



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**JUDICIAL REVIEW NO. 7 OF 2019**

**IN THE MATTER OF AN APPLICATION BY MOHAMED ASAFA WOCHÉ**

**AN APPLICATION FOR JUDICIAL ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS**

**AND**

**IN THE MATTER OF THE COUNTY GOVERNMENT ACT 2012**

**IN THE MATTER OF THE LAW REFORM ACT (CAP 21) LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE PHYSICAL AND LAND USE PLANNING ACT NO. 13 OF 2019**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS NO. 4 OF 2015**

**AND**

**IN THE MATTER OF THE ENVIRONMENT AND LAND COURT ACT 2012**

**AND**

**IN THE MATTER OF THE LAND REGISTRATION ACT 2012**

**AND**

**IN THE MATTER OF THE ORDER 53 OF THE CIVIL PROCEDURE RULE 2010**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**AND**

**THE COUNTY GOVERNMENT OF LAIKIPIA.....RESPONDENT**

**AND**

**MOHAMED ASAFA WOCHÉ.....EX-PARTE APPLICANT**

## JUDGEMENT

1. By Notice of Motion dated the 27<sup>th</sup> November 2019, the Applicants herein sought leave Apply for the orders of certiorari, prohibition and mandamus. The application having been served upon the Respondent and there having not been any response in opposition or otherwise, the same was herein allowed.
2. The Applicant was directed to file and serve the substantive motion upon the Respondent. Leave was also granted to the Respondent to file and serve their response within 14 days upon service wherein the substantive motion was fixed for hearing.
3. Pursuant to the above directions the Applicant filed their substantive motion dated 17<sup>th</sup> December, 2019 wherein their complaint had been that by contravening Sections 58(6), 60 and 61 and 72 of the Physical and Land Use Planning Act, the Respondent herein, had in turn infringed on his rights guaranteed by the provisions of Article 47 of the Constitution as read with Section 4 of the Fair Administrative Action Act, to his prejudice and detriment.
4. The substantive motion which was supported by the statement of facts filed on 27<sup>th</sup> November, 2019 and the verifying affidavit sworn by the ex-parte application on the same date was served upon the Respondent but then again, there had neither been an appearance or response from the Respondent wherein the Applicants sought that the Court allows prayers No. 1, 2, 3 and 4 of their Motion.
5. In their submissions, the Applicants framed their issues for determination as follows:
  - i. Whether the exparte Applicant was entitled to the relief sought;
  - ii. Whether the Court had jurisdiction to grant the orders sought;
  - iii. Whether the Court had power to grant damages to the ex-parte Applicant in a matter such as this;
  - iv. The issue of costs.
6. On the issue of jurisdiction, Counsel referred the Court to the Physical and Land Use Planning Act 2018 and submitted that Section 92 (1) of the said Act dealt with the transition
7. That Section 93 was critical in their case as it provided as follows:

*“All disputes relating to physical and land use planning, before establishment of the national and county physical and land use planning liaison committees shall be heard and determined by the Environment and Land Court”.*
8. It was their submission that by virtue of the above provision of the law, the Court had jurisdiction to handle this matter.
9. On the issue of the relief sought, Counsel for the ex-parte Applicant referred the Court to paragraph 3 of their statement of facts and proceeded to submit that the same confirmed the fact that the Applicant was the registered owner of L.R. No. 10422/96 and 10422/98 which land was located opposite British Army camp in Nanyuki.
10. That the parcel of land was leasehold property wherein the ex-parte Applicant had applied to the County Government of Laikipia for its development approval between the months of June and August, 2019.
11. That in order for such approval to be done, approvals had to be made by the Executive Committee members in charge of infrastructure and land. That further in order for the County Executive Committee members to grant him the approval, he needed approvals from the following departments within the County.
  - i. National Land Commission (NLC)
  - ii. National Environment and Management Authority (NEMA)
  - iii. Public Health
  - iv. Land and Physical Planning
  - v. County Engineer
  - vi. County Architecture
12. That as per their annexure marked as MAW 3C he had secured approvals from the National Land Commission, from the County Engineers as per his annexure marked as MAW 3D, and from the Ministry of Infrastructure within the County Government as per a letter annexed as MAW 3F.
13. That he had attached all receipts to confirm application and payments, as well as scanned copies of approved plans as annexure MAW

3A which was the structural planning and approvals.

14. That copies of the original maps had been handed over to the Court which certified that they had been approved, through the stamps affixed thereto. That a planning brief had also been attached as shown in MAW 3(b). It was thus his submission that he had complied with all requirements of approval as required by the law.

15. The Applicant further submitted that the provisions of Section 58 (6) of the Physical and Planning Act provided that;

*“Where an Applicant here an Applicant does not receive written response for development permission within sixty days, such permission shall be assumed to have been given in terms of this Act.*

16. That there was a time line of 60 days placed by the law upon which an Applicant ought to receive a response. That via their annexure marked as MAW 5, the same was an enforcement notice dated 4<sup>th</sup> September, 2019 to stop a construction which had already been approved which notice caused the filing of the present application so as to quash the same.

17. That the notice had been signed by one Mr. Mugambi who was the works officer at the County and not the Chief Executive Committee member who is the Minister.

18. The Applicant’s submission was therefore to the effect that the enforcement notice was null and void as it was *ultra vires* the Physical and Land Use Planning Act in terms of the fact that the works officer was not authorized to issue either the development approval or an enforcement notice. That the application was therefore merited in terms of Sections 57, 58, 60 and 61 of the Act.

19. That under Section 61 (1) (2) of the Physical and Land Use Planning Act, the Minister was supposed to communicate within 30 days upon receipt of the approval for development permission his refusal or the grant therein. The same had not been communicated to the Applicant from June, 2019 to 27<sup>th</sup> November, 2019 when the present application was filed. That in such circumstance, Section 58(6) kicked in by operation of the law in that it was to be assumed that the same was granted.

20. The Applicant’s submission on the 3<sup>rd</sup> issue for determination as to whether the Court could grant damages, was based on the finding in the case of **Republic vs County Government Laikipia [2019] eKLR** wherein the Court had granted damages in a similar matter. They also referred the Court to the case of **Nyeri Misc Application No. 36 of 2015 Republic vs The Divisional Criminal Investigation Officer, Laikipia East Division & Another Ex-parte Gilbert Okero Ombachi** where at page 4, the Court held as follows;

*“in order to succeed in an application for judicial review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...illegality is when the decision making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provisions of a law or its principles are instances of illegality. ....irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such decision is usually a defiance of logic and acceptable moral standards.....procedural impropriety is when there is a failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the rules of natural justice.....It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument....”*

21. That the enforcement notice in their case was tainted with illegality having been issued by a person not recognized by the law. That the decision not to grant the development permission was therefore in violation of Section 58(6) of the Physical and Land Use Planning Act.

22. The Applicant also relied on the decided case of **Republic vs Judicial Service Commission the Chief Justice ex-parte Applicant Joyce Manyasi [2012] eKLR**. at paragraph 44 where the Court held that;

*“The Applicant like every other citizen of this country, has legitimate expectation of being taken through a fair administrative process whenever there is contract with the administration. I have in this judgment demonstrated that the Respondent have conducted themselves in a fair and legal manner towards the Applicant. There is therefore no breach of the Applicant’s legitimate expectation to a fair administrative process.”*

23. The Applicant thus referred the Court to the provisions of Article 47 of the Constitution and Section 4(3) of the Fair Administration Actions Act to submit that in the present instance, the Applicant had not been given fair Administration Action by the Government of Laikipia and therefore his expectation has been breached by the enforcement notice issued on 4<sup>th</sup> September, 2019.

24. On the final issue for determination as to whether the ex-parte Applicant was entitled to costs, their answer was in affirmative as costs follow events. They sought for their application to be allowed as prayed.

#### **Determination.**

25. I have considered the application, the affidavits filed, the submissions as well as the authorities cited. The Applicant’s complaint herein is based on the fact that after the Respondent having contravened the provisions of Sections 58(6), 60 and 61 and 72 of the Physical and Land Use Planning Act, had in turn infringed on his rights which were guaranteed by Article 47 of the Constitution as read with Section 4 of the Fair Administrative Action Act.

25. I find the issues arising for determination as follows:-

- i. Whether the Petition discloses a legal interest capable of protection under the law.
- ii. Whether there was breach of Article 47 of Constitution as read with Section 4 of the Fair Administrative Actions Act.
- iii. Whether the Petitioner was entitled to the orders sought in the Petition?

27. On the 1<sup>st</sup> issue for determination, I find that the clearly identified the relevant and specific Articles of the Constitution by availing evidence, through affidavit of the said violation as per the required standard set out in the case of **Anarita Karimi Njeru vs The Republic (196-1980) KLR 1272** where it was held, in the words of the Justices Trevelyan and Hancox that ;

*We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.*

28. From the above captioned Petition, the Petitioner has alleged, by setting out with a reasonable degree of precision that his Constitutional rights envisaged under Article 47 of the Constitution as read with Section 4 of the Fair Administrative Action Act had been violated by the Respondent herein. For ease of reference, I shall set out the said provisions of the law as follows;

29. Article 47 of the Constitution provides as follows;

- (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**
- (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.**
- (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—**
  - (a) provide for the review of administrative action by a Court or, if appropriate, an independent and impartial tribunal; and**
  - (b) promote efficient administration.**

30. Section 4 of the Fair Administrative Actions Act provides as follows

- 1. Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.**
- 2. Every person has the right to be given written reasons for any administrative action that is taken against him.**
- 3. Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-**
  - a. prior and adequate notice of the nature and reasons for the proposed administrative action;**
  - b. an opportunity to be heard and to make representations in that regard;**
  - c. notice of a right to a review or internal appeal against an administrative decision, where applicable;**
  - d. a statement of reasons pursuant to section 6;**
  - e. notice of the right to legal representation, where applicable;**
  - f. notice of the right to cross-examine or where applicable; or**
  - g. information, materials and evidence to be relied upon in making the decision or taking the administrative action.**
- 4. The administrator shall accord the person against whom administrative action is taken an opportunity to-**
  - a. attend proceedings, in person or in the company of an expert of his choice;**
  - b. be heard;**
  - c. cross-examine persons who give adverse evidence against him; and**

*d. request for an adjournment of the proceedings, where necessary to ensure a fair hearing.*

*5. Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.*

*6. Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 41 of the Constitution, the administrator may act in accordance with that different*

31. Section 3 of the Fair Administrative Action Act provides that:

**3. (1) This Act applies to all state and non-state Application agencies, including any person**

**a. exercising administrative authority;**

**b. performing a judicial or quasi-judicial function under the Constitution or any written law; or**

**c. whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.**

32. By its very definition, Judicial Review is the means through which the Courts supervise the actions or decisions of administrative bodies or tribunals. In the case of **Municipal Council of Mombasa v Republic and Another [2002] eKLR** the Court held that:

*Judicial Review is concerned with the decision-making process, not with the merits of the decision itself... The Court would only be concerned with the process leading to the making of the decision...*

33. In the present case the Applicant submitted that that he was the registered owner of L.R. No. 10422/96 and 10422/98 which land was located opposite British Army camp in Nanyuki. That the parcel of land was leasehold property wherein he had applied to the County Government of Laikipia for its development approval between the months of June and August, 2019 and had proceeded to get all approvals as required from.

i. National Land Commission (NLC)

ii. National Environment and Management Authority (NEMA)

iii. Public Health

iv. Land and Physical Planning

v. County Engineer

vi. County Architecture

34. Pursuant to obtaining the said approvals, and making all the necessary payments meaning that he had now complied with all requirements of approval as required by the law, the Respondent herein served him with enforcement notice, signed by one Mr. Mugambi, a works officer at the County, dated 4<sup>th</sup> September, 2019. The said Notice was to the effect that he stops the construction which had already been approved.

35. Sections 57(1) of the Physical and Land Use Planning Act provide as follows:

*(1) A person shall not carry out development within a county without a development permission granted by the respective county executive committee member.*

36. Sections 58(1) and (6), of the Physical and Land Use Planning Act provide as follows:

*(1) A person shall obtain development permission from the respective county executive committee member by applying for development permission from that county executive committee member in the prescribed form and after paying the prescribed fees.*

*(6) Where an Applicant does not receive written response for development permission within sixty days, such permission shall be assumed to have been given in terms of this Act.*

37. Sections 60 of the Physical and Land Use Planning Act provide as follows:

*(1) Within seven days of receiving an application for development permission, the county executive committee member shall give a copy of the application to the relevant authorities or agencies to review and comment and the relevant authorities or agencies shall comment on all relevant matters including—*

*(a) land survey;*

(b) roads and transport;

(c) agriculture and livestock;

(d) health;

(e) public works and utilities;

(f) environment and natural resources;

(g) urban development;

(h) national security in respect of land adjoining or within reasonable vicinity of safeguarding areas; and

(i) any other relevant authority.

(2) Within fourteen days of receiving the copy of the development permission from a county executive committee member, the relevant authorities or agencies shall submit their comments to the respective county executive committee member.

38. Sections 61(3) and (4) of the Physical and Land Use Planning Act provide as follows:

(3) An Applicant or an interested party that is aggrieved by the decision of a county executive committee member regarding an application for development permission may appeal against that decision to the County Physical and Land Use Planning Liaison Committee within fourteen days of the decision by the county executive committee member and that committee shall hear and determine the appeal within fourteen days of the appeal being filed.

(4) An Applicant or an interested party who files an appeal under sub-section (3) and who is aggrieved by the decision of the committee may appeal against that decision to the Environment and Land Court.

39. The Petitioner's argument was that the notice had been signed by one Mr. Mugambi who was the works officer at the County and not the Chief Executive Committee member who is the Minister.

40. The Applicant's submission was therefore to the effect that the enforcement notice was null and void as it was *ultra vires* the Physical and Land Use Planning Act in terms of the fact that the works officer was not authorized to issue either the development approval or an enforcement notice. That his application was therefore merited in terms of Sections 57, 58, 60 and 61 of the Physical and Land Use Planning Act.

41. That under Section 61 (1) (2) of the Physical and Land Use Planning Act, the Minister was supposed to have communicated to him within 30 days upon receipt of the approval for development permission, his refusal or the grant therein. The same had not been communicated to the Applicant from June, 2019 to 27<sup>th</sup> November, 2019 when the present application was filed. That in such circumstance, Section 58(6) kicked in by operation of the law in that it was to be assumed that the same was granted.

42. Section 38 of the Physical Planning Act, Cap286 Laws of Kenya provides as follows:

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 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.

3) Unless an appeal has been lodged under subsection (4) an enforcement notice shall take effect after the expiration of such period as may be specified in the notice.

4) If a person on whom an enforcement notice has been served under subsection (1) is aggrieved by the notice he may within the period specified in the notice appeal to the relevant liaison committee under section 13.

43. The Petitioner submitted that he had sought and obtained all the necessary approvals for development of the said property which approvals were acquired legally and the same produced as evidence in this case.

44. It was therefore his submission that his prevention from completing the construction by the issuance of the Enforcement Notice by the Respondent without giving him fair administrative action constituted a breach of his constitutional rights under Art 47 of the Constitution

thereby prejudicing him to his detriment.

45. It is not in dispute that the issuance of the Enforcement Notice was an administrative action by the Respondent. It is also not in dispute that the Respondent has a duty to ensure that its action is expeditious, efficient, lawful, reasonable and procedurally fair.

46. Procedural fairness necessarily requires that persons who are likely to be effected by the decision be afforded an opportunity of being heard before the decision is taken.

47. In this case the notice dated 4<sup>th</sup> September, 2019 to stop a construction that had already been approved without giving the Petitioner an opportunity to be heard and to address any issue arising therein before issuing an enforcement in my view violated the Petitioner's right to fair administration.

48. Section 72 of the of the Physical Planning Act, Cap286 Laws of Kenya provides as follows:

*(1) A county executive committee member shall serve the owner, occupier, agent or developer of property or land with an enforcement notice if it comes to the notice of that county executive committee member that—*

*(a) a developer commences development on any land after the commencement of this Act without the required development permission having been obtained; or*

*(b) any condition of a development permission granted under this Act has not been complied with.*

*(2) An enforcement notice shall—*

*(a) specify the development alleged to have been carried out without development permission or the conditions of the development permission alleged to have been contravened;*

*(b) specify measures the developer shall take, the date on which the notice shall take effect, the period within which the measures shall be complied; and*

*(c) require within a specified period 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.*

49. I find the notice herein issued to the Petitioner both unlawful and un-procedural. The Respondent was obliged to afford the Applicant a hearing before it made its decision which decision, was undoubtedly bound to adversely affect the interest of the Applicant by requiring it to stop the construction on his property.

50. The Court of Appeal in **Onyango Oloo –vs-Attorney General (1989) EA 456** held as follows;:

*“The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly, and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard... There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principles of natural justice...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...”*

51. Consequently, I find merit in the Petition dated the 17<sup>th</sup> December, 2019 and grant the following orders:

**i. An order of certiorari is herein issued to bring to this Court for the purposes of quashing the Enforcement Notice dated 4<sup>th</sup> September 2019 requiring the Ex-parte Applicant to stop further works until approval is complete with immediate effect.**

**ii. An order of prohibition is herein issued against the County Government Laikipia by itself, agent, employees and any other person acting on its behalf from stopping any further works on the Ex-parte Applicant's land LR No. 10422/98 and LR No. 10422/96- Trench Farm located opposite the British Army Camp in Nanyuki.**

**iii. By an order of Mandamus, the County Government of Laikipia by itself, agent, employee or any person acting on itself is herein compelled to unconditionally issue the development permission to the ex- parte Applicant's Construction works.**

**iv. The Respondent shall be compelled to pay general damages for the unfair disruption of the ex-parte Applicant's development works and construction works from the 4<sup>th</sup> September 2019 to the date of the delivery of this Judgment.**

**v. The Applicant will have the costs of these proceedings.**

**Dated and delivered at Nyeri this 5<sup>th</sup> day of March 2020.**

**M.C. OUNDO**

