



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC JUDICIAL REVIEW NO. E007 OF 2021

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY
FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS**

AND

**IN THE MATTER OF NOTIFICATION OF APPROVAL OF DEVELOPMENT PERMISSION OF
CHANGE OF USER ON L.R NO. NAIROBI/BLOCK139/705 ISSUED TO JAMES NJIRAINI
GACHANJA BY THE NAIROBI CITY COUNTY ON 26TH SEPTEMBER, 2018**

AND

IN THE MATTER OF ARTICLES 22, 23, 42, 47,69,70 AND 232(1) OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF LAND ACT, 2012, PHYSICAL PLANNING ACT,
1996 & THE ENVIRONMENT & LAND COURT ACT, 2011**

BETWEEN

DENNIS MWANGI NGINYI.....APPLICANT

AND

ALPHOPE HOLDINGS LIMITED.....1ST RESPONDENT

DIRECTOR OF PHYSICAL PLANNING NAIROBI CITY COUNTY.....2ND RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....3RD RESPONDENT

NATIONAL CONSTRUCTION AUTHORITY.....4TH RESPONDENT

CHIEF LAND REGISTRAR.....5TH RESPONDENT

RULING

What is before the court is a Chamber Summons application dated 20th April, 2021 in which the applicant has sought the following orders;

- a. Leave to apply for an order of Certiorari for the purposes of quashing the administrative action of the 2nd respondent of 13th September, 2018 approving the change of user PRN:PPA-CU-AAB344(PPA2) for the construction of multi-storey apartment

building on L.R No. Nairobi/Block 139/705 submitted by James Njiraini Gachanja on behalf of the 1st respondent.

b. Leave to apply for an order of Prohibition directed at the 2nd respondent prohibiting the 2nd respondent from approving any building plans for L.R No. Nairobi/Block 139/705 and also directed at the 5th respondent prohibiting him from issuing any lease with regard to the proposed change of user to multi-dwelling units.

c. The leave if granted do operate as a stay of the approval Ref: PRN:PPA-CU-AAB344(PPA2) NO.PPA2 and further construction on L.R No. Nairobi/Block 139/705 pending the hearing and determination of the Notice of Motion to be filed.

d. The costs of this application be provided for.

The application is supported by a verifying affidavit of the applicant dated 20th April, 2021 and a statutory statement of the same date. The application has been brought on the grounds that: The applicant is the proprietor of all that parcel of land known as L.R No. Nairobi/Block 139/706 located in Maruri Estate, Roysambu, Nairobi (hereinafter referred to as “the applicant’s land”) while the 1st respondent is the proprietor of all that parcel of land known as L.R No. Nairobi/Block 139/705 (hereinafter referred to as “the suit property”). The suit property borders the applicant’s land. The leases for the parcels of land within Maruri Estate (hereinafter referred to as “the estate”) where the applicant’s land and the suit property are situated have similar terms regarding user. The user of the parcels of land in the estate is restricted to one private dwelling house.

The 1st respondent is carrying out construction of multi-dwelling houses on the suit property. The construction commenced on or about 30th March, 2021. The applicant learnt that the 2nd respondent had granted a change of user approval in respect of the suit property from one private dwelling house to multi-dwelling units. The change of user approval was granted to James Njiraini Gachanja an agent of the 1st respondent on 13th September, 2018. The 2nd respondent did not put up a notice on the suit property of the application by the 1st respondent for change of user and as such the public was not given an opportunity to raise objection to the application. The applicant did not know of the change of user until the construction commenced.

The applicant has averred that the change of user approval was valid for one (1) year from the date of issue. The applicant has averred that the approval of change of user granted to the 1st respondent lapsed on 13th September, 2020. The applicant has averred that despite the lapse of the said approval that was issued irregularly, the 1st respondent was continuing with construction of multi-dwelling houses on the suit property even after a demand letter was written to him to stop. The applicant has averred that the 2nd, 3rd and 4th respondents have failed to intervene to stop the said illegal construction. The applicant has averred that in addition to the approval from the 2nd respondent, the 1st respondent also required a change of user approval from the Commissioner of Lands. The applicant has averred further that the construction being undertaken by the 1st respondent also required environmental impact assessment license from 3rd respondent. The applicant has averred that if the 1st respondent obtained the necessary license from the 3rd respondent and a change of user approval from the Commissioner of Lands, the same were acquired by the 1st respondent irregularly since no notice of the application for the same was given to the public and more particularly the residents of the estate.

The applicant has averred that the development being undertaken on the suit property intrude on his right to privacy, right to own and enjoy his land and a right to clean and healthy environment. The applicant has averred further that the development interferes with the serene condition of the neighbourhood. The applicant has averred that the available shared amenities such as water, drainage systems and sanitation is already overstretched and as such cannot support the high density development being undertaken by the 1st respondent on the suit property. The applicant has averred that a previous attempt by a land owner in the estate to put up multi-dwelling houses on his land was stopped through a consent court order.

The applicant has contended that if the 1st respondent is allowed to proceed with the ongoing development on the suit property, the applicant and other residents of the estate will lose the purpose and the value for which they purchased and developed their parcels of land which loss cannot be compensated in damages. The applicant has averred that he has no other remedy against the illegal approval of change user by the 2nd respondent in favour of the 1st respondent other than coming to court.

The court directed that the application be served for hearing inter-partes. The 1st respondent opposed the application through a Notice of Preliminary Objection dated 13th May, 2021. The 1st respondent has contended that the application is bad in law and incompetent in that the applicant has not exhausted alternative statutory remedies available to him before coming to court. The 1st respondent has termed the application frivolous and an abuse of the process of the court and has urged the court to strike out the same. The 2nd respondent also opposed the application by way of a Notice of Preliminary Objection dated 24th May, 2021 in which it has contended that the applicant brought the application prematurely before exhausting available alternative statutory remedies. The 3rd, 4th and 5th respondents did not respond to the application.

The application was argued on 9th June, 2021 when Mr. Thimba appeared for the applicant, Ms. Nganga for the 1st respondent, Ms. Kwamboka for the 2nd respondent and Ms. Korir for the 4th respondent. There was no appearance for the 3rd and 5th respondents. In his submission, Mr. Thimba for the applicant reiterated the contents of the verifying affidavit filed in support of the application that I have highlighted above. Ms. Nganga for the 1st respondent submitted that the court has no jurisdiction to entertain the applicant’s application because the applicant came to court before exhausting alternative remedies available to him under the Constitution and various statutes. The 1st respondent’s advocate submitted that the court should be a forum of last resort for resolution of disputes. Ms. Kwamboka for the 2nd respondent adopted the submissions by Ms. Nganga since the 2nd respondent had raised objections to the application similar to those raised by the 1st respondent. Ms. Korir for the 4th respondent supported the application.

In a rejoinder, Mr. Thimba submitted that there was no way the applicant could have pursued the alternative remedies the 1st and 2nd respondents have referred to. Mr. Thimba submitted that the approval of change of user application was given by the 2nd respondent to the 1st respondent without notice.

I have considered the legal basis and the facts relied upon by the applicant in support of the leave sought and for the same to operate as a stay. Two issues arise for determination in the present application that I will consider together. First, whether the applicant has made out a case for the grant of the leave sought and secondly, whether leave if granted should operate as a stay. The following is my view on the matter.

In Njuguna v Minister for Agriculture [2000] 1 E.A 184, it was held that:

“the test as to whether leave should be granted to an applicant for judicial review is whether, without examining the matter in any depth, there is an arguable case, that the reliefs might be granted on the hearing of the substantive application.”

In Republic v County Council of Kwale & Another Ex Parte Kondo & 57 Others [1998] 1 KLR (E&L) the court set out the rationale for seeking leave to apply for judicial review as follows:

“The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration.”

I am satisfied from the material before the court that the applicant has established a prima facie case against the respondents of violation of his constitutional and statutory rights. The applicant has demonstrated that decisions affecting him were made by the 2nd respondent in favour of the 1st respondent without according him an opportunity to be heard. The applicant has also demonstrated that the 3rd and 4th respondents who have statutory responsibility of controlling developments have not intervened to stop the development complained of by the applicant. The applicant has placed sufficient evidence before the court showing that the 1st respondent required a change of user of the suit property before he could put up multi-dwelling houses on the suit property. The applicant has also demonstrated that the change of user on the strength of which the 1st respondent was constructing multi-dwelling houses on the suit property was issued on 13th September, 2018. The applicant has demonstrated that the said change of user approval was only valid for 2 years from the date of issuance. The applicant has placed evidence before the court showing that the 1st respondent commenced development on the suit property in March, 2021 more than 2 years after the issuance of the said change of user approval.

The 1st respondent did not place any evidence before the court showing that he obtained an extension of the said change of user approval. The 1st and 2nd respondents did not also place any evidence before the court showing that the 1st respondent's application for change of user of the suit property was published in a daily newspaper with nationwide circulation and on the suit property and an opportunity given to the public to object to the same. Photographs produced by the applicant show that the 1st respondent did not place a board outside the construction site showing the nature of the development and the details of the developer, the contractor and other professionals involved in the project as required by law. There is also no indication that the project was approved by the 3rd and 4th respondents. The details of such approval is normally required to be indicated in the board that I have referred to above. Despite these omissions and transgressions of the law, the 3rd and 4th respondents have not taken any action even after a letter was written to them by the applicant's advocates to intervene. Due to the foregoing, the applicant's contention that the 1st respondent is engaged in an illegal project which violates the applicant's constitutional rights and which the 3rd and 4th respondents have refused to stop despite having statutory powers to do so is not far-fetched. I am satisfied that a prima facie case has been established which should be ventilated in a judicial review application.

I am in agreement with the 1st and 2nd respondents' submissions regarding the need to exhaust alternative remedies before approaching the court for judicial review. They have however not satisfied me that the applicant had alternative remedies. The applicant has contended that he only learnt of the approval for change of user of the suit property in March, 2021. The approval was given in 2018 without notice according to the applicant. There is no way the applicant could have challenged the said change of user approval within the dispute resolution mechanism provided for in the Physical Planning Act, 1996 that was in force then in the absence of a notice by the 1st and 2nd respondents of the application and invitation of objections. As at March, 2021 when the applicant learnt of that approval, the time set out in the said Act within which an appeal against the same should have been lodged had expired. That left the applicant with only one option which is to come to court. With regard, to the applicant's complaint regarding lack of environmental impact assessment license for the project, again, there is no evidence that such license was granted to the 1st respondent. The applicant could not therefore challenge the license before the National Environmental Tribunal by way of an appeal. Due to the foregoing, I am not in agreement with the contention by the 1st and 2nd respondents that the applicant's application was brought to court prematurely.

As mentioned earlier in this ruling, the applicant has also sought an order that leave if granted should operate as a stay of the approval of the change of user that was granted by the 1st respondent to the 2nd respondent and further construction on the suit property pending the hearing and determination of the judicial review application. On this issue, I am of the view that the approval had already been granted by the 1st respondent to the 2nd respondent by the time the applicant came to court and as such the same cannot be stayed. In any event, the said approval according to the applicant's submission expired on 13th September, 2020. The court cannot therefore stay a non-existent approval. With regard to stay of construction, I am of the view that a case has been made out for the same. The applicant has demonstrated that the construction being carried out by the 1st respondent on the suit property is prima facie illegal. I am however not inclined to stop the construction. The construction started in March, 2021 and has been going on since then. The construction must be at an advanced stage now. An appropriate order at this stage in my view would be to stop occupation of the houses being constructed by the 1st respondent pending the hearing of the judicial review application.

For the foregoing reasons, it is my finding that the applicant's Chamber Summons application dated 20th April, 2021 is well founded. The application is allowed in terms of prayers 4 and 5 thereof. The grant of leave shall operate as a stay of leasing, sale or occupation of the multi-dwelling houses or apartments or any of them being constructed by the 1st respondent on the suit property. The order shall however not prevent the 1st respondent from employing security guards to protect the property. The judicial review application shall be filed within 21 days from the date hereof. The costs of the application shall abide the outcome of the judicial review application.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF OCTOBER, 2021

S. OKONG'O

JUDGE

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

Mr. Thimba for the Applicant

N/A for the 1st Respondent

Mr. Kioko for the 2nd Respondent

N/A for the 3rd, 4th and 5th Respondents

Ms. C. Sagina-Court Assistant