



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MAKUENI**

**ELC JUDICIAL REVIEW NO. 04 OF 2020**

**REPUBLIC.....APPLICANT**

**VERSUS**

**MAKUENI COUNTY GOVERNMENT.....RESPONDENT**

**AND**

**BENSON KIOKO MAINGI.....EX-PARTE APPLICANT**

**JUDGEMENT**

1. Before this Court for determination is the Notice of Motion dated 18<sup>th</sup> June, 2020 and filed on even date. It is brought under Order 53 Rule 3 of the Civil Procedure Rules and all other enabling provisions of the Law.

2. The Applicant seeks judicial review orders as follows: -

**i) THAT an order of *certiorari* do issue to remove into this Honourable Court and to quash the Physical and Land Use Planning Act of 2019 Enforcement Notice of the Respondent dated 30<sup>th</sup> April, 2020 where the Respondent herein intends to illegally interfere with the Applicant's right to property on Plot No. 113A Kikima Town.**

**ii) THAT an order of prohibition do issue directed to the Respondent restraining it from implementing the Physical and Land Use Planning Act of 2019 Enforcement Notice of the Respondent dated 30<sup>th</sup> April, 2020 where the Respondent herein intends to illegally interfere with the Applicant's right to property on Plot No. 113A Kikima Town.**

**iii) THAT costs of this application be paid by the Respondent.**

3. The application is based on the statement of facts dated 2<sup>nd</sup> June, 2020 and the verifying affidavit of Benson Kioko Maingi sworn on the same date. It is deposed therein that the ex-parte Applicant entered into a sale agreement with Joshua Kilonzo Mutisya in the year 2012 for the purchase of Plot No. 113A Kikima Town (the suit property) together with the structures erected thereon. That after purchase of the suit property, he took immediate possession and rented out the premises to tenants. The affiant deposed further that he had been paying the requisite rates for the suit property to the Respondent since 2012 and the Respondent had been issuing official receipts. That since purchase of the suit property he had not undertaken any further construction. That on 30<sup>th</sup> April 2020, he was issued with an enforcement notice from the Respondent directing him to remove the structures erected on the suit property on the basis that the same lied on a road reserve.

4. He further deposed that following receipt of the said enforcement notice, he wrote to the Respondent in response on 12<sup>th</sup> May, 2020 but his letter elicited no response after being duly served. The ex-parte Applicant bemoans the propriety of the above enforcement notice averring that he was condemned unheard prior to its issuance. He deposed that the Respondent's decision was irregular and illegal in that; he was not given prior adequate notice of the nature and reasons for the proposed administrative action requiring him to demolish his property nor was he given an opportunity to defend himself or make representations in that regard. Again, he averred that he was not given notice of a right to review the decision through an internal appeal procedure nor was he given information and or evidence relied on by the Respondent in making the decision. He urged this Court to allow his application lest he would suffer irreparable damage and injustice.

5. Opposing the application, the Respondent filed a replying affidavit sworn on 27<sup>th</sup> October, 2020 by Geoffrey Mutinda, who is the Sub-County Physical Planner. He deposed therein that the Respondent constituted a committee to execute and implement the Kikima Urban Land Use Plan which included the opening of surveyed roads et al. That the said committee was drawn from members of the County Assembly, the Respondent's officers and a member of public nominated by plot owners. That before commencement of the exercise, public participation was done and property owners were sensitized on the nature of the imminent exercise. That a verification and validation

exercise was subsequently done in Kikima Market and the boundaries thereof were earmarked against the adjacent freehold land. That during the exercise, the ex-parte Applicant together with other officers of the Respondent visited the suit property, took measurements and after that reviewed the Registry Index Map (RIM) – Mbooni/Mutitu Sheet No. 9 – which then determined that the suit property had overshoot the boundaries of the said plot. Structures at the suit property had also partly encroached into the surveyed road thereby blocking it.

6. The Respondent deposed further that its officers went on to place marks on the structures in the suit property showing the extent of encroachment and the said marks were shown to the ex-parte Applicant prior to service of the impugned enforcement notice. That on 19<sup>th</sup> May, 2020, a meeting was scheduled to address grievances in the aftermath of the survey and planning exercise. That the ex-parte Applicant did not dispute the encroachment and upon visiting the suit property again, his plea for being spared was rejected. Accordingly, it was deposed that the enforcement notice dated 30<sup>th</sup> April, 2020 was justified and valid under the law. That the enforcement notice also gave valid reasons fully disclosing the grounds upon which the Respondent's decision was based.

7. That the ex-parte Applicant ought to have challenged the enforcement notice in the manner accorded by Section 72 of the Physical and Land Use Planning Act, 2019. That the ex-parte Applicant has not presented to this Court evidence challenging the process or demonstrating an illegality thereof. That no evidence of approved building plans or development permissions or a site plan or a beacon certificate to identify and show the extent of the suit property was supplied by the ex-parte Applicant. That the ex-parte Applicant is therefore estopped from contending that due procedure was not followed by the Respondent.

8. In a further affidavit sworn by the ex-parte Applicant on 15<sup>th</sup> December, 2020, he deposed that he was never summoned to appear or attend any meeting called by the Respondent. That the structures on the suit property were built in or about 1948 when no development approvals were required. That since the minutes dated 19<sup>th</sup> May, 2020 indicated the agenda as being appeals, he properly appealed as required by Section 72 of the Physical and Land Use Planning Act, 2019.

9. The ex-parte Applicant filed his submissions on 19<sup>th</sup> January, 2021. He submitted that the enforcement notice was approved without giving him an opportunity to be heard and that amounted to a violation of his right to fair hearing. He also argued that since he purchased the suit property together with the developments therein in 2012, he was not required to be in possession of development permissions as the Physical and Land Use Planning Act came to force in 2019. Before then, it was submitted that the Respondent had been collecting property rates without raising any issues. Lastly, the ex-parte Applicant argued that his right to a fair hearing was denied when the Respondent neglected to consider his appeal hence rendering the decision unlawful and unprocedural. In support of his submissions, the ex-parte Applicant relied on the following cases: -

**i) David Oloo Onyango -Vs- Attorney General [1987] eKLR; and**

**ii) Republic -Vs- County Government of Laikipia Exparte Mohamed Asafa Woche [2020] eKLR**

10. The Respondent filed its submissions on 1<sup>st</sup> February, 2021. In reply to the submission that the ex-parte Applicant did not require development permissions under the Physical and Land Use Planning Act, 2019, it was submitted that Section 92 thereof made development permissions granted under any other written law in force prior to commencement of the new Act as valid and effective. The Respondent further argued that the ex-parte Applicant had not exhausted the appeal procedure provided under Section 72 of the Physical and Land Use Planning Act, 2019 hence divesting this Court of jurisdiction to determine the application. That the ex-parte Applicant ought to have appealed to the Liaison Committee established under Section 77 of the aforesaid Act in the manner and procedure provided under Section 80 thereof. In addition, the ex-parte Applicant did not file an application for exemption under Section 9(4) of the Fair Administrative Action Act. Lastly, it was submitted that the application herein lacks merit because it is an attempt by the ex-parte Applicant to appeal the enforcement notice through the back door by way of judicial review.

11. The Respondent relied on the following authorities: -

**i) Matthew Kamanu Mwaura -Vs- Permanent Secretary Office of the President Provincial Administration & 2 others [2018] eKLR;**

**ii) Whitehorse Investment Limited -Vs- Nairobi City County [2019] eKLR;**

**iii) Republic -Vs- Rent Restriction Tribunal & 2 others Ex Parte Evans Nyahoro & another [2018] eKLR;**

**iv) Registered Trustees, Kenya Railways Staff Retirement Benefits Scheme -Vs- Chairman Rent Restriction Tribunal & 99 others [2018] eKLR; and**

**v) New Life Travellers Limited -Vs- County Government of Kiambu & another [2019] Eklr.**

12. I have perused the respective pleadings. The salient issue for determination is whether this Court's jurisdiction under Section 13(4) of the Environment and Land Court Act, 2011 has been properly called into use.

13. Being desirous not to belabour this issue, I am inclined to find persuasion in one oft-cited Court of Appeal authority; **Speaker of the National Assembly -Vs- James Njenga Karume [1992] eKLR** where the learned judges aptly held as follows: -

***“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory***

*provisions.”*

14. The Physical and Land Use Planning Act, 2019 contains a complete codification of 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 abundantly clear from the exhibit marked BKM5 that no such appeal was registered with the said caucus. 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.

15. Currently, the plea that he has been earnestly paying property rates are misplaced at this stage. I am therefore convinced that the ex-parte Applicant ought to present legal documents to justify whether or not there has been an encroachment of a public road reserve to the Liaison Committee in order to expunge any doubt as to the question of violation of his property rights. Thus, it is my conclusion that the enforcement notice dated 30<sup>th</sup> April, 2020 is valid and was issued regularly. Conversely, the ex-parte Applicant has not exhausted the statutory appeal procedure provided under the Physical and Land Use Planning Act, 2019.

16. The Notice of Motion dated 18<sup>th</sup> June, 2020 is unmeritorious and is hereby dismissed with costs.

Signed, dated and delivered at Makueni via email this **13<sup>th</sup>** day of **September, 2021**.

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**HON. MBOGO C.G.**

**JUDGE**

**Court Assistant:** Mr. Kwemboi