



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC MISC CAUSE NO. 133 OF 2018

IN THE MATTER OF AN APPLICATION BY GEMINI PROPERTIES LIMITED

FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

AGAINST THE DIRECTOR PLANNING COMPLIANCE AND ENFORCEMENT

AND NAIROBI CITY COUNTY

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE ENVIRONMENT AND LAND COURT ACT, NUMBER 19 OF 2015 (SECTION 13)

AND

IN THE MATTER OF THE LAND REGISTRATION ACT, NUMBER 3 OF 2012

AND

IN THE MATTER OF THE PHYSICAL ACT (CAP 286 OF THE LAWS OF KENYA

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN

REPUBLIC.....APPLICANT

AND

DIRECTOR PLANNING COMPLIANCE AND ENFORCEMENT,

NAIROBI CITY COUNTY.....1ST RESPONDENT

NAIROBI CITY COUNTY.....2ND RESPONDENT

GEMINI PROPERTIES LIMITED.....EX PARTE APPLICANT

RULING

1. Pursuant to the leave granted on 16th August 2018 the Ex parte applicant filed a notice of motion dated 29th August 2018 seeking orders:-

(1) An order of certiorari to call into the honourable court to quash the enforcement notice dated 9th August, 2018 issued by the 1st respondent to the applicant purporting that the structures on Land Nairobi/Block 209/9295-New Muthaiga Estate- Nairobi were constructed without approved plans and that the change of use in the said piece of land is unavailable and that no occupation certificate was ever issued.

(2) An order of prohibition prohibiting respondents by themselves, their agents, employees and or anybody deriving authority from the said respondents be restrained from making any demolitions in relation to the structures erected in all that piece or parcel of land being Land Reference Nairobi/Block 209/9295, Nairobi.

(3) A declaration do issue that the applicant's fundamental right to fair administrative action and right to property was infringed and/or violated by the respondents in the enforcement notice dated 9th August, 2018 contrary to the provisions of Article 27, 40, and 47 of the Constitution of Kenya.

(4) A declaration do and hereby issue that the respondents are constitutionally obligated to act lawfully, fairly and reasonably in the exercise of their constitutional mandate, which principles were violated in the enforcement notice dated 9th august 2018 against the applicants herein.

(5) The leave to act as a stay of any attempt by the respondents by themselves, their agents, employees and or anybody deriving authority from the said respondents be restrained from making demolitions in relation to the structures erect to Land Nairobi/Block 209/9295-New Muthaiga Estate-Nairobi as contemplated under the notice dated 9th August, 2018 issued by the 2nd respondent as against the applicant.

(6) The respondent be ordered to pay the applicant the costs of this application.

(7) Any such further order as this honourable court shall deem just and fit to grant.

2. The application is supported by the grounds on the face of the application, the verifying affidavit of Rahum Chatur, a director of the Exparte applicant sworn on the 15th August 2018 and a further affidavit sworn on the 12th March 2019.

3. The application is opposed. There is a replying affidavit sworn by Jasper Ndeke, Director of Urban Planning, Compliance and Enforcement of the 2nd Respondent, sworn on the 6th February 2019.

4. On the 13th December 2018, the court directed that the application be canvassed by way of written submissions.

The Ex parte applicant's submissions

5. The Ex parte Applicant is the registered owner of Nairobi/Block 209/2925- New Muthaiga Estate Nairobi (hereinafter referred to as **"the suit property"**) and has been in occupation of the suit premises for over forty 40 years. The respondents served upon the exparte applicant and its tenants an enforcement notice citing that the applicant has constructed offices without approval of the Nairobi City County Government and illegally changed use of the suit premises. The intended demolition in respect of the suit premises vide the enforcement notice dated 9th August 2018 is illegal, null and void as it requires demolition of the exparte applicant's buildings without adequate notice and having not afforded the exparte applicant a right to be heard.

6. The respondents have already made a decision that the exparte applicant carried out its developments in the suit property without the requisite permission and/or following the conditions required in the Physical Planning Act and Building Code and other regulations. It has put forward the case of **Munir Sheikh Ahmed vs Capital Markets Authority [2018] eKLR**. The applicant's contention is that its right to a fair administrative action has been breached by the respondent's impugned enforcement notice. The applicant and his tenants are judiciously apprehensive; that if the prayer of prohibition is not granted, the respondents will demolish the applicant's premises despite the applicant not being afforded a fair hearing and or notified of any investigations being carried out on the suit property. It has also put forward the cases of **Republic vs Chief Magistrate's Court at Mombasa Exparte Ganijee & Another [2002] eKLR**, **Coalition for Reform and Democracy (CORD) & 2 Others vs Republic of Kenya & 10 Others**.

7. Failure to comply with the provisions of the Fair Administrative Actions Act may by extension be construed to amount to a violation of the spirit of the constitution. It has also put forward the case of **Republic vs Firearms Licensing Board & Another Exparte Jimi Wanjigi [2019] eKLR**. The respondents after having determined that the structures were illegal vide their enforcement notice further demanded the applicant supply them with approved plans and occupation certificates, failure to which the applicants were to remove the said structures. It has also put forward the case of **Kenya Human Rights Communication & Another vs Non-Governmental Organizations Coordination Board & Another [2018] eKLR**; **Judicial Service Commission vs Mbalu Matava & Another [2015] eKLR**.

8. Article 47 of the Constitution of Kenya 2010 is now emphatic on the fairness of administrative action. The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. The respondents ought to have given the applicant an opportunity to be heard before the impugned decision in the enforcement notice was made, which the respondents failed.

9. The High Court may in exceptional circumstances find that exhaustion requirement would not serve the values enshrined in the constitution or law and permit the suit to proceed before it. Section 38 of the Physical Planning Act, contemplates the service of a valid notice. In this case the notice requires the applicant to remove the said structure within seven days yet the applicant was never afforded the right to be heard. The existence of an alternative remedy cannot by itself prevent a court from issuing a judicial review order. It has relied in

the case of **Republic vs National Environment Management Authority [2011] eKLR. Globe Developers Ltd vs Nairobi City County & 6 Others [2017] eKLR.**

10. The applicant submits that the respondents should be condemned to bear the costs of this application.

The Respondents' Submission

11. The enforcement notice does not bear a decision as alleged by the ex parte applicant but allegations as required by the ex parte applicant but the conditions as required by the physical planning Act and as such there exists no decision capable of being quashed. He who comes to equity must come with clean hands. The hands of the Ex parte Applicant cannot be said to be clean.

12. The doctrine of exhaustion is contained in section 9 (2) of the Fair Administrative Actions Act. They have put forward the case of **Mutanga Tea & Coffee Co. Ltd vs Shikara Limited & Another [2015] Eklr**. The existence of a dispute resolution mechanism under the Physical Planning Act is not in question. Section 38 of the Act in making provisions for an enforcement notice refers the reader of the statute to Part III of the Act which deals with Liaison Committees and provides a dispute resolution mechanism, if a party is aggrieved by any decision by a local authority. The ex parte applicant never considered happened or even waiting for a decision.

13. Upon receipt of the documents sought a number of things could have happened; the constitution of a tribunal for a hearing, or a withdrawal of the allegations of the respondent, or a decision from the respondents. Arising from these actions an appeal would have been preferred or the ex parte applicant would have been satisfied with the progress of things. Instead of all these the ex parte applicant rushed to court to claim demolition was imminent though these words have been mentioned by none but it.

14. The ex parte applicant seeks to impugn a decision that is non-existent based on an enforcement notice that they responded to as they filed this application. The application ought to be dismissed with costs to the respondents.

15. I have considered the notice of motion, the affidavits in support and in reply, the written submissions made on behalf of the parties, the oral highlights and the authorities cited. The issues for determination are:-

(i) Whether a decision was made capable of being challenged by judicial review proceedings.

(ii) In the circumstances should the doctrine of exhaustion be applied?

(iii) Who should bear costs of this application?

16. The Ex parte Applicant's case is founded on the alleged enforcement notice dated 9th August 2018 issued by the 1st respondent to the ex parte applicant. The said notice states in part **"you are hereby required to:-**

(i) Provide approved plans.

(ii) Provide occupation certificate.

(iii) In the absence of the same, vacate premises and remove within a period of seven days"

17. Upon receipt of this notice the ex parte applicant responded by a letter which was received by the respondent on 15th August 2018. Without waiting or giving any reasonable time for a response the ex parte applicant filed the chamber summons that brought this cause of action into existence.

18. In my view, this notice required the ex parte applicant to provide certain documents to confirm the development was approved. It does not bear any threat of imminent demolition. There is no decision therefore capable of being quashed. Judicial review proceedings is concerned with the decision making process. In the instant case no decision had been made by the respondents.

19. The ex parte applicant's contention is that despite forwarding approval plans and occupation certificates, it has received no communication from the respondents. The respondents on the other hand states that they received the ex parte applicant's response on the 15th August 2018. The application seeking leave to file this application was filed on 16th August 2018. Clearly the applicant did not give the respondent time to consider their response.

20. Section 9(2) and (3) of the Fair Administrative Actions Act, implores the court to take up matters only if it is shown that the alternative dispute resolution mechanisms have been exhausted. The Court of Appeal in the case of **Mutanga Tea & Coffee Company Ltd vs Shikara Ltd & Another [2015] eKLR** held that:-

"The central issue for determination in this appeal is whether a party aggrieved by a decision of the director of physical planning under the physical planning Act Cap 286 (PPA) or of the National Environment Management Authority (NEMA) under the Environmental Management and Coordination Act, Cap 387 (EMCA) may invoke the original jurisdiction of the High Court instead of the dispute resolution mechanisms prescribed under those Acts".

21. In the instant case, the ex parte applicant failed and/or neglected to follow the established dispute resolution mechanism under the physical planning Act. Section 38 of the Act, in making provisions for an enforcement notice refers to Part III of the Act which deals with

Liaison Committees and provide a dispute resolution mechanism, if a party is aggrieved by any decision by a local authority.

22. There is an elaborate process in the physical planning Act requiring appeal to the physical planning liaison committee and from there to the national physical planning liaison committee and then to the High Court. The exparte applicant did not follow this procedure.

23. In the case of **Speaker of the National Assembly vs Karume [1992] KLR 21** it was held that:-

“Where there is a clear procedure for the redress of any particular grievances prescribed by the constitution or an Act of Parliament, that procedure should be strictly followed”.

24. Also in the case of **Director of Planning & Architecture, County Government of Mombasa vs Makupa Transit shade Ltd [2019] ekLR** the Court of Appeal held that:-

“.....where there is an alternative remedy and especially where parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted and that in determining whether a matter is exceptional. It is necessary for the court to examine carefully the suitability of the statutory tribunal in the context of a particular case and ask itself whether the statutory body had the power to determine the issue at hand. It is a common ground that the issue at hand in this matter was about physical planning and execution of development plan regarding land reclamation. The issues were purely matters of land reclamation, planning and development that are covered under the physical planning Act. For the aforesaid reasons I am persuaded that the respondent ought to have followed and exhausted the alternative dispute resolution mechanism provided by parliament under the physical planning Act before engaging the High Court”.

25. I am guided by the above authority in finding that the exparte applicant engaged this court before exhausting the alternative dispute resolution mechanism set out on the Physical Planning Act.

26. In conclusion I find no merit in this application and the same is dismissed with costs to the respondents.

It is so ordered.

Dated, signed and delivered in Nairobi on this 30th day of January 2020.

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L. KOMINGOI

JUDGE

In the presence of:-

Mr. Mugo for Ms Kendi for the Applicant

Mr. Nyauchi for the Respondents

Kajuju - Court Assistant