



**Republic v Director of Planning Compliance & Enforcement, Nairobi City County; Waska Company Limited (Ex parte Applicant) (Judicial Review Application E012 of 2023) [2025] KEELC 4908 (KLR) (26 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4908 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
JUDICIAL REVIEW APPLICATION E012 OF 2023**

**JA MOGENI, J**

**JUNE 26, 2025**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS IN THE NATURE OF CERTIORARI AND PROHIBITION**

**AND**

**THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF THE LAND ACT NO. 6 OF 2012**

**AND**

**IN THE MATTER OF THE LAND REGISTRATION ACT NO. 3 OF 2012**

**AND**

**IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT NO.4 OF 2015**

**AND**

**AND IN THE MATTER OF LAW REFORM ACT SECTION 8 AND 9 CAP 26 LAWS OF KENYA**

**AND**

**IN THE MATTER OF ENFORCEMENT NOTICE BY NAIROBI CITY COUNTY DATED 16TH OCTOBER 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**DIRECTOR OF PLANNING COMPLIANCE & ENFORCEMENT, NAIROBI CITY COUNTY ..... RESPONDENT**

**AND**



**JUDGMENT**

1. The Ex-parte Applicant, brought this Judicial Review application by way of Notice of Motion dated 22/01/2024 seeking the following orders;
  - a. That an Order in the nature of certiorari do issue quashing the decision of the Director Planning Compliance & Enforcement Nairobi City County vide Enforcement Notice dated 16<sup>th</sup> October 2023.
  - b. That an order of prohibition do Issue prohibiting the Respondent by himself, his agents, servants and or employees from implementing or enforcing the offensive Enforcement Notice dated 16<sup>th</sup> October 2023.
  - c. That leave to apply for the judicial review orders of certiorari and prohibition do operate as stay of the Respondent's enforcement notice dated 16<sup>th</sup> October 2023 pending hearing and determination of the substantive application and further orders by this Honourable Court.
  - d. That costs of this Application be provided for.
2. The application was brought on the grounds set out in the Statutory Statement and verifying Affidavit of the Applicant both dated 22/01/2024 and the Applicant's substantive motion supported by an Affidavit sworn by its Managing Director Stephen Kamunge Wainaina dated 22/01/2024
3. The Applicant has contended that he owns LR No. 28223/33/C2 (suit property) being the registered owner on 28/09/2017. That he has been in physical possession of the suit property at all material times until the 23<sup>rd</sup> November 2023 when the Respondent without any lawful, reasonable, probable or any color of right whatsoever trespassed and encroached on the suit property and proceeded to illegally construct a fence made up of corrugated GCI sheets ostensibly on the pretext that the suit property belongs to it.
4. It is the Applicant's contention that the Respondent continues with trespass and encroachment on the suit property and that its illegal structures remain on the suit property to date. Further that the Respondent did not serve the Applicant with any document demonstrating his claim over the suit property.
5. That the Applicant became cognizant of an enforcement notice issued by the Respondent which the upon making an enquiry which notice stated that the enforcement notice was directed upon the owners, developers and or occupiers of LR 5980/1 Kiambu Road.
6. That from the Notice issued it is clear that the suit property is not situate on the parcel of land specified thus the Applicant contends that the action of the Respondent in trespassing upon the Applicant's suit property and the erection of illegal structures thereto is a brazen abuse of its power, is arrogant and clearly infringes on the Applicant's constitutional right to ownership of property.
7. It is clear that the enforcement notice clearly indicates that the Applicant's suit property is not one of the properties identified as the subject matter of the said enforcement notice. Thus the Applicant is aggrieved by the said Respondent's enforcement notice which has no legal basis for the action taken out by the Respondent.



8. On his part, the Respondent through its Acting County Solicitor on W.S Ogola filed a Replying Affidavit sworn on 7/08/2024 and averred that he opposed the Notice of Motion dated 22/01/2024 and the Supporting Affidavit sworn by one Kamunge Wainaina, a Director of the Ex Parte Applicant.
9. He contends that the ex parte Applicant's averment at paragraphs 2 and 3 of the Supporting Affidavit to the effect that they are the bona fide and registered proprietors of L.R. No.28223/33/C2 lacks correlation with the subject property of the Enforcement Notice dated 16<sup>th</sup> October 2023.
10. It is his averment that the Enforcement Notice dated 16<sup>th</sup> October 2023 which forms the basis of this Application for Judicial Review was not at all directed at the ex parte Applicant but to the Owner/ Developer/Occupier of L.R. No.5980/1 none of which the ex parte herein legitimately claims to be. He annexed a copy of the Enforcement notice marked WSO-1 which bore the registration number of LR No. 5980/1.
11. It was therefore his contention that the that the ex parte Applicant does not at all, therefore, have the locus standi to institute the Judicial Review proceedings as they cannot seek orders of Judicial Review against a decision that does not occasion any harm, loss or prejudice on them.
12. This is because the annexed sub-lease at paragraph 2 of the Supporting Affidavit relates only and specifically to L.R. No. 28223/33/C2 and not relating in any way to the subject L.R. No. 5980/1 as categorically set out in the said Enforcement Notice dated 16<sup>th</sup> October 2023.
13. It is his averment that contrary to paragraph 5 of the Supporting Affidavit, the Respondent herein acted in accordance with the statutory confines under section 72 of the *Physical and Land Use Planning Act, 2019* in arriving at the issuance of the Enforcement Notice.
14. Further that in response to paragraph 12 of the Supporting Affidavit, the ex parte Applicant has not provided any relationship between these proceedings and those it has referred to as involving the Respondent and the Administrators of the Estate of the one Samuel Mundati Gatabaki and relating to L.R. No.5980/1 which is the subject of the Enforcement Notice giving rise to the proceedings.
15. The Respondent contends that the ex parte Applicant has instituted these proceedings in bad faith having flouted section 72(3) of the *Physical and Land Use Planning Act, 2019* which requires a person aggrieved by an enforcement notice to appeal to the County Physical and Land Use Planning Liaison Committee within fourteen (14) days of being served with the notice.
16. Further, that the Respondent will suffer prejudice if this Application is allowed as it will give the ex parte Applicant a blank cheque giving room to illegitimate occupation and use of the suit property to the detriment of the Respondent and against the public interest of its residents. That there is a high likelihood that ex parte Applicant will illegally benefit from the suit property in respect of which they have not proved any legitimate interest thereon, in case the orders sought in the said Application are granted.
17. Therefore the Respondent urges the Court to dismiss the Notice of Motion dated 22/01/2024 for being devoid of merit and being fatally defective for want of compliance with the mandatory procedural requirements of instituting Judicial Review proceedings. This being the case then he has urged the Court to consider the best interest of the rule of law, justice and fairness and find the Notice of Motion to be lacking in merit and thus strike it out with costs.
18. The application was argued by way of written submissions. The Applicant filed submissions dated 7/02/2025. In his submissions the Applicant framed two issues for determination namely: whether



this is a proper case for grant of order of stay of Respondent's enforcement notice dated 6<sup>th</sup> October 2023 and who should bear the cost of the application.

19. The Applicant has submitted that the action of the Respondent in the issuance of the impugned enforcement notice and subsequent trespass, encroachment and erection of illegal structures is capricious, unconstitutional and was well beyond the powers of the Respondent.
20. It is his submission that the grant of stay in Judicial Review proceedings is at the discretion of the Court and the central purpose for such stay is to prevent the Respondent from implementing the enforcement notice and suspending its validity, pending the substantive hearing of these proceedings. That the purpose of the stay would be to ensure that the substantive motion is not rendered nugatory if stay is not granted.
21. Therefore the Applicant submits that since the Respondent has complained of acts are patently unlawful, illegal, unjustifiable and in excess of its powers it is an imperative that stay be granted to enable the Applicant ventilate his complaint fully in the substantive motion.
22. In his submissions he also stated that whereas it also clear from the facts in this case that the suit property is not in any way directly or remotely connected with the property expressed and envisaged in the said enforcement notice the Court should consider the Court's decision in the case of *Republic vs Director of Public Prosecution & 2 others: Ayoo (Ex parte Applicant) Miscellaneous Application No. E45 of 2022* (2022) KEHC 15493 (KLR) ( Judicial Review) ( 17<sup>th</sup> November 2022) ( Ruling).Which the Applicant has relied on where Honorable Justice David Maraga (as he then was) stated that:-  
  
“... As injunctions are not available against the government and public officers, stay is a very important aspect of the judicial review jurisdiction .... I also want to state that in Judicial Review applications like this one the Court should always ensure that the ex parte Applicant's application is not rendered nugatory by the acts of the Respondent during the pendency of the application. Therefore, where the order is efficacious the Court should not hesitate to grant it.”
23. It is therefore the Applicant's position that given the situation at hand then this is a proper case for the grant of stay which order will enable the Applicant to ventilate its case in the substantive motion pursuant to his constitutional right for access to justice. That as a corollary it is an imperative that the stay be granted in order not to render the Applicants substantive motion nugatory in line with legal precedent. Further that the costs of this application should be in cause as it is anticipated that these proceedings are ongoing.
24. At the time of writing this Ruling the Respondent had not filed any submissions. Therefore in this Ruling I will only the pleadings filed including the replying Affidavit of the Respondent and annexures.

### **Determination**

25. The Court has considered the application and submissions filed and is of the view that the following are the salient issues for determination herein:-
  - i. Whether the Applicant has locus standi to institute the application.
  - ii. Whether the Exparte Applicant has made a case for grant of the Judicial Review remedies sought.
  - iii. What orders should issue as to costs?



26. The Respondent objected to the locus of the application for the reasons that the Exparte Applicant had not exhausted the existing alternative dispute resolution mechanism as provided for under Section 72(3) of the *Physical and Land Use Planning Act*, 2019.
27. The Exparte Applicant on the other hand admitted that indeed his suit property is not mentioned in the enforcement notice issued by the Respondent dated 16/10/2023 but yet the Respondent has trespassed on his suit property and erected illegal structures thus interfering with his right of ownership of land violating Article 40 of *the Constitution*.
28. Now, on the issue of locus, Article 22(3) of *the Constitution* provides that any person aggrieved by an administrative action may apply to the High Court or Subordinate Court upon which original jurisdiction is conferred. The Applicant submits that whereas the enforcement notice does not mention his suit property, however the Respondent has trespassed onto the suit property and taken actions on the Respondent's property in trespassing upon the Applicant's suit property and erected illegal structures on it clearly infringing the Applicant's constitutional right to ownership of property.
29. Locus standi is the legal capacity of a person to institute and maintain legal proceedings in Court. It can also be defined as the right to be heard before a Court heard before the Court. It is generally accepted that in Judicial Review matters, parties only have to show that they have sufficient interest so as to have locus standi before the Court. In *Republic v Resident Magistrate, Milimani Commercial Court & Another exparte AIG Insurance Company Ltd* [2010] eKLR (Miscellaneous Application 723 of 2007) the Court found that the words 'sufficient interest' should be construed in a very wide manner and each interpretation would depend on the circumstances of each case. The Court adopted the sentiments of Lord Diplock in *R V Inland Revenue Commissioners Ex parte National Federation of Self Employed and Small Business Ltd* (1982) AC 617. Lord Diplock stated that:
- “ ... The draftsmen ... avoided using the expression 'a person aggrieved' although it lay ready to his hand. He chose instead ordinary English words which on the face of them leave the Court an unfettered discretion to decide what in its good judgment it considers to be 'a sufficient interest' on the part of (a claimant) in the particular circumstances of the case before it. For my part, would not strain to give them any narrow meaning.”
30. Applying these findings to the instant case, I am of the view that the Applicant has an interest in the outcome of these proceedings. The enforcement notice issued by the Respondent will directly affect the Applicant's interest (if any) in the parcel of land. The Respondent's arguments that the Applicant has no locus therefore fails.
31. The second issue is whether the Respondents acted ultra vires in issuing the Enforcement notices. The Enforcement Notices are issued by the Respondent under the Physical Planning Act of 2019. The notice did not specify the section but most notices of this nature are issued under section 38 (1) and (2) of the Physical Planning Act. This section reads as follows:

“ 38.

- (1) When it comes to the notice of a local authority that the development of land has been or is being carried out after the commencement of this Act without the required development permission having been obtained, or that any of the conditions of a development permission granted under this Act has not been complied with, the local authority may serve an enforcement notice on the owner, occupier or developer of the land.



(2) An enforcement notice shall specify the development alleged to have been carried out without development permission, or the conditions of the development permission alleged to have been contravened and such measures as may be required to be taken within the period specified in the notice to restore the land to its original condition before the development took place, or for securing compliance with those conditions, as the case may be, and in particular such enforcement notice may require the demolition or alteration of any building or works or the discontinuance of any use of land or the construction of any building or the carrying out of any other activities.”

32. The enforcement notices in question comply with Section 38 (1) and (2). These notices specify the illegal developments and specify that the developer should stop any further development and remove the said structures within seven days.
33. The Respondent on their part have stated that the notice issued does not in any way concern the Applicant since the Ex parte Applicant’s averment at paragraphs 2 and 3 of the Supporting Affidavit are to the effect that they are the bona fide and registered proprietors of L.R. No. 28223/33/C2 (and they annexed a copy of the sub-lease to support their averment). That this lacks correlation with the subject property of the Enforcement Notice dated 16<sup>th</sup> October 2023.
34. In fact that the Enforcement Notice dated 16<sup>th</sup> October 2023 which forms the basis of this Application for Judicial Review was not at all directed at the Ex parte Applicant but to the Owner/Developer/ Occupier of L.R. No. 59801/1 of which the Ex parte herein does not legitimately claim to be the owner of.
35. The Respondent avers that he does not believe that the Ex parte Applicant has any locus standi to institute these Judicial Review proceedings as they cannot seek orders of Judicial Review against a decision that does not occasion any harm, loss or prejudice on them.
36. The issues raised by the parties are on the ownership of the subject properties of land, which cannot be a ground for granting Judicial Review orders.
37. In *Sanghani Investment Limited V Officer In Charge Nairobi Remand & Allocation Prison* [2007] eKLR (Misc Appli 99 of 2006) Wendoh J rightly pointed out that:
- “Judicial Review proceedings is not a forum where such a dispute can be adjudicated and determined as there would be need for viva voce evidence to be adduced on how the land was acquired and came to be registered in the names of the Applicant; whether the title is genuine or not ....”
38. I find that this position correctly applies to this case. There is need to determine whether or not the property in question form part of the suit property LR No. 59801/1 and if so whether that form the illegal structures referred to in the Enforcement Notice as has been alleged by the Respondent, or if the structures erected thereupon belong to the Applicant by virtue of the sub-lease that they hold. The interests of justice will not be served by orders of Judicial Review.



39. The Applicant also states that there has been a violation of the rules of natural justice because he was not heard before the issue of the enforcement notice. In *Jane Njeri Nkrumah v Chief Magistrates Court at Nakuru Judicial Review No 26 of 2009 (Unreported)* the Court found that:

“The orders of certiorari and prohibition therefore issued primarily to inferior Courts and other persons and bodies having the duty to act judicially, where there has been an actual or threatened usurpation of jurisdiction or a breach of the rules of natural justice or an error of law on the face of the proceedings.”

40. From my reading of the facts presented, I hold the view that the Applicant chose a wrong forum for the complaint that he has against the Respondent. In *Republic v National Land Commission Ex-Parte Ephraim Muriuki Wilson & Others [2018] eKLR*) the Court stated as follows:

“In this regard, it is important to mention that what emerges is that there is a land dispute, and this Court cannot allow itself to be used to resolve a land dispute disguised as a Judicial Review application. Behind the curtain of these Judicial Review proceedings is the real dispute, namely, ownership, use and or occupation of land. These questions call for the need for this Court to exercise caution, care and circumspection. First, there is the question of jurisdiction discussed earlier. Second, there is a real danger of this Court rendering a decision that will have the implication of determining ownership of the disputed land. I decline the invitation to venture into this forbidden territory. The upshot is that I dismiss this Judicial Review application with costs to the Interested Parties. I award no costs to the Respondent since it did not participate in the proceedings.” In *Republic v Cabinet Secretary, Ministry of Interior & Co-ordination of National Government & 2 others Ex-Parte Kisimani Holdings Ltd [2015] eKLR*, the Court dealing with a similar issue stated as follows: “26. As was held in *Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354*: “Judicial Review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the Affidavits filed in support of the application..... Whereas it is true that the underlying dispute herein is ownership of the land, Judicial Review proceedings is not a forum where such a dispute can be adjudicated and determined as there would be a need for viva voce evidence to be adduced on how the land was acquired and came to be registered in the names of the Applicant; whether the title is genuine or not. In cases where the subject matter or the question to be determined involves ownership of land, and the rights to occupy land namely occupation, and disposition, there would be need to allow viva voce evidence and cross-examination of the witnesses which is not available in Judicial Review proceedings. Even if the Respondents had filed documents, they would be copies that would not be sufficient to establish authenticity of the title. The original documents would need to be produced at a full hearing where oral evidence would be adduced..... It may indeed be true that the notice that is impugned is irregular or unlawful and an order of certiorari would be deserved, but it is not in every case that the Court will grant an order of Judicial Review even though it is deserved. Judicial Review being discretionary remedy will only issue if it will serve some purpose. Certiorari is a discretionary remedy, which a Court may refuse to grant even when the requisite grounds for it exist. The Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the Court being a judicial one must be exercised on the basis of evidence and sound legal principles..... So that in this case, even though this application were properly before this Court and the application had merit, the Court may not have



granted an order of certiorari because it would not be the most efficacious remedy in the circumstances. Even if the notice under challenge is quashed, the issue over the ownership of the land still stands and it will require determination by way of filing pleadings and viva voce evidence at another forum preferably the Civil Courts.”<sup>27</sup>.To grant the orders sought herein will leave the serious conflicting issues of fact raised in these proceedings unresolved hence will be a source of future conflicts since as already stated Judicial Review applications do not deal with the merits of the case but only with the process. In other words, in Judicial Review applications the Court’s jurisdiction is to determine whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an Applicant brings Judicial Review proceedings with a view to determining contested matters of facts with an intention of securing a determination on the merits of the dispute the Court would not have jurisdiction in a Judicial Review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits.”

41. Due to the foregoing, I find no merit in the Applicant’s Notice of Motion Application dated 22/01/2024. The same is dismissed with no order as to costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 26<sup>TH</sup> DAY OF JUNE 2025 VIA MICROSOFT TEAMS.**

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**MOGENI J**

**JUDGE**

In the presence of:

Ms. Mbirwe holding brief for AGN Kamau for the Exparte Applicant

Mr. Ntogo for the Respondent

Mr. Melita – Court Assistant

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**MOGENI J**

**\*\*JUDGE**

