.

26. It is not disputed that the Respondents had marked the building on the suit property for demolition although it was not among those that were targeted for demolition based on the aforesaid criteria for identifying buildings that were to be demolished. It is not disputed that the said building was approved by the City Council of Nairobi. It is also not disputed that the Applicants were not given a hearing or notice before their building on the suit property was marked for demolition and before the demolition exercise commenced.

27. The Respondents claimed in their grounds of opposition that it notified the Applicants of the intended demolition and that the Applicants were misleading the court by claiming that they were not given notice. The Respondents did not however tender evidence of any such notice to the Applicants.

28. The Respondents had contended further that the decision to demolish the buildings near Moi Eastleigh Airbase was made for the social good and with a view to upholding the country's defence and as such public interest must override the Applicants' private interests. The Respondents neither filed a replying affidavit nor submissions. The Respondents did not therefore tell the court what they were out to

achieve by the demolition of the building on the suit property. The Respondents did not swear an affidavit to explain to the court how the building on the suit property was a security threat. These are matters that the Respondents cannot leave to the court to assume or guess. It is my finding that the Respondents have not demonstrated that they were acting in the public interest.

29. In Halsbury's Laws of England (Administrative Law) Fourth Edition 2001 Reissue, at page 218, paragraph 95 natural justice is defined follows:

> **"Natural justice comprises two basic rules; first that no man is to be a judge in his own cause (nemo judex in causa sua) , and second that no man is to be condemned unheard (audi alteram partem) These rules are concerned with the manner in which the decision is taken rather than with whether or not decision is correct. The rules of natural justice must be observed by courts, tribunals, arbitrators and all persons and bodies having duty to act judicially, save where the application is excluded expressly or by necessary implication, or by reason of other special circumstances"**

30. In Kenya, the requirement to observe rules of natural justice is now a statutory and constitutional imperative. The essential components of fairness in any administrative action are reasonable notice, reasonable opportunity to be heard and an impartial, competent and independent decision maker.

31. Failure by the Respondents to notify the Applicants of the intended demolition of the building and to give them an opportunity to be heard before the demolition was carried out amounted to a breach of the rules of natural justice and contravened Articles 40 and 47 of the Constitution.

32. In Republic *v* Kenya National Commission on Humans Rights Ex-Parte Uhuru Muigai Kenyatta [2010] eKLR the court stated that:

> **"This court has the onerous task of maintaining the delicate balance between an individual right and those of the public. Sometimes private rights have to bow to public interest."**

33. In the absence of evidence of public interest that the Respondents were serving in the said demolitions, I am unable to agree with the Respondents contention that the alleged public interest should prevail over the Applicants' private interest in the suit property.

34. Due to the foregoing, it is my finding that the decision by the Respondents to mark the building on the suit property for demolition was arbitrary and unreasonable. If the Respondents intended to demolish structures within 12 metres from the boundary and fence of Moi Eastleigh Airbase and buildings within 30 metres from the said boundary and fence but with more than two floors which they deemed as a threat to the said security installation, there is no explanation why they decided to extend the demolition to the building on the suit property which though developed with a four storey building is said to be more than 30 metres from the boundary and fence of Moi Eastleigh Airbase.

35. Even if it is assumed that the building on the suit property was within 30 metres from the said boundary and fence of Moi Eastleigh Airbase, the Applicants were entitled to be given a notice of the intended demolition and a hearing before the same was carried out. As I have stated above, no such notice was given neither were the Applicants give a hearing.

36. In their grounds of opposition, the Respondents had contended also that the application offended Order 53 Rule 2 of the Civil Procedure Rules, 2010 which provides as follows:

> **"Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by 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."**

37. This rule is derived from section 9(3) of the Law Reform Act which provides that:

> **"In the case of an application for an order of *certiorari* to remove any judgment, order, decree, conviction or other proceedings for the 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 proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired."**

38. I have not appreciated the Respondents' argument on this issue. As I have mentioned, the Respondents did not file submissions. Without submissions on the issue, it is difficult to understand the Respondents' contention that the Applicants contravened Order 53 Rule 2 of the Civil Procedure Rules. According to the Applicants' verifying affidavit, the demolition in Eastleigh complained of by the Applicants started on 22nd November, 2011 which means that the decision to carry out the demolition was made around that date. The Applicants commenced these proceedings on 30th November, 2011, eight days after the demolitions started. It follows therefore that the Applicants were within the 6 months' statutory period for instituting applications for leave to apply for certiorari

Conclusion:

39. In conclusion, I am satisfied that the Applicants have made out a case for the grant of orders of Certiorari and Prohibition. However, I

have a problem with the manner in which the orders sought by the Applicants have been framed. Since the Applicants have contended that the building on the suit property is more than 30 metres from the boundary and fence of the Moi Eastleigh Airbase, I can see no justification for issuing an order of Certiorari to quash the decision by the Respondents to demolish structures that are within 12 metres from the boundary and fence of Moi Eastleigh Airbase and buildings within 30 metres with more than two floors. The Applicants' complaint was not general. The complaint concerned a decision to demolish the building on the suit property which the Applicants claimed was more than 30 metres from the said boundary and fence. If I was to grant the order of Certiorari sought by the Applicants, the order will not relate to the suit property. It will however extend to all properties around Moi Eastleigh Airbase which are within 12 metres from the boundary and fence of Moi Eastleigh Airbase and buildings within 30 metres with more than two floors. The court cannot give such a general order. The application before the court was not brought by the owners of the properties within 12 metres from the boundary and fence of Moi Eastleigh Airbase and buildings within 30 metres with more than two floors. The orders sought by the Applicants should have been limited to the decision to demolish the building on the suit property which the Applicants have claimed to be more than 30 metres from the boundary and fence of Moi Eastleigh Airbase. I find the order of Certiorari sought inconsistent with the order of Prohibition also sought by the Applicants to complement it.

40. I am unable also to issue the order of Prohibition sought by the Applicants. The Prohibition is sought in relation to the buildings on L.R Nos. 36/111/109, 36/111/110 and 36/111/218 in respect of which leave was not granted. The leave that was sought and granted to the Applicants was to enable the applicant to apply for an order of Prohibition prohibiting demolition of buildings on L.R No. 36/11/274(the suit property). I am unable to give orders in respect of the properties which were not the subject of the application for leave.

41. As I mentioned earlier, prerogative orders are discretionary and the court can refuse to grant the same even where a basis had been laid. This in my view is one of such cases.

42. For the foregoing reasons, I hereby make the following orders;

a) The Applicants Notice of Motion application dated 16th December, 2011 is dismissed.

b) Each party shall bear its costs of the application.

Delivered and Dated at Nairobi this 23rd Day of September 2021

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Ndege for the Applicants

Mr. Kamau h/b for Mr. Motari for the Respondents

Ms. C.Nyokabi-Court Assistant