



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT OF KENYA AT MERU

JUDICIAL REVIEW NO. 16 OF 2018

REPUBLIC.....APPLICANT

VERSUS

THE COUNTY GOVERNMENT OF MERU.....1ST RESPONDENT

THE PHYSICAL PLANNER MERU COUNTY.....2ND RESPONDENT

EX-PARTE APPLICANT-THERESA STEPHEN M' IKIUNGA

(Legal representative of STEPHEN MICHUKI M' IKUNGA)

JUDGMENT

1. On 22/10/2018 leave was granted to **Stephen Michuki M'Kiunga (the ex-parte applicant herein)** to file the substantive motion of Judicial Review of which the same was filed on 26/10/2018 seeking the following Orders;

a. That this Honourable Court do hereby grant the ex-parte applicant an Order of mandamus by way of judicial review calling for and compelling the Respondents to approve the request and/or plans by the ex-parte applicant to put up temporary structures on his plot, and further accept all land rent as and when paid by the exparte applicant over his plot Meru Municipality Block 11/287.

b. That the Honourable court be pleased to grant the exparte applicant an order of prohibition by way of judicial review calling for and prohibiting the Respondents from interfering with the ex-parte applicant's peaceful and quiet use of his plot Meru Municipality Block 11/287.

2. The ex-parte applicant passed on and was duly substituted by his legal representative, THERESA STEPHEN KIUNGA through a consensus on 30.1.2019.

Case for the Ex-parte Applicant

3. The exparte applicant's case is anchored on his application, his statutory statement of facts, the affidavit and annexures thereof. It is averred that **Stephen Michuki M' Kiunga** is the registered owner in possession and occupation of a parcel of land known as **Meru Municipality Block 11/287**. Stephen had filed a case before this court, MERU ELC NO. 68 OF 2014 against the current respondent seeking declaratory orders to the effect that he is the owner of the suit land and a permanent injunction restraining the respondent from interfering with the said suit land. Judgment was delivered in favour of the exparte- applicant and a decree to that effect was issued on 21. 9. 2017.

4. That on or around September 2017, he presented his building plans for the suit land to the Respondents but the Respondents have refused to accept and approve the same. He had been frequenting the offices of the Respondents for the approval of the building plans to no avail. Further, the respondent has failed to accept the land rent over the suit land, thus frustrating his peaceful use of the land.

5. It is stated by the exparte applicant that annexures Em1 and Em2 proffered by the respondent are falsified and tailored to suit the Respondent's illegality as the same are signed by only one member of the council. The ex-parte applicant denied there being a sewer line, underground water supply, manhole toilet or any other thing as alleged by the Respondent. It was also his averment that his property measures about ½ an acre and if there is any sewer line, that cannot be the reason why the Respondents have denied him his right. In any event, the adjacent plots have all been built up with storey buildings.

6. In support of the case of the ex-parte applicant, the following documents have been produced for the court's perusal; **Copy of lease certificate in the name of Stephen M'Ichuki M'Kiunga in respect of the suit land, the building plans, letters dated 09/03/2018, 03/09/2018 authored by counsel for the ex-parte applicant addressed to the respondent, copy of the newspaper public advertisement**

of the sale of the suit land, rate payment receipts, the decree in Meru ELC no. 68 of 2014.

7. The ex parte applicant contends that their letters to the respondent to be allowed to pay outstanding rent were not responded to. Therefore, the actions of the respondent are unfair, discriminatory, unreasonable, irrational arbitrary and illegal *ab initio* as the same amounts to a violation of the ex-parte applicant's constitutional right to administrative action that is expeditious, efficient, lawful and is procedurally fair since he was not even given the reasons as to why his building plans were not approved and why the respondent has failed to accept rent payments.

Case for the respondent

8. The Respondents have opposed the suit vide the Replying affidavit dated 28/1/2019 sworn by **Elizabeth Mburu** who is the Director physical planning in the County government of Meru. She averred that the suit plot was initially part Of Meru Bus Park before the ex-parte applicant obtained ownership of the same. That during the construction of the sewerage system, the suit plot was affected due to the sewer lines lying beneath the subject plot and traversing to the main treatment plant. That the ex-parte applicant would only put up the desired development if he removes the sewer lines from his plot and which process is costly and unachievable due to the connections that were put underneath the plot and which affect the main public utilities. That the decision not to approve the building plans was reached at with good reasons and a resolution was reached to that effect and it is within the powers of the Respondents to reject such building plans.

9. In support of their case, the respondents relied on the following annexed documents: **Minutes of the Special Town planning works and Housing Committee, Copies of Minutes of the Special Council Meeting EM2, Image showing results of the field survey conducted by the physical planning Office over the area.**

10. Both parties have duly filed their respective submissions. The Ex-parte applicant submitted that the Respondents have annexed a blurred map which is unreliable. That there was no fair administrative action since the Ex-parte applicant was never informed of the Respondents decision. If there was a decision, the same ought to have been in written form and addressed to the applicant. That the sewer line does not only pass through the applicant's residence but runs through other premises. He relied on the provisions of **Article 47 of the Constitution, Section 2, 3 & 4 of the Fair Administrative Action Act No 4 of 2015** and the following cited authorities; **Kenya Human Rights Commission & another v Non-Governmental Organizations Co-ordination Board & another [2018] eKLR, Judicial Service Commission vs. Mbalu Mutava & Another (2014) eKLR** and the case of **Dry Associates Ltd. Vs. Capital Markets Authority and Another (2012) eKLR.**

11. The Respondents submitted that there is no evidence to show that the adjacent plots have been developed in a permanent manner and that the Respondents have a mandate to approve the buildings. On Prohibition, it was submitted that the case in **ELC Civil Suit No. 68 of 2014** issued prohibitory orders hence that issue is Res judicata. They relied on the following cited authorities; **Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR, Republic v Nairobi City County Government & another Ex Parte Simon Mukuria Kamau T/A City Clothing [2017] eKLR** and **Nairobi H.C Petition no. 408 of 2015, Eliud Nyauma Omwoy vs. Kenyatta University & 3 Others (2016)e KLR.**

Analysis and Determination

12. The issue in contention in this review is whether this Court has the mandate to compel the Respondent to approve the request made by the Ex-parte applicant for the Respondent to approve the building plans and accept the land rent in respect of plot no. **Meru Municipality 11/287**. In determining this issue, the court must keep in mind that Judicial review is not concerned with the merits of the decision sought to be reviewed but rather the propriety of the decision. The purpose thereof is to ascertain and ensure that an individual is given fair treatment by the body/ Authority which made the decision. This concept was aptly captured in the case of **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**, where it was held that;

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to 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...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision...It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but is a statutory body which can only do what is authorized by the statute creating it and in the manner authorized by statute.”

13. In **Republic vs. The Registrar of Companies Ex Parte Transglobal Freight Logistics Limited Nairobi HCMA No. 711 of 2005**, **Emukule, J** held inter alia that:

“Judicial Review, now regulated by Order 53 provides the means by which judicial control of administrative action is exercised, the subject matter of every judicial review is a decision made by some person or body of persons or else a refusal by him to make a decision. To qualify as a subject for Judicial Review the decision must have consequences which affect some person (or body of persons) other than the decision- maker, although it may affect him too. It must affect such other person either (i) by altering rights or obligations of that person which are enforceable in or against him in private law, or (ii) by depriving him of some benefit or advantage which either (1) he has in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which has been given an opportunity or (2) he has received an assurance from the decision maker that it will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn...The matter in question here qualifies for Judicial Review.”

14. In this case it is not in dispute that the Exparte applicant is the registered owner of the suit premises in **Meru Municipality Block 11/287**, having been so registered on 24.7.2009 as per the Certificate of lease. The ownership issue was litigated upon in the case, **Meru ELC no. 68 of 2014**, where by the Exparte applicant was declared the owner of the suit land.

15. The Exparte applicant wished to develop his premises hence the request for approval of building plans. The Respondent has not shown that he informed the applicant of the decision made as regards the approval of the plans to put up a temporary structure on the suit premises and refusal to accept land rent. I therefore do find that this is a matter fit for judicial Review.

16. Parliament enacted the Fair Administrative Action Act of 2015 in order to give effect to the provisions of Article 47 of the constitution. Section 4 of the Fair Administrative Action Act hence re-echoes what is stipulated under Article 47 of the Constitution and reiterates the entitlement of every Kenyan to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

17. **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. (Emphasize added)".

18. **Section 4(3) of the Fair Administrative Action Act, 2015** provides as follows:

(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". [Emphasis added].

19. The applicant herein has clearly demonstrated that he was never informed of the decision made by the Respondent in respect to the approval of his building plans. The said decision (if there was any at all) was also arrived at without prior and adequate notice and therefore the applicant was not afforded an opportunity to be heard.

20. In **Republic v Director of Physical Planning Ex-Parte Globe Developers Limited & 3 others [2017] eKLR**, the Court cited the decision made in **Ridge vs. Baldwin [1963] 2 All ER 66 at 81, Lord Reid** where it was stated as follows:

"Time and again in the cases I have cited it has been stated that a decision given without the principles of natural justice is void."

The Court further cited the decision by **Lord Wright's in General Medical Council vs. Spackman [1943] 2 All ER 337** cited with approval in **R vs. Vice Chancellor JKUAT Misc. Appl. No. 30 of 2007** that:

"If the principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared as no decision."

21. Judge Odunga gave an in depth analysis of the import of what amounts to fair administrative action in the case of **National Land Commission & 2 others Ex Parte Archdiocese of Nairobi Kenya Registered Trustees (St. Joseph Mukasa Catholic Church Kahawa West Welfare Association, Nairobi JR 266 of 2017**, Where he stated that;

"In my view the notice contemplated under Article 47 of the Constitution as read with section 4(3) of the Fair Administrative Action Act must not only be prior to the decision but must also be adequate and must disclose the nature and reasons for the proposed administrative action". This was the position in Geothermal Development Company Limited vs. Attorney General & 3 Others [2013] eKLR where it was held that: "Article 47 enshrines the right of every person to fair administrative action. Article 232 enunciates various values and principles of public service including, responsive, prompt, effective, impartial and equitable provision of services and transparency and provision to the public of timely, accurate information."

...

As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it. Elementary justice and the law demands that a person be given full information on the case against him and be given reasonable opportunity to present a response."

22. I align myself with the decisions made in the above cited authorities. In paragraph 12 of the affidavit of **Elizabeth Mburu**, it is contended that;

"The exparte applicant was given reasons as to why his building plans would not be approved and the same was due to the sewer lines

lying beneath the subject plot”.

23. A look at the documents which the respondent relies upon shows that “EMI & 2” are dated February 2009. However, the formal request made by the Exparte applicant is captured in his document marked as “SMK 3 & 4”, which are letters to the respondent dated 9.3.2018 and 3.9.2018. There is no evidence to indicate that the Respondent ever informed the Exparte applicant of their decision. It appears that this is a clear case of a refusal by the respondent to undertake their mandate as outlined under section 4 of the Fair Administrative Action act and Article 47 of the Kenyan Constitution. The arguments being advanced by the Respondent that there is a sewer line is an issue of the merits of their decision. This being a Judicial Review case, the court cannot delve into the merits of such a decision.

24. Having determined that the Respondent flaunted the law on fair administrative Action, I proceed to declare its decision as null and void in the circumstances.

25. I now wish to determine whether the applicant warrants the Orders Sought. The Physical Planning Act clearly provides a laid down procedure for the issuance of building plans and appeals against the decision of the director and the National Liaison Committee, See **Wainaina Kenyanjui & 2 others v Andrew Ng’ang’a [2013] eKLR**.

26. **Part 3 of the Physical Planning Act** provides for the establishment and composition of the liaison Committees. Therein lies the dispute resolution mechanisms appertaining to matters planning. **Section 15(4)** of the aforementioned Act provides as follows:

“Any person aggrieved by a decision of the National Liaison Committee under this section may appeal to the High Court against such decision in accordance with the rules of procedure for the time being applicable to the High Court.”

27. Going by the Act (Physical Planning), the court comes in after exhaustion of the dispute resolution mechanisms provided for under the act.

28. A writ of mandamus is therefore only bound to compel a party who has not acted, or has neglected to act within his legal mandate to conduct that particular act and/or function.

29. In **Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR**, the court explained the principles and objective of the writ of mandamus when it held as follows;

“The next issue we must deal with is this: What is the scope and efficacy of an ORDER OF MANDAMUS? Once again we turn to HALSBURY’S LAW OF ENGLAND, 4th Edition Volume 1 at page 111 FROM PARAGRAPH 89. That learned treatise says:- “The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”

At paragraph 90 headed “the mandate” it is stated:

“The order must command no more than the party against whom the application made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.” What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. We can do no better than give examples. The Liquor Licensing Act, Chapter 121 Laws of Kenya, by section 4(1) creates a licensing court for every licensing area and provides that the licensing court, chaired by the District Commissioner of each area, is to consider and determine applications for and the cancellation of liquor licences. Section 8 of the Act provides the manner and procedure to be followed by those who desire to acquire liquor licences. The duty imposed on the licensing court is “to consider and determine applications and the cancellation of licences”-section 4(1) Now, if a party applies for a licence under section 8 and the licensing court simply refuses or neglects to consider and determine the application, such a party would be entitled to come and ask the High Court for a mandamus, and if the High Court is satisfied that the licensing court has simply refused or neglected to consider and determine the “application” the High Court would be entitled to issue an order of mandamus, compelling the licensing court to consider and determine the application as it is bound by the law to do so. The High Court would, in those circumstances, be compelling, through the remedy of mandamus, the licensing court to perform its public duty imposed on it by section 4(1) of the Liquor Licensing Act, and the public duty imposed by that section is the consideration and determination of the application for a licence. The High Court cannot, however, through mandamus, compel the licensing court to either grant or refuse to grant the licence (Emphasize added). The power to grant or refuse a licence is vested in the licensing court and unless there is a right of appeal, the High Court cannot itself grant a licence. In fact the Act provides for appeals to the High Court by persons whose licences the licensing court has refused to renew or whose licences have been cancelled”.

30. The illustration given in respect of issuance of liquor licence in the case **Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge (supra)**, is quite lengthy, but it aptly captures the issue at hand. As has been opined in the decision therein, this court does not have the jurisdiction to order the approval of the building plans, but can only compel the Respondent to consider and determine the application as it is bound by the law to do so. The Exparte applicant is entitled to have a clear response from the respondent whether negative or positive. Only then can the Ex-parte applicant be in a position to pursue a relief through the dispute resolution

mechanisms provided for under the statutes (I.e The Physical Planning Act).

31. The court will apply the efficacy test in compelling the Respondent to carry out its statutory mandate and by doing so follow due procedure and apply the elements of natural justice. I am however dismayed that the Respondent, a County Government has opted for this laborious path of litigation just to be directed on what its mandate is! Judicial time is not an unlimited resource and ought not to be squandered in directing an entity like a county government to exercise its mandate in accordance with the law.

32. **Final orders:**

1) **An Order of mandamus by way of judicial review is hereby issued calling for and compelling the Respondents TO CONSIDER the request and/or plans by the Exparte applicant to put up a temporary structure on his plot, and further accept all land rent as and when paid by the ex-parte applicant over his plot Meru Municipality Block 11/287 in line with the relevant laws and procedures, particularly under the physical planning Act.**

2) **An order of prohibition by way of judicial review is hereby issued calling for and prohibiting the Respondents from interfering with the Ex-parte applicant's peaceful and quiet use of his plot Meru Municipality Block 11/287, unless and until a consideration is made in terms of point (1) above.**

3) **Time being of essence, but at the same time, taking judicial notice that there is a Covid 19 pandemic, the compliance period given to the Respondent is Six (6) months failure to which, the Exparte applicant is at liberty to commence contempt proceedings.**

4) **The Respondent is condemned to pay the costs of this suit.**

DATED, SIGNED AND DELIVERED AT MERU THIS 20TH DAY OF MAY, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this ruling was given to the parties at the conclusion of the hearing and by a fresh notice by the Deputy Registrar. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE