REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 335 OF 2014

IN THE MATTER OF AN APPLICATION BY ELITE EARTHMOVERS LIMITED FOR LEAVE TO APPLY FOR AN ORDER OF MANDAMUS

AND

IN THE MATTER OF THE CIVIL AVIATION ACT, CHAPTER 394 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE KENYA AIRPORTS AUTHORITY ACT, CHAPTER 395 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE JUDICATURE ACT, CHAPTER 8 LAWS OF KENYA

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT, CAP 26 LAWS OF KENYA AND ORDER 53 RULES 1 &2 OF THE CIVIL PROCEDURE RULES AND SECTION 3A OF THE CIVIL PROCEDURE ACT

BETWEEN

REPUBLIC……APPLICANT

AND

KENYA CIVIL AVIATION AUTHORITY…..…….1ST RESPONDENT

KENYA AIRPORTS AUTHORITY..……..……2ND RESPONDENT

EXPARTE: ELITE EARTHMOVERS LIMITED

JUDGEMENT

1. By a Notice of Motion dated 6th November, 2014, the *ex parte* applicant herein, **Elite Earthmovers Limited**, seeks the following orders:

> **1. An order of Mandamus compelling the First and Second Respondents, the Director General of the 1st respondent, the Managing Director of the 2nd respondent and any officer and/or Employee acing on their behalf to issue the applicant within 21 days after the issuance of this order with approval/consent to develop land reference number 25799/1 and the necessary height specifications of any buildings to be constructed by the applicant and land reference number 25799/1.**
>
> **2. That the cost of this application/proceedings be provided for.**

Applicant's Case

2. According to the applicant, it is the owner of land reference number 25799/1 (hereinafter referred to as the suit property") in respect of which an allotment letter was issued to the applicant on 12th July, 1999.

3. According to the applicant, on 12th February, 1999 it wrote to the Commissioner of Lands for the purchase of the same and attached an bankers cheque of Kshs 918,700.00/= towards payment of the same. It was further averred that through a letter dated 13th December, 2007 the applicant applied for consent to develop the said plot from the 1st respondent which letter was duly received by the 1st respondent who responded vide a letter dated 18th December, 2007 instructing the applicant to pay Kshs 6,000/= as inspection fees, which was paid.

4. It was further deposed that on 14th February, 2008, the 2nd respondent wrote to the applicant and denying the applicant me authority to develop its aforesaid parcel of land because according to them the site is within the approach funnel of the proposed parallel runway at Jomo Kenyatta International Airport. There was a further letter on 25th February, 2009 by which the 2nd respondent informed them that the land was next to Kapa Oils Industries (which had been given approval and had constructed therein) and went ahead and attached the obstacle Limitation Chart for Nairobi. It was revealed that on 23rd November, 2009 the 2nd respondent wrote to the applicant seeking that the applicant transfers the land back to them an act which, in the applicant's view was in itself an admission that they recognized that the applicant was the rightful owner.

5. Based on legal advice the applicant contended that the decision by the respondents to deny the applicant the said approval is factually and legally wrong as the same is:

> a. Totally wrong and unreasonable being the absolute and registered owner of land reference number 25799/1 and the 2nd respondent did not even produce and attach any title deed or any title document to prove it owns land reference 25799/1 as alleged in their letter of 14th December, 2008. Further it was unreasonable to deny the applicant the approval on the basis that the site where the parcel of land is situated is within the approach of the proposed parallel runway at Jomo Kenyatta Airport because:
>
> > i. The 2nd Respondent has no powers under the law laws to approve development as these powers are solely vested to the 1st respondent
> >
> > ii. The respondents' proposal to construct a runway on the applicant's parcel of land is an act of trespass and the respondents are simply abusing their immense powers to forcefully violate its constitutional right to free use, enjoyment and development of the said parcel of land.

iii. The site where the parcel of land is situated is not currently being used by planes or any air navigation and my proposed development is not a threat to air navigation.

iv. Other land owners bordering the said parcel of land have been granted approval by the 1st respondent to develop their parcels of land.

v. The denial of an approval renders the applicant's ownership of the said parcel of land worthless as it denies it the constitutional right to use and develop the land and from the reason given by the 1st and 2nd respondent there appears to be a deliberate move and/or conspiracy to frustrate it and dispossesses it of its land and/or intimidate it to abandon its claim to the said land and/or arm twist it to allow the respondents to acquire its land at a throw away price or for free.

vi. The applicant cannot be illegally denied quiet and free use and development of my land without being given adequate compensation.

b. Unconstitutional and hence null and void: Denial of approval violates the provisions of the Constitution which guarantees the applicant the right to enjoy, use and develop the said land and based on legal advice the applicant believed that any power purportedly used by the respondents pursuant to the provisions of the ***Civil Aviation Act***, Chapter 394 of the Laws of Kenya and the ***Kenya Airports Authority Act***, Chapter 395 of the Laws of Kenya to deny it approval are inconsistent with the provisions of the constitution and hence null and void and the actions/decisions of the respondents are an illegality hence null and void.

c. **Discriminatory:** The Respondents' denial of an approval to the applicant is discriminatory as other land owners near its aforesaid plot such as **Kapa Industries** and the **Kenya Railways Corporation** have been issued with approvals to develop their parcels of land.

d. **Illegal:** Based on legal advice the applicant believed that the 1st respondent has no power under section 9 and 10 of the ***Civil Aviation Act***, Chapter 394 of the Laws of Kenya to deny the applicant approval to develop the said parcel of land as its powers are limited to controlling the height of any proposed buildings to ensure such developments do not interfere with safety or efficiency of air navigation. Further the 2nd respondent had no power or role in issuance of the said approval as such power can only be exercised by the 1st respondent and its letter of 14th February, 2008 denying the applicants approval was illegal, a total abuse of power, motivated by improper and ulterior motives stated in paragraph 8 (a) (v) above and ultra vires the ***Kenya Airports Authority Act***, Chapter 395 of the Laws of Kenya.

e. **Against the Rules of Natural Justice:** The Rules of Natural Justice have been violated as the applicant should be treated in the same way as all the other applicants who neighbour its land and who have been given approval.

6. The applicant lamented that unless the court hears intervened its constitutional right to own, use and develop the said parcel of land would be violated with impunity as the respondents had denied it approval to develop its parcel of land and any time a plan of a proposed runway would be approved which in effect would dispossess it of its parcel of land without any and/or adequate compensation.

1st Respondent's Case

7. In response to the application the 1st Respondent filed a notice of a preliminary objection that:

1. The *ex-parte* Applicant has instituted the Judicial Review proceedings more than 6 years of the act giving rise to these proceedings and/or more than 6 years of the decision thereof, in contravention of the mandatory statutory provisions under Section 41 (b) of Civil Aviation Act, that any action or legal proceedings against the 1st Respondent for any act done in

pursuance, or execution or intended execution of this Act or any public duty or authority, or in respect of any alleged neglect or default in the execution of this Act, or of any such duty of authority, shall not lie or be instituted unless it is commenced within three (3) years next after the act, neglect, omission or default complained of.

2. The *ex-parte* Applicant failed to serve the mandatory written notice before the commencement of these proceedings and has thus contravened the mandatory provisions under Section 41 (A) of the Civil Aviation Act that any action or legal proceedings shall not be commenced against the Authority, the 1st Respondent herein, until at least one month after written notice containing the particulars of the claim, and of the intention to commence the action or legal proceedings, has been served upon the Director-General by the plaintiff or his agent.

3. The administrative jurisdiction of this Honourable Court is ousted on account of the fact that the parcel of land, subject matter in respect of whose approval for development the ex-parte Applicant seeks Judicial Review remedies, is the subject of competing claims and has dispute on ownership; the issue of ownership is one of merit and evidence which this Honourable Court cannot make an inquiry into and/or competently adjudicate upon.

4. In the premises above the instant proceedings are untenable, bad in law and unmaintainable as against the 1st Respondent and we humbly pray that the Cause be determined forthwith and the same dismissed against the 1st Respondent with costs to the 1st Respondent.

2nd Respondent's Case

8. According to the 2nd Respondent, the Applicants herein made an application on 13th December, 2007 for approval of developments on the parcel of land known as L.R. No. 25799/1 situate within the erstwhile Mavoko Municipality and in the immediate vicinity of a government aerodrome, the Jomo Kenyatta International Airport.

9. To the 2nd Respondent, the 1st Respondent herein is authorised in law to perform functions *inter alia* taking responsibility over the safety, security, economic and technical regulations of civil aviation in Kenya, which functions includes regulation of developments in the land situate in the proximity of any aerodrome or land situate within and/or adjacent to a declared area and in the discharge of its responsibility for aviation safety and security, and by extension all functions incidental to that responsibility, including issuance of approvals for developments around aerodromes, the 1st Respondent is empowered to co-ordinate its activities with other agencies of the Government, including the Kenya Airports Authority (the 2nd Respondent herein), the Department of Defence and the National Police Service which interrelation in functioning is provided for in applicable statute.

10. It was averred that the 1st Respondent, pursuant to lawful mandate aforesaid, in accordance with the applicable law and in strict adherence to due process, sought advice on the Applicant's said application for approval from the 2nd Respondent and on or about 14th February, 2008 the 2nd Respondent communicated its decision to the 1st Respondent and advised the Applicant, directly, that the suit premises are situated within the approach funnel of the proposed runaway to the main runaway 06-24 at the aforesaid aerodrome, Jomo Kenyatta International Airport and that the same had been granted to the 2nd Respondent. In any event, the law provides that any development thereabout ought to be subject to restrictions with a view to safeguarding aviation security.

11. It was the 2nd Respondent's case that it is allowed in law to issue such approvals as well and that for the Applicant to demand that the communication on approval or disapproval of development ought to emanate, only, directly from the 1st Respondent has misconstrued the applicable statutes and the powers and functions of the 1st and 2nd Respondents herein.

12. The 2nd Respondent claimed that the suit premises are subject to a claim by the 2nd Respondent herein and in view of such competing interests the 1st Respondent is constrained in issuing or making any decision in respect of the Applicant's application for approval save to add that a decision by the 2nd Respondent suffices in the circumstances. It was its case that the issue of the competing interests and/or parallel claims, on the suit premises, between the 2nd Respondent and the Applicant goes into the merits of the decision and the Applicant has within its reach ample avenues to ventilate the issue of ownership. Its case was that the suit premises are located within a declared area and immediately adjacent to a government aerodrome and accordingly the refusal for authorization is an act sanctioned in law and the same was done in good faith, in accordance with the applicable law, procedure and due process and in the interest of ensuring safety of civil aviation and air transport. Accordingly, the refusal of authorization was done in the interest of aviation security.

13. The 2nd Respondent was of the view that the instant Application is founded on the merits of the decision denying approval rather than the legality, validity and/or sanctity of the decision making process leading to the said determination. It however asserted that the decision was legally sound and was made in accordance with due process, in exercise of statutory mandate and application of lawful principles. As judicial review is only concerned with the legality of the decision making process and not the merits of the decision itself, it took the view that the correctness or otherwise of the decision herein cannot be challenged in these Judicial Review proceedings since this Honourable Court in exercising its Judicial Review jurisdiction ought not, as a matter of law, examine the merits of the decision with a view to establishing whether there was a clear, exceptional and or merited case or otherwise, for the grant and/or refusal of authorization to develop the suit premises.

14. The 2nd Respondent further contended that it is a well settled rule of thumb that judicial review proceedings must be instituted within the 6 months limitation period which period cannot and ought not to be enlarged. In this case however, the impugned decision was rendered in 2008 or thereabouts and more than 6 years have lapsed since the same was made. The Applicant, it contended, only woke from its slumber more than 6 years later to make an Application for leave herein dated 5th September 2014 and filed in Court on the same date.

15. It was therefore contended that this delay is grossly inordinate, inexcusable and in any event, in excess of the statutorily stipulated 6 months. Accordingly, the avenue for advancing a claim of this nature is now firmly shut and access to the remedy of judicial review is no longer available to the said Applicant by reason of effluxion of time.

16. It was further contended that any action or legal proceedings against the 1st Respondent for any act done in pursuance, or execution or intended execution of this Act or any public duty or authority, or in respect of any alleged neglect or default in the execution of this Act, or of any such duty of authority, shall not lie or be instituted unless it is commenced within three years next after the act, neglect, omission or default complained of. Accordingly, the judicial review Application herein is bad in law, incurably defective, incompetent and the same is an abuse of the Court process.

17. The applicant was further accused of having failed to comply with the mandatory provisions of the law providing that any action or legal proceedings shall not be commenced against the Authority, the 1st Respondent herein, until at least one month after written notice containing the particulars of the claim, and of the intention to commence the action or legal proceedings, has been served upon the Director-General by the plaintiff or his agent.

18. In the 2nd Respondent's view, an order of mandamus lies and is only granted to 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 compel the legal duty to be performed. The instant Application has prayed for the grant of an order of mandamus against the Respondents herein. Indeed, if a complaint is that a duty has been wrongly performed i.e. that the duty has not been performed according to the law, then mandamus is the wrong remedy to apply for because like an order for prohibition, an order of *mandamus* cannot quash what has

already been done. It was contended that a decision is already in place in respect of the issue, the subject of the instant Application and unless the same is quashed and/or set aside then there is the actual risk of having two parallel and actionable decisions in respect of the same issue. In the foregoing, if the Honourable Court were inclined to issue an order as sought by the Applicant herein, the same would be inoperative, in vain and would result in miscarriage of justice.

19. The 2nd Respondent averred that the aerodrome, within whose vicinity the suit premises are located, has been in existence long before the Applicant's acquisition of the said suit premises and the Applicant knew or ought to have known the law as pertains restrictions on developments thereabouts aerodromes and other installations specified in law. Accordingly the Applicant assumed and accepted the risk as herein and is presently seeking assistance of the law to lord its intentions over a reasonable, legal and valid decision. As such the Applicant is seeking to alleviate a situation resulting from a bad bargain on his part and is in that regard perpetuating an abuse of Court process.

20. It was the 2nd Respondent's case that if the Honourable Court be inclined to find the decision herein denying approval for development on the suit premises as irregular then an eventual grant of an order of *mandamus* would be undesirable, injudicious, inoperable and futile for reasons that:

a. The suit premises are subject of competing interests and the 1st Respondent cannot determine the *bona fide* claim and thus cannot proceed to issue an approval or indeed render a decision in the circumstances.

b. The suit premises is located in any area within which restrictions in developments are stipulated in Statute and an order compelling such development would compromise aviation security.

c. An order compelling the 1st Respondent to grant approval would in effect be sanctioning an illegality given that Statute bars such developments.

21. In the premises, the 2nd Respondent prayed that this application be dismissed with costs.

Determinations

22. I have considered the issues raised in this application. Before dealing with the merits of the application, I wish to deal first with the preliminary issues raised herein.

23. The first issue for determination is whether these proceedings are time barred. Section 9 of the ***Law Reform Act*** provides:

> ***9. (1) Any power to make rules of court to provide for any matters relating to the procedure of civil courts shall include power to make rules of court—***
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> > ***(a) prescribing the procedure and the fees payable on documents filed or issued in cases where an order of mandamus, prohibition or certiorari is sought;***
> >
> > ***(b) requiring, except in such cases as may be specified in the rules, that leave shall be obtained before an application is made for any such order;***
> >
> > ***(c) requiring that, where leave is obtained, no relief shall be granted and no ground relied upon, except with the leave of the court, other than the relief and grounds specified when the application for leave was made.***
>
> ***(2) Subject to the provisions of subsection (3), rules made under subsection (1) may prescribe that applications for an order of mandamus, prohibition or certiorari shall, in specified proceedings, be made within six months, or such shorter period as may be prescribed, after the act or omission to which the application for leave relates.***

(3) In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

24. The issue of the six months limitation was dealt with by a three judge bench in the case of **R. vs. The Judicial Inquiry Into The Goldernberg Affair Ex Parte Hon Mwalulu & Others HCMA No. 1279 of 2004 [2004] eKLR.** The same issue was also the subject of **Republic vs. The Commissioner of Lands Ex Parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998.** In these cases it was held that the 6 months limitation period set out in Order 53 rules 2 & 7 only applies to the specific formal orders mentioned therein and to nothing else.

25. Two conclusions arise from the foregoing. Firstly that the six months limitation applies to a "*judgment, order, decree or conviction*". In my view the decision of the Respondents declining to grant the applicant an approval cannot amount to a judgement, order decree or conviction. Such an action is merely a decision. The next issue is however whether such an act amounts to "*other proceeding"* for the purposes of the said limitation. According to the *ejusdem generis* rule where there are general words following particular and specific words the general words must be confined to things of the same kind as those specified. In other words, when a series of particular words in a statute is followed by general words, the general words are confined by being read as the same scope of genus as *(ejusdem generis* with) the particular words. See **R vs. Edmundson [1859] 28 LJMC 213 at 215** and **Registered Trustees of Kampala Institute vs. Departed Asians Custodian Board SCCA No. 21 of 1993 [1994] IV KALR 110**.

26. The phrase "or other proceedings" for the purposes of judicial review has been considered by the Tanzania Court of Appeal in **Mobrama Gold Corporation Ltd vs. Minister for Water, Energy and Minerals & Others Dar-Es-Salaam Civil Appeal No. 31 of 1999 [1995-1998] 1 EA 199,** in which case the said Court held that the phrase "or other proceedings" has to be construed *ejusdem generis* with judgement, order or decree, and conviction as having reference to a judicial or quasi-judicial proceedings as distinct from acts and omissions for which *certiorari* may be applied for.

27. In this case, however it is clear that the applicant restricted itself to the order of *mandamus*. From the above cited provision, the six months limitation only applies to the orders of certiorari. It would not apply to prohibition for the simple reason that in such cases intended action is yet to materialise or is still in the process of completion. With respect to mandamus, it does not apply for the obvious reason that the nature of the relief is such that it compels the performance of a public duty as opposed to quashing an already made decision.

28. In the premises it is my view and I so hold that the six months limitation period prescribed under the ***Law Reform Act*** is inapplicable to the present proceedings and the preliminary objection cannot succeed on that basis.

29. I must however disabuse the notion that an application made within the six months is by that mere fact valid or warranted. Therefore whereas under the ***Law Reform Act*** there is no limitation as to when to apply for orders of prohibition and mandamus while the limitation period for applying for certiorari is six months from the date of the decision that falls under the categories specified under sections 8 and 9 of the ***Law Reform Act***, the Court in determining whether or not to grant the relief sought will take into account the delay in making the application and the import and impact of such delay in the administration of justice.

30. It must always be remembered that judicial review remedies are discretionary in nature and one of the factors which would militate against the grant thereof is delay in seeking relief. As was held by **Nyamu, J**

(as he then was) in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728** and **Mureithi & 2 Others vs. Attorney General & 4 Others [2006] 1 KLR (E&L) 707: "***Speed and promptness are the hallmarks of judicial review.***"** This was emphasised in **Republic vs. Minister For Finance & Another Ex Parte Nyong'o & 2 Others, [2007] eKLR** where **Nyamu, J** (as he was then) stated;

> **"Refocusing on the issue of delay in seeking earlier intervention by the applicants the court must point out again as it has done before, that speed is the hallmark of judicial review… indeed decisions with financial implications must be challenged promptly failing which orders should not issue even where otherwise deserved."**

See also **Mutemi Kithome vs. The District Land Adjudication & Settlement Officer Mwingi District & Others Nairobi HCMA No. 1108 of 2004 [2006] 1 EA 116.**

28. In my view, judicial review acknowledges the need for speedy certainty as to the legitimacy of the target activities. The court's responsibility is that of handling matters before it with speed, efficiency and economy so as to achieve the overall objective of judicial review. See **O'reilly vs. Mackman and Others [1982] 3 ALL ER 1124.**

31. Judicial review proceedings ought, therefore as a matter of public policy to be instituted, heard and determined within the shortest time possible hence the stringent limitation provided for instituting such proceedings. It is recognised that judicial review jurisdiction is a special jurisdiction. The decisions of parastatals and public bodies involve millions and sometimes billions of shillings and public policy demands that the validity of those decisions should not be held in suspense indefinitely. It is important that citizens know where they stand and how they can order their affairs in the light of such administrative decisions. The financial public in particular requires decisiveness and finality in such decisions. People should not be left to fear that their investments or expenditure will be wasted by reason of belated challenge to the validity of such decisions. The economy with the current volatile financial markets cannot afford to have such uncertainty. As such judicial review remedies being exceptional in nature should not be made available to indolents who sleep on their rights. When such people wake up they should be advised to invoke other jurisdictions and not judicial review. Public law litigation cannot and should not be conducted at the leisurely pace too often accepted in private law disputes. See **Republic vs. The Minister for Lands & Settlement & Others Mombasa HCMCA No. 1091 of 2006.**

32. The issue of delay can therefore be a factor in determining whether or not to grant judicial review, even if merited. This was the position adopted by **Majanja, J** in *Judicial Review Misc. Civil Appl. No. 139 of 2014 between* ***Vania Investments Pool Limited and Capital Markets Authority & Others*** where the learned Judge pronounced himself as hereunder:

> ***"The issue of failure to invoke alternative remedies is intricately linked with the issue of delay. Applications seeking leave to commence judicial review proceedings must be made promptly as soon as grounds giving rise to the need for judicial review become known. Undue and inordinate delay in applying for judicial review is a major factor for consideration. Lord Hope of Craighead in Regina v London Borough of Hammersmith and***
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> ***Fulham (Respondents) and Other Exparte Burkett &***
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> ***Another (FC) (Appellants) [2002] UKHL 23 noted the need for the applicant to move the court promptly when he observed that,***
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> ***"[64] On the other hand it has repeatedly been acknowledged that applications in such cases should be brought as speedily as possible. Ample support for this approach is to be found in the well-known observations of Lord Diplock in O'Reilly v Mackman [1983] 2 AC 237, 280-281 to the effect that the public interest in good administration requires that public authorities and third parties should not be kept in suspense for any longer period than is absolutely necessary in fairness to the person affected by the decision…But decisions as to whether a petition should be***

dismissed on the ground of delay are made in the light of the circumstances in which time was allowed to pass. As Lord President Rodger put it in Swan v Secretary of State for Scotland 1998 SC 479, 487:"It is, of course, the case that judicial review proceedings ought normally to be raised promptly and it is also undeniable that the petitioners let some months pass without starting these proceedings. None the less, in considering whether the delay was such that the petitioners should not be allowed to proceed, we take into account the situation in which time was allowed to pass."

33. In judicial review proceedings, therefore, the provision relating to limitation is not a procedural provision. Rather it is a substantive provision. Accordingly, it cannot be treated as a mere technicality and it has been held even in civil matters that an abandonment of a plea of limitation cannot relieve the Court from taking notice of it. See **Tzamburakis and Another vs. Rodoussakis Civil Appeal No. 5 of 1957 (PC) [1958] EA 400.**

34. It is however my view that the issue of delay in bringing the proceedings in judicial review unless barred by limitation, being a discretionary matter cannot be the subject of a preliminary objection though it may be a factor in determining the Motion itself.

35. It was however contended that these proceedings are Statute barred under section 41 (a) and (b) of the ***Civil Aviation Act, 2013***. The said section provides as hereunder:

Where an action or other legal proceeding is commenced against the Authority for any act done in pursuance, or execution or intended in execution of this Act or any public duty or authority, or in respect of any alleged neglect or default in the execution of this Act, or of any such duty of authority, the following provisions shall have effect—

(a) the action or legal proceedings shall not be commenced against the Authority until at least one month after written notice containing the particulars of the claim, and of the intention to commence the action or legal proceedings, has been served upon the Director-General by the plaintiff or his agent;

(b) the action or legal proceedings shall not lie or be instituted unless it is commenced within three years next after the act, neglect, omission or default complained of or in the case of a continuing injury or damage, within six months next after the cessation thereof.

36. It is contended that the phrase "legal proceedings" must of necessity be construed wide enough to include judicial review proceedings. Even assuming this submission is correct it would not necessarily follow that these proceedings in totality must fail. This is due to the fact that section 2 of the Act defined "Authority" means the Kenya Civil Aviation Authority established under section 4 of the Act. Since section 41 only deals with the "Authority" as defined under the Act, the provision would not apply to the 2nd Respondent.

37. With respect to the 1st Respondent, it is clear that section 41 of the ***Civil Authority Act*** only applies to ***"legal proceeding is commenced against the Authority for any act done in pursuance, or execution or intended in execution of this Act or any public duty or authority, or in respect of any alleged neglect or default in the execution of this Act".*** It is therefore clear that anything done or purported to be done which does not fall within the Act cannot be said to be covered thereunder. From the Respondents' submissions it is clear that there is no express provision that gives power to the 1st Respondent to approve constructions. Section 56, which is cited by the Respondents deals with authority to regulate the height of buildings on an area in the vicinity of an aerodrome. Can this be construed to encompass the power to approve buildings or developments?

38. It is trite that an administrative or quasi-judicial body has no inherent powers. In **Choitram vs. Mystery Model Hair Salon [1972] EA 525**, **Madan, J** (as he then was) was of the view that powers must be expressly conferred; they cannot be a matter of implication. Similarly, in **Gullamhussein Sunderji Virji vs. Punja Lila and Another HCMCA No. 9 of 1959 [1959] EA 734**, it was held that

Rent Restriction Board is the creation of statute and neither the Board nor its chairman has any inherent powers but only those expressly conferred on them.

39. It was in appreciation of the foregoing position that the Court in **Ex Parte Mayfair Bakeries Limited vs. Rent Restriction Tribunal and Kirit R (Kirti) Raval Nairobi HCMCC No. 246 of 1981** held that in testing whether a statute has conferred jurisdiction on an inferior court or a tribunal the wording must be strictly construed: it must in fact be an express conferment and not a matter of implication since a Tribunal being a creature of statute has only such jurisdiction as has been specifically conferred upon it by the statute. Therefore where the language of an Act is clear and explicit the court must give effect to it whatever may be the consequences for in that case the words of the statute speak the intention of the legislature. Further, each statute has to be interpreted on the basis of its own language for words derive their colour and content from their context and secondly, the object of the legislation is a paramount consideration. See **Chogley vs. The East African Bakery [1953] 26 KLR 31 at 33 and 34; Re: Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR 1195; Choitram vs. Mystery Model Hair Salon** (supra); **Warburton vs. Loveland [1831] 2 DOW & CL. (HL) at 489; Lall vs. Jeypee Investments Ltd [1972] EA 512 at 516; Attorney General vs. Prince Augustus of Hanover [1957] AC 436 at 461**.

40. It is therefore clear that a Tribunal's power must be conferred by the Statute establishing it which statute must necessarily set out its powers expressly since such Tribunals have no inherent powers. Unless its powers are expressly donated by the parent statute, it cannot purport to exercise any powers not conferred on it expressly. As has been held time without a number, where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority. In **Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530** it was held that the general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others.

41. Therefore where the law exhaustively provides for the jurisdiction of an executive body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. The courts would be no rubber stamp of the decisions of administrative bodies. Whereas, if Parliament gives great powers to them, the courts must allow them to it, the Courts must nevertheless be vigilant to see that the said bodies exercise those powers in accordance with the law. The administrative bodies and tribunals or boards must act within their lawful authority and an act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on certain grounds. The tribunals or boards must act in good faith; extraneous considerations ought not to influence their actions; and they must not misdirect themselves in fact or law. Most importantly they must operate within the law and exercise only those powers which are donated to them by the law or the legal instrument creating them. See **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090.**

42. Clearly there is no express provision under the ***Civil Aviation Act*** that provides that any person intending to undertake development within the vicinity of an aerodrome must seek the approval of the 1st Respondent.

43. With respect to the 2nd Respondent, the Respondents have relied on section 15(3) of the ***Kenya Airports Authority Act***. That provision states as follows:

> ***Where any person erects any building which in any way interferes with the operation of any service provided by the Authority under this Act, the Authority may, unless such person has previously obtained the approval of the managing director to the erection of such building, or has modified it to the satisfaction of the managing director, apply to the High Court for an order for the demolition or modification of such building, or, as the case may require, for the payment to the***
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> ***Authority of the cost incurred in the resetting or replacement necessary to prevent such***

obstruction or danger and the court at its discretion may grant such order as it may deem fit as to the payment of compensation and costs.

44. In my view, this provision does not make an approval of the 2nd Respondent a pre-requisite to any development around an aerodrome. In my view, if that had been the intention, the provision would have used the words "if any person intends to erect" as opposed to "if any person erects". What it provides is the 2nd Respondent has the power to control any such developments.

45. Having considered the provisions of the two Acts, it is my view and I hold that since there is no express power conferred upon the Respondents to give a prior approval before any development is carried out as opposed to controlling such developments, section 41 of the ***Civil Aviation Act*** with respect to limitation does not apply. In my view **Korir, J** was correct in **Republic vs. Kenya Civil Aviation Authority & Another ex parte Timothy Nduvi Mutungi [2012] eKLR** when he found that:

"A plain reading of the Act clearly shows that the 1st Respondent is under a duty to provide height specifications once an application is made. The height specifications should, however, not exceed the height specified by the Minister in the Kenya Gazette. I do not think that Parliament intended to empower the respondents to completely deny landowners development of their land."

46. With respect to height specifications, the only letter which the applicant has exhibited is dated 13th December, 2007 in which the applicant expressed itself as hereunder:

We shallappreciate knowing if you have any objections to the proposed developments and shall specifically appreciate haing your express consent and approval on our aforementioned proposed developments.

47. Clearly the applicant did not apply for height specifications but applied for an indication as to whether the 1st Respondent had any objection to the applicant's proposed development and sought express consent and approval for the same. As stated hereinabove, the applicant has to show that there is a duty imposed on the respondent to act and the respondent as failed to act in accordance with that duty. It has therefore been held that generally a demand for the actions to be taken is a prerequisite to the grant of an order of mandamus. See **The District Commissioner Kiambu vs. R & Others Ex Parte Ethan Njau Civil Appeal No. 2 of 1960 [1960] EA 109.**

48. As therefore is no evidence that the applicant did expressly seek for height specification as opposed to consent and approval of its proposed developments, it is my view that the prayer for the said specification is premature.

49. The second issue was with respect to the requirement for notice before commencement of these proceedings. Again a notice is only necessary where "***legal proceeding is commenced against the Authority for any act done in pursuance, or execution or intended in execution of this Act or any public duty or authority, or in respect of any alleged neglect or default in the execution of this Act"*** and approval of developments does not fall under the said provision.

50. In interpreting a similar provision to section 41 of the ***Civil Aviation Act***, the High Court in **Lucia Wambui Ngugi vs. Kenya Railways & Another Nairobi HCMA No. 213 of 1989,** was of the view, which view I subscribe to, that the section only protected the Corporation in relation to claims brought against it for breach of its statutory duties or those committed in the course of its statutory duties. The statutory duties imposed upon the Corporation were those relating to the running of trains and steamers in Lake Victoria and not the renting of houses to its employees or the selling of houses to its staff or former staff or even to third parties. Similarly in this case the statutory duties imposed upon the Respondent do not expressly deal with approval of developments as opposed to controlling the same. Therefore approval of developments from inception is outside the statutory duties of the Respondents.

51. The requirement of notice before institution of legal proceedings was the subject of **Mike J. C. Mills & Another vs. The Posts & Telecommunications Nairobi HCMA No. 1013 of 1996** where the Court held that:

> **"Judicial review matters are commenced by a notice to the Registrar under Order 53 rule 1(3) of the Rules. This is a Notice which the Registrar is supposed to and ought to be dispatching to the Attorney General or the intended Respondent to come and oppose the application for leave if he or it so wish and that is the only Notice required to be given on account of intended Judicial Review applications...Section 109 of the Kenya Posts & Telecommunications Act Cap. 411 has no application to judicial review as the application for leave does not commence judicial review until such permission is granted to institute appropriate Judicial Review application...Judicial Review aims at providing justice at minimum delays and therefore a multitude of Notices to be given before an application for judicial review is made is contrary to that spirit of judicial review...Public institutions cannot afford luxuries of bad manners."**

52. The requirement of notice to sue before commencement of legal proceedings was further dealt with in **Pradhan vs. Attorney General & Another [2002] 1 KLR 1,** where the Court was of the opinion that provisions of ***Government Proceedings Act***, Cap 40 [which require that the Government be served with a notice before institution of a suit] did not override the then section 3 of the Constitution which provided that the provisions of the Constitution shall prevail over all other provisions of the law all over the Republic. No requirement of any notice was required under section 84 of the Constitution and in any case the Court was prepared to find that the Attorney General had been given adequate notice by the Applicant that the Applicant was intending to take legal action against the Government.

53. Accordingly, it is my view and I so hold that section 41 of the ***Civil Aviation Act*** is inapplicable to the present case.

54. That leads me to the issue whether the orders sought herein are merited. It is important to note that the only relief sought herein is mandamus. This calls for a discourse on the circumstances in which such a relief would be granted. The Court of Appeal in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge& Others Civil Appeal No. 266 of 1996 (CAK) [1997] eKLR** expressed itself inter alia as follows:

> **"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 or 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. The order must command no more than the party against whom the application 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…These principles mean that an order of mandamus compels 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. An order of mandamus compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then mandamus is wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done…Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without**

jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of certiorari and that is all the court wants to say on that aspect of the matter."

55. In **Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543 Goudie, J** expressed himself, *inter alia*, as follows:

"Mandamus is essentially English in its origin and development and it is therefore logical that the court should look for an English definition. Mandamus is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen's Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. Mandamus is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature… In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant mandamus to compel the fulfilment."

2. The same position was adopted in the case of **The Republic v. Director – General of East African Railways Corporation, ex parte Kaggwa (1997) KLR 194,** in which **Chesoni, J** (as he then was) stated:

"Mandamus is neither a writ of course neither a writ of right but a discretionary remedy which the court will grant only if there is no more appropriate remedy. In other words, if there is a satisfactory alternative remedy available to the applicant, the court will not grant mandamus. Adequate alternative remedy is an important limitation to the availability of an order of mandamus. The purpose of Mandamus is to compel the performance of a public duty or an act contrary to, or evasive of, the law; and it does not lie against a public officer as a matter of course and where one or more, of the bars or limitations exists, the court will, usually, not exercise its discretion in favour of the applicant. These bars are: that there is an alternative specific remedy at law; that there is no possibility of effective enforcement, or performance will be impossible by reason of the circumstances, like lack of power or means to obey on the part of the Respondent; and that it will result in interference by the judicial department with the executive arm of the government…All in all, these bars are discretionary; but there has to be a good reason for them not to apply to a particular case where they exist."

56. It is therefore clear that for an order of *mandamus* to go forth the applicant must satisfy the Court that the Respondent has a legal duty whether statutorily or at common law which the applicant expects the Respondent to fulfil and the Respondent has failed to do so. In other words *mandamus* cannot issue against a person or authority for performance of a duty that the Respondent is not mandated or obliged to perform.

57. In this case, I have found that there is no express duty imposed upon the Respondents that oblige them to give the applicant an approval before the commencement of the applicant's development. If the Respondents have purported to deny the applicant such approval, the Respondents would be acting outside their powers hence their actions would be *ultra vires* their powers. That however would be a ground for quashing the decision in question as opposed to compelling them to perform what the law does not expressly mandate them to do. To direct them to perform a duty which they are not legally entitled to do would amount to compelling them to undertake an unlawful action and mandamus only compels the undertaking of lawful actions.

58. In these proceedings, the applicant does not seek an order to quash the said decision and as stated in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** an order of *mandamus* cannot quash what has already been done. In this case, a decision had already been made denying the applicant the said approval. Without quashing the said decision, an order of mandamus would be still-born as it would not be efficacious in light of the said decision.

59. The Respondents raised the issue of the dispute revolving around ownership of the suit land. In light of my findings hereinabove, I do not have to embark on that discourse. Suffice it to say that in these kinds of proceedings, the Court does not deal with disputes revolving around ownership of land since such a determination would necessarily require *viva voce* evidence. Similar position applies with respect to the issue whether the suit property is within the vicinity or inside the aerodrome. See **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354.**

60. Having considered the application it is my view that the order sought herein cannot be granted on two grounds Firstly, the Respondents are under no legal obligation and have no power to issue consent or approval to develop land under the ***Civil Aviation Act*** and the ***Kenya Airports Authority Act***, before the commencement of the development. Secondly, there is no evidence that the applicant has sought for height specifications for its development from the 1st Respondent.

Order

61. Accordingly the order which commends itself to me and which I hereby grant is that the Notice of Motion dated 6th November, 2014 fails and is dismissed but as the Respondents purported to exercise a power they did not possess, there will be no order as to costs.

62. It is so ordered.

Dated at Nairobi this 23rd day of January, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kamau for Mr Masila for the 1st Respondent

CA Mwangi