REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 337 OF 2016

IN THE MATTER OF: ARTICLES 47 AND 227 OF THE

CONSTITUTION

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT, 2015.

AND

IN THE MATTER OF A STOP OF FURTHER DEVELOPMENTS ON LR NO. 209/4904 AND 209/4905/1 RIVERSIDE DRIVE

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

ORDERS OF PROHIBITION AND CERTIORARI

REPUBLIC……APPLICANT

VERSUS

THE DIRECTOR OF PHYSICAL PLANNING…..……RESPONDENT

AND

GEORGE NDEGWA

ABDUL HAMEED SHEIKH

DIANELLA PROSKE (In their individual capacity

and as the Officials of RIVERSIDE GARDENS RESIDENTS

ASSOCIATION)……..…..…….....INTERESTED PARTY

EX-PARTE: GLOBE DEVELOPERS LIMITED

JUDGEMENT

Introduction

1. By its application brought by way of Motion on Notice dated 15th August, 2016, the applicant herein, **Globe Developers Limited,** seeks the following orders:

> **1. An order of Prohibition do issue against the Director of Physical Planning prohibiting him from stopping any further developments on plot numbers 209/4904 and 209/4905/1 in Riverside Gardens by the Applicant.**
>
> **2. An order of Prohibition do issue against the Director of Physical Planning prohibiting a review of approvals given by the City County of Nairobi for developments on plot numbers 209/4904 and 209/40905/1 in Riverside Gardens by the Applicant.**
>
> **3. An Order of Certiorari to remove to this Honourable Court and quash the decision of the Respondent contained in a letter dated 12th July, 2016 ordering the ceasing of all developments by the Applicant on plot numbers 209/4904 and 209/4905/1 in Riverside Gardens and ordering for a review of the approvals given to the Applicant by the City County of Nairobi for the developments therein.**
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> **4. The costs of this application.**

Ex Parte Applicant's Case

2. According to the Applicant, it is the is the owner of plot number 29/4904 and 209/40905/1 on Riverside Gardens in Nairobi County while the 3rd Respondent is the Residents Association in the neighboring area. According to the Applicant it has successfully proposed for a project to be commenced on the property for the construction of nine (9) blocks of apartments with one (1) Duplex Unit per floor having a total of sixty-six (66) three (3) and four (4) bedroom apartment units and in proposing the said project complied with the relevant laws and regulations. According to the applicant:

> a)It sought a Change of User from single dwelling to multiple dwelling units (Apartments) under the ***Physical Planning Act*** No. 6 of 1996 and the Notification of Approval of Development Permission was granted on 9th October 2013. The Application for change of user was duly publicized and there was no objection in respect thereof from the Respondents.
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> b) It sought approval for the amalgamation of the properties under the ***Physical Planning Act*** No. 6 of 1996 and the Notification of Approval of Development Permission was granted on 18th October 2013.
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> c) It Commissioned Greendime Consultants, a NEMA accredited Environmental Impact Assessment/ Audit Firm to conduct an Environmental Impact Assessment in respect of the proposed project.
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> d)The process leading to the EIA begun in January 2014. The Environmental Expert held a meeting with the Applicant and the project Architects who explained the details of the proposed project. During this month of January, the Environmental Expert visited the proposed site, surveyed the proposed site and the general area of Riverside
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> e) It was informed by the Environmental Expert that the latter thereafter prepared the questionnaires which he, on or about the 24th of January 2014, circulated to ALL the residents of Riverside Gardens and other neighbouring homes with copies of the Title Documents, Amalgamation Plan and a copy of the Architectural designs which were shown to all parties before being given the questionnaire and where the owners were not present, the questionnaire was left

with the available caretakers or security personnel with instructions to give the same to the owners. Contact details were left together with the questionnaires so that any questions raised could be forwarded to the Environmental Expert. The Treasurer and Chairman of the Interested Party were personally given the questionnaires and attendant documents and the 2nd and 3rd Interested Parties all informed the Environmental Experts that they could not respond to the questionnaire and would await the decision of their Association on responding to the questionnaire.

f) The Environmental Expert further informed the applicant that this was followed by an e-mail to the Treasurer requesting for their opinion, objections or comments on the proposed development but no response was forthcoming from him.

g) The Applicant's request for the approval of the building plans was sought from the Nairobi City County for the proposed Domestic Building Proposed 72 No. Duplex Apartments which approval was granted on 30th April 2014.

h) The Environmental Expert informed the applicant that on or about the 1st of March 2014 while the Environmental Expert was visiting the area in a bid to get responses to the questionnaire, the Environmental Expert received a concern that the architectural drawings were not clear and thereafter he provided clearer architectural drawings to the 3rd Interested Party through his son.

i) The Environmental Expert informed the applicant that the same were delivered to him on the 1st March, 2014. Upon receipt of the said Architectural drawings, the 3rd Interested Party then informed the Environmental Expert that he would not respond to the questionnaire without having sight of the approved Architectural designs.

j) When the Architectural drawings were approved by the Nairobi City County on 30th April 2014, on the first week of May, the same were furnished to the 3rd Respondent's Chairman and a copy delivered to the offices of the 1st Respondent.

k) Having furnished the interested party, NEMA all the information that the Environmental Expert was seized off, and that the Interested Party having failed, refused and or neglected to respond to the questionnaire, the interested part duly allowed the submission of the EIA Report with the collected and available information from other neighbours and interested parties.

l) The interested party, NEMA issued the approval letter together with conditions for licensing the EIA to the Applicant via a letter dated 2nd July 2014 which approval was subject to the acceptance of the conditions set out in said letter by the Applicant which conditions the applicant duly accepted on 3rd July 2014.

m) It was during this period that the Interested Parties finally sent their questionnaire to the Environmental Experts and NEMA.

n) The Environmental Impact Assessment License was thereafter granted on 9th July 2014.

o) The number of apartments and blocks were altered after the Applicant carried out a market research in 2015 on customer preference on the unit sizes and this informed a change in the design of the proposed project leading to a reduction of the number of Units from 72 units to 66 Units while the units per floor were reduced to one duplex unit per floor. These altered plans were submitted to the Nairobi City County and the Altered Plans were subsequently approved vide an approval letter dated 18th August 2015.

p) A NEMA License variation was sought from the interested party NEMA as per the Approved Architectural Plans which license was varied and is dated 1st December 2015.

3. It was averred by the Applicant that it was aware that the Interested Parties have made concerted efforts to stall the development on the Applicant's property in the following way:

a. They wrote a letter to the Respondent copied to the National Environment Management Authority as well as the Committee Member of Lands Housing and Physical Planning department which letter dated 4th October 2013 vehemently objected to the change of user of Plots 209/4904 and 209/4905/1.

b. They wrote a complaint to the Director of City Planning, on 12th October 2015 raising questions on the county approvals for the proposed project.

c. They wrote a letter to the Public Complaints Committee dated 21st October 2015 objecting to the contents and issuance of the EIA License to the Applicant.

d. When this failed, they proceeded to the National Environmental Tribunal through ***NET/172/2016 Riverside Gardens Residents Association –vs- Director General, National Environment Management Authority and Globe Developers Ltd*** wherein they claimed that the Applicant had breached zoning laws and regulations and that the project would have high negative impact in the area but the suit was struck out for being filed out of time and without leave as in the view of the Tribunal, the parties had knowledge of the process and knowledge of when the EIA License was granted.

e. The Interested Party then proceeded to the National Environment Tribunal again, through ***NET/178/2016 Abdul Hameed Sheikh suing for and on behalf of Riverside Gardens Residents Association –vs- Director General, National Environment Management Authority and Globe Developers Ltd*** where they have raised similar grounds and sought to be allowed to re-start their suit against the Applicant afresh which matter was yet to be listed for Directions as at the time of filing this suit.

4. According to the applicant, the Advocate for the Interested Party had admitted in their oral submissions before the Tribunal in ***NET/172/2016 Riverside Gardens Residents Association –vs- Director General, National Environment Management Authority and Globe Developers Ltd*** that the only reason that they had proceeded to the Tribunal was due to the fact that they had been seeking remedies from other avenues being the Public Complaints Committee, National Environment Management Authority and the Nairobi City County.

5. It was averred by the applicant that it learnt of the above stated actions of the Interested Party through documents that they produced before the National Environment Tribunal in ***NET/172/2016 Riverside Gardens Residents Association –vs- Director General, National Environment Management Authority and Globe Developers Ltd.***

6. The applicant's case was that no communication has been received by the Applicant from the Respondent neither have they forwarded to the Applicant the complaints raised by the Interested Party for the Applicant's response or input. However in his letter dated 12th July 2016 the Respondent proceeded to inform the Applicant to stop further developments on the property until the approvals it had been given by the Nairobi City County for developing the property was reviewed and determined which stoppage of work was as a result of complaints raised by the Interested Party.

7. According to the applicant, under section 5 of the ***Physical Planning Act***, Cap 286 Laws of Kenya, the functions of the 1st Respondent are to:

a. Formulate national, regional and local physical development policies, guidelines and strategies;

b. Be responsible for the preparation of all regional and local physical development plans;

c. Initiate, undertake or direct studies and research from time to time into matters concerning physical planning;

d. Advise the Commissioner of Lands on matters concerning alienation of land under the ***Government Lands Act*** (Cap 280) and the ***Trust Land Act*** (Cap 288) respectively;

e. Advise the Commissioner of Lands and local authorities on the most appropriate use of land including land management such as change of user, extension of user, extension of leases, subdivision of land and amalgamation of land; and

f. Require local authorities to ensure the proper execution of physical development control and preservation orders.

8. To the applicant, since the role of the Respondent is mainly advisory without authority to stop developments or review planning permissions, it acted in breach of the rules of natural justice by;

a. Failing to take into account and to seek relevant information from the Applicant;

b. Failing to ask the right questions and to undertake sufficient enquiry, and taking reasonable steps to obtain the information on which a proper decision can be based;

c. Holding a hearing or inquiry, if at all, in the absence of the Applicant;

d. Failing to notify the Applicant of the time and place of the hearing that would lead to the decision being taken against them;

9. It was the applicant's case that no investigative report, as alluded to in the impugned letter, was forwarded to the Applicant so that they could respond thereto and neither has the Nairobi City County informed the Applicant that the approvals granted are under inquiry. This is despite the fact that the Local Authority has, under section 32 of the ***Physical Planning Act***, a duty to refer all development applications to the Respondent, not later than 30 days after receiving it from a proponent and the Respondent may thereafter make any necessary comments and the Local Authority will make the ultimate decision on whether or not to grant the permission. It was therefore contended that the Respondent was aware of the development plan which was placed before the Nairobi City County for approval by the Applicant and therefore had an opportunity to raise any issues he may have had with the development.

10. To the applicant, it is curious, illegal, biased, unprocedural and in bad faith that the Approvals by the Nairobi City County are being cancelled 2 years after their issuance, after the commencement of the project and without the Applicant being informed.

11. The applicant's case was that it is the statutory duty of the Local Authority, in this case, the Nairobi City County to consider and approve all development applications and to grant all development permissions hence the actions of the Respondent are lacking in jurisdiction, biased, unfair, ultra vires, unprocedural, unfair and unconstitutional based on the following grounds:

a. It is only the relevant Liaison Committee which has the authority and the jurisdiction to cancel the approvals granted by any Local Authority. While the Respondent sits in these Committees, he is not the sole decision maker.

b. Legal procedure was not followed into arriving at the decision contained in the Respondent's letter dated 12th July 2016.

c. The Respondent only took into consideration the issues raised by the Interested Party and proceeded to order a stop of a project worth over Kshs. 1,400,000,000/- (One Billion Four Hundred Million Only) without giving the Applicant's a chance to respond to the issues raised by the Interested Party or giving the Applicant notice of his intentions to cancel their approvals.

d. This amounts to an abuse of the right of the Applicant to fair administrative action as contained in Art. 47 of the Constitution, 2010 and usurping the powers of NEMA by purporting to question the procedure taken by NEMA for the grant of an EIA license and of the Liaison Committee which is mandated to deal with grievances on the grant of planning permissions by a Local Authority.

12. The National Environment Management Authority in due diligence wrote a letter dated 28th May 2014 to the relevant lead agencies seeking their views on the proposed project. Among the agencies copied was the Director of Housing, Ministry of Lands, Housing and Urban Development. This to the applicant shows that the concerned officer of the Ministry of Lands, Housing and Urban Development, of which the Respondent is an officer, were informed by NEMA of the project and invited to state their views but no response was provided to NEMA. It was therefore the applicant's case that the Respondent was given a chance to comment on the development which he seeks to stop on two occasions, once by the Nairobi City County and secondly through a letter from NEMA.

13. According to the applicant, it is noteworthy that the Respondent's grounds for the stoppage of work by the Applicant are *inter alia* that the issues raised by the Interested Party during the period for advertisement for change of user were not considered during the approval process yet no evidence of this has been adduced. Since the Respondent does not sit at the Nairobi City County for approval, he cannot claim that some information was not taken into consideration.

14. The applicant's case was that the Interested Party has sought other avenues to stop the Applicants from continuing with this project. Their actions amount to an abuse of process and forum shopping in an attempt to get desired results which is to stop the development from happening.

15. The applicant averred that the ***Fair Administrative Actions Act*** is clear that when a public body wishes to make a decision which has adverse effects on a party, it has the duty and obligation to inform that party so that it may respond. To the applicant, the actions of the Respondent go against the principles of good governance set out in the Constitution, 2010 and the Applicant's rights to fair administrative action and it is clear that the decision made by the Respondent was unfair, unprocedural, ultra vires, unconstitutional, illegal and should be quashed and the Respondent stopped from reviewing the approvals given to the Applicant by the Nairobi City County.

Respondent's Case

16. In opposition to the application, the Respondent averred that there was an objection that was raised by the Riverside Residents Association to the Nairobi City County dated 4th October, 2013 within the stipulated time as required by the ***Physical Planning Act CAP 286***. The issues raised include overload on current infrastructure, increased traffic, pollution and a request for an Environmental Impact Assessment with regard to development on Parcels L.R no. 209/4904 and 209/4905.

17. According to the Respondent the processing of the development application did not comply with section 32(1) and 33(1) of the ***Physical Planning Act CAP 286***. In the Respondent's view, according to the provisions of Section 32(1) and 33(1) of the said Act County Governments are required to submit development applications for comments by the Director of Physical Planning. However, there is no record or evidence that the Nairobi City County submitted the application to the Director of Physical Planning for comments as required by the law.

18. To the Respondent, the applicant has not disclosed all relevant information by not enjoining Nairobi City County which receives and processes development applications.

19. It was disclosed that the interested party appealed against the approval of the building plans to the secretary of the Nairobi Physical Planning Liaison Committee on the 17th June, 2016 on grounds that the building plans violated the number of permitted floors/storey, plot ratio of 75% and ground coverage of 35% and there is no record to show that the Nairobi Physical Planning Liaison Committee has determined this appeal. Further, the resident association raised an objection in a letter addressed to the Lead Expert dated 7th July 2014 where they raised several issues; environmental degradation, pollution of Nairobi

River, Depletion of ground water, noise pollution and adherence to Zoning policy but this objection was ignored altogether.

20. It was contended that the applicant did not adhere to condition 2.17 in approval and grant of NEMA license which requires that the development adheres to zoning specifications issued for the development of such a project within the jurisdiction of the Nairobi City Government with emphasis on the approved land use for the area.

21. To the Respondent, it is established under section 4 and one of its functions under section 5(1)(f) of the ***Physical Planning Act*** Cap 286 is to require local authorities to ensure the proper execution of Physical Development Control and preservation orders.

22. The Respondent averred that upon receiving a complaint from Riverside Gardens Association and referring to a Guide of Nairobi City Development Ordinances for Zone 4 he wrote to the applicant and the County Executive Committee Member, Urban Planning and Lands both letters dated 12th July, 2016. However, contrary to the averment by the applicant in ground 13 of the Statutory Statement; the critical and fundamental information has been forwarded to the applicant by the Director of Physical Planning vide letter Ref. No PPD/42/19/III/19 dated 12th July, 2016 in exhibit TWM5 (a) mentioned at paragraph 11 and no response has been received from him. The Respondent asserted that the applicants are aware the interested party raised the complaint to the respondent in the letter Ref. No. LRD/13429/1/C/16 dated 19th May, 2016 and another to the Respondent's secretary Nairobi Liaison Committee dated 17th June, 2016.

23. The Respondents however took the position that the approvals have not been cancelled by the respondent and that all he has done is to advise for the suspension pending determination of the issues raised. It was contended that the law requires the respondent as the Chief Advisor to both National and County Governments on matters of Physical Planning to ensure the proper execution of physical development control and preservation orders as well as to coordinate planning by the counties as provided for by section 5 of the ***Physical Planning Act*** Cap 286 and section 21 of Part 1 of the Fourth Schedule of the Constitution respectively.

1st Interested Parties' Case

24. On the part of the 1st interested parties the following grounds of opposition were filed:

> **1) The office of the Director of Physical Planning [hereinafter 'the Director'], has never issued an Order howsoever directing or demanding for a cease, halt or stop on any further developments on plot numbers LR 209/4904 and LR 209/4905/1 Riverside Gardens; and as such the project has never been restrained by the Respondent and an Order of stay thereto is most unwarranted.**
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> **2) The office of the Director has never, and is not undertaking a review of the approvals given by the City County of Nairobi for the developments on plot numbers LR 209/4904 and LR 209/4905/1. The Director has however required the implementing authority being the City County of Nairobi to review the development approvals in tandem with the law; and as such a purported Order of stay over an alleged review by the Director is most unwarranted.**
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> **3) The legal mandate and authority of the office of Director in respect of the action/functions challenged under the Application herein as being ultra vires is unequivocally recognised and protected *viz*;**
>
> **4) The National government; under Part 1 of the Fourth Schedule of the Constitution at item 21; through the office of the Director has the Constitutional authority to oversight and co-ordinate planning by Counties including the City County of Nairobi;**

5) The Physical Planning Act, CAP 286, at Section 5 (f) posits in mandatory terms that the Director shall, '…require local authorities [*read County governments*] to ensure the proper execution of physical development control…' thereby clothing the office of the Director with sufficient legal mandate to oversight and supervise the undertaking of physical developments across the Country; and,

6) Under Sections 31 as read with 32 and 33 of the Physical Planning Act, CAP 286; the Director must be notified of all development Applications; such as is the demised one; and the approval made by the local authority [*read County Government*] is subject to the comments made by the Director emphasising the Director's legal authority and mandate – This notification and comments was neither sought or obtained in the instance of this development; and as such the Director has never been notified and allowed to comment on the subject development.

7) The questions abounding in the subject development smack of brazen and gross violation of various physical planning and development controls within zone 4 including a stark increase from 5 [five] floors as approved to now nineteen [19] floors; plot ratio of 0.75 which they are exceeding by 600% and a ground coverage of 0.35 and which they are exceeding by 200% *inter alia*, as well as grave environmental violations: which concerns remain unaddressed on their merits to date: hence the necessity for the welcomed legal intervention by the Director in discharge of the office's legal mandate.

8) The Director's actions and directives are vis-à-vis the City County of Nairobi [CCN] and the National Environment Management Authority [NEMA] in accordance with the Physical Planning Act, Environment Management and Coordination Act and the Constitution and not the Applicants herein: whose standing in the same is ancillary and/or collateral.

9) Indeed the lawful process ill-advisedly and ill-conceivably pre-empted by the Applicant's will need to factor in the representations from the Applicant developer, in tandem with the rules of Natural Justice and the principle of *nemo judex in causa sua* before any adverse decision is made including a possible restraint on the development.

10) The Application raises grave questions that would have the effect of unduly curbing the lawful discharge of the functions of the office of the director in first ensuring that indeed the county governments ensure compliance with the planning regulations and secondly that the conditions [*if any-where applicable*] imposed upon issuance of the approvals are indeed satisfied and complied with by the developers.

11) The contest of the discharge or exercise of the roles or functions of the office of the Director is also irregularly before the Honourable Court, as the Physical Planning Act, CAP 286, at Section 10(2)(a) and (e) posits that any and all complaints, challenge or appeals on the exercise of the functions or decisions of the Director shall be heard at first instance by the Liaison Committee, and not this Honourable Court and the same should for that reason be dismissed.

12) Indeed core Parties on the matters in question i.e. the City County of Nairobi and the National Environment Management Authority; who peremptorily ought to be enjoined in the suit but have been selectively omitted and the Orders sought herein cannot be pursued and indeed granted in their absence.

13) The legal mandate of the Director extends even post-grant of the approvals and/or licenses as indeed the likelihood of violation is even more rife at the undertaking of the development post-approval.

14) The Judicial Review Application and indeed the prayers sought by the Applicant is therefore a non-starter and at best pre-mature on the grounds set-out above moreso that no

action has been undertaken by the office of the Director in either restraining the development and/or reviewing the development, indeed this Application only serves to unduly delay the possible expeditious review action by the relevant implementing agencies; and should be dismissed with costs.

2nd Interested Party's Case.

25. According to the 2nd interested party, the Nairobi City County, (hereinafter referred to as "the County") it is clear that the orders sought are not as against the City County of Nairobi, but as against the Director of Physical Planning who issued a letter dated 12/7/2016 addressed to the ex-parte applicant herewith which letter among others stated as follows;

a. The developer had not abided to zoning regulations;

b. The issues raised by the Resident Association during the change of use were not considered during the approval process;

c. That the issues raised during the EIA public participation were not taken into consideration during the approval;

d. That the developer disregarded condition 2.17 of the Nema License

26. According to the County, the director in conclusion directed for a stop of the project and further developments pending a review and determination of the compliant raised to him.

27. To the County, the project under issue is a duplex apartment development and as such, not the normal high-rise developments that have an apartment on each floor. The current development has a single apartment on two floors and as such, two floors only make one apartment and as such ought to be counted as a single floor. To the County, it followed the law to the letter when issuing the approvals for the same and the said approval was within its powers and all comments and issues raised to the County were duly considered before the approval was issued. It was averred that the director of Physical Planning had not shown how the same was ignored and no evidence was tendered or taken before the Director herewith reached his conclusion that there was no public participation or that the issued raised by the residents was not considered. The director was therefore accused of having made blind allegations as against the process of approval by the 2nd Interested Party without tendering any evidence on the same.

28. According to the County in approving of development plan, the consideration does not only end at the zoning policy, but other considerations and parameters are taken into account which considerations include but not limited the build-up area vis a vis the green spaces available, the number of users for the said development, the injury if any that may be caused if the development is approved, the plinth are of the construction and the plot area to build area ratios. Therefore the zoning guidelines are just guidelines developed by the local authority to be used as a guide when issuing approvals for developments.

29. The County averred that the Nairobi City County is currently a metropolis and the fastest growing City in Africa and with the said growth, and within the framework of the implementation of the Vision 2030 goals, the old guides on zoning are under review and the county is coming up with the reviewed zoning guides. In the meantime, the County Government considers each application on its own merit and due to the scarcity in land and open spaces within the city, the County Government has shifted its framework and polices from the horizontal developments as has been from the colonial period to vertical development so as to save as much ground/green spaces as possible. It was disclosed that the current project is one of such developments and it does not contravene any laws as the same was scrutinized and approved upon consideration. Furthermore, the county government continues to approve even higher storied buildings depending on the use, availability of space and the positive development brought about by the coming constructions and the applicants building is not even among the tallest building approved by the county. To the County, the said development when viewed from the road level is only up to 4 stories but when viewed from the lowest level towards the Nairobi river, seems to be higher. However,

this is as a result of the multi-level development on a step and sloping area.

30. The County noted that the Director of Physical Planning is an employee of the National Government and works for the National Government and as such separate and distinct from the county government as the Constitution of Kenya, 2010 clearly sets out under Part 5, the Relationship between the two levels of government being the National Government and the County Government in Article 189(1)(a) provides for Cooperation between National and County Government. The County's position was therefore that paramount is the respect that ought to be accorded by the two levels to each other in performing their respective functions as provided for in the Fourth Schedule and one of functions assigned to the County Governments as provided for in part 2 of the 4th Schedule is County Planning and development hence it is clear that issues of planning are indeed and remain matters within the authority county governments.

31. It was averred that under the ***County Government Act***, Part XI provides for county planning which provides for the principles, objectives and the obligation for the county to plan. The said county planning framework is obliged to integrate economic, physical, social and environmental planning. To the County, the issues of physical planning is not a new issue, as such, it is clearly provided for and in detail under the ***Physical Planning Act***, Cap 286 which is an Act of Parliament to provide for the preparation and implementation of the Physical Development Plan and for connected purposes while Part V of the Act provides for the control of Developments.

32. To the County, it is clear from the actions of the director of physical planning vis a vis the provisions of the Constitution, the ***County Government Act*** and the ***Physical Planning Act***, the said letter and the directions contained in the same are *ultra vires* the powers of the director of physical planning and as such, the instant case is a proper candidate for exercise of judicial review powers of the honourable court.

Applicant's rejoinder

33. In its rejoinder, the applicant averred that it was not aware of any appeal by the Interested Party against the approval of the building plans to the Secretary of the Nairobi Physical planning Liaison Committee. It was therefore not a party to this Appeal, if at all, having never been served and only learning of it through the Respondents Affidavit.

Determinations

34. I have considered the application, the affidavits filed in support of and in opposition to the application as well as the submissions made.

35. In my view, the substratum of these proceedings largely hinges upon the determination whether or not the applicant ought to have been afforded an opportunity of being heard before the letter dated 12th July, 2016 was written and whether this was actually done.

36. According to the said letter the Respondent confirmed being in possession of the letter of complaint. From the said letter it was clear that the Respondent did in fact carry out its own investigations as a result of which it arrived at certain findings because it stated that the said investigations "revealed" non-compliance with guidelines of the County Government. It was on this basis that the applicant was advised to stop any further development activities in the site until the matter was reviewed and determined.

37. Article 47 of the Constitution provides:

> ***(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.***

38. 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.

39. I associate myself with **Kasanga Mulwa, J** in **Republic vs. Registrar of Companies *ex parte* Githungo [2001] KLR 299,** that natural justice requires that persons who might be affected by administrative acts, decisions or proceedings be given adequate notice of what is proposed.

40. In **Geothermal Development Company Limited vs. Attorney General & 3 Others [2013] eKLR** the Court 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 *"(c) responsive, prompt, effective, impartial and equitable provision of services"* and *"(f) 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 given reasonable opportunity to present a response. This right is not limited only in cases of a hearing as in the case of a court or before a tribunal, but when taking administrative actions as well. (See *Donoghue v South Eastern Health Board* [2005] 4 IR 217). Hilary Delany in his book, *Judicial Review of Administrative Action, Thomson Reuters 2nd edition, at page 272,* notes that, *"Even where no actual hearing is to held in relation to the making of an administrative or quasi-judicial decision, an individual may be entitled to be informed that a decision which will have adverse consequences for him may be taken and to notification of the possible consequences of the decision."…*Fair and reasonable administrative action demands that the taxpayer would be given a clear warning on the probable consequences of non-compliance with a decision before the same is taken…In many jurisdictions around the world, it has long been established that notice is a matter of procedural fairness and an important component of natural justice. As such, information provided in relation to administrative proceedings must be sufficiently precise to put the individual on notice of exactly what the focus of any forthcoming inquiry or action will be. (*See Charkaoui v Canada* [2007] SCC 9*, Alberta Workers' Compensation Board v Alberta Appeals Commission (*2005) 258 DLR (4th), 29, 55 and *Sinkovich v Strathroy Commissioners of Police (1988) 51 DLR (4th) 750)."*

41. 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. It is a decision of the Registrar of Companies, a public body conveyed to the Interested Party by a letter without reference to the Applicant, a party already in Court over a previous decision by the same decision maker, the Registrar. The Applicant is a person who the Registrar knew would be affected by that decision. The letters dubbed "without prejudice" and in part said that the Registrar would not insist on the change of name provided the interested party withdrew the application then before the Court. The letter was not copied to the Applicant as an interested party in that application. That decision is indicative of bias, unreasonableness and lack of even-handedness on the part of the Registrar, the decision-maker. As an interested party in the Application, the Applicant had a legitimate expectation that it would be informed and given opportunity to respond to the proposed decision... It is no answer to that legitimate expectation for the interested party to say that the Applicant was awarded costs upon the termination of the proceedings arising from the impugned decision contained in the said letter. It is also no answer to say that section 20(2)(b) of the Companies Act does not confer upon the Registrar power to consult or summon any one before exercising her discretion under that section... Under section 12 of the Societies Act, where in respect of any registered society the Registrar is of the opinion that the registration of a society should be cancelled or suspended for any of the stated causes or reasons, the Registrar is bound to give the notice to the Registered Society before exercising that discretion. The reason is that a Society upon registration acquired a protected interest, which cannot be taken away without due process as outlined in that section."

42. It may well be that the investigations that the Respondent purported to have conducted were simply meant for the purposes of making recommendations. However, the said investigations did lead to "one of the recommendations" which was to "advice" the applicant to stop further developments. In other words the said "recommendations" had the effect of restricting the applicant's rights to use its property hence amounted to limitation of Article 40 rights. In this respect section 4(3)(a) of the ***Fair Administrative Actin Act***, 2015 provides:

> ***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 prior and adequate notice of the nature and reasons for the proposed administrative action.***

43. The so called "advice" in my view was in fact a decision since "a decision" for the purposes of administrative action is a deliberate act that generates commitment on the part of the decision maker toward an envisaged course of action of some specificity. See ***Public Administration,*** **A Journal of the Royal Institute of Public Administration, by P H Levin, at page 25.**

44. Here the Respondent did act on a complaint, carried out investigations which informed his resolution to "advice" the applicant to stop development. It also generated his commitment to review the applicant's developments which was a course of action with some specificity.

45. Where recommendations may have far-reaching consequences on the rights of the applicant, it is trite that the applicant ought to be heard before such recommendations are unleashed. In **Re Pergamon Press Ltd [1971] Ch. 388,** the Minister had appointed inspectors to investigate the affairs of a company and on behalf of the directors it was claimed that the inspectors should conduct the inquiry much as if it were a judicial inquiry in a Court of law. That issue was answered as follows:

"It seems to me that this claim on their part went too far. This inquiry was not a court of law. It was an investigation in the public interest, in which all should surely co-operate, as they promised to do. But if the directors went too far on their side, I am afraid that Mr Fay, for the inspectors, went too far on the other. He did it very tactfully, but he did suggest that in point of law the inspectors were not bound by the rules of natural justice. He said that in all the cases where natural justice had been applied hitherto, the tribunal was under a duty to come to a determination or decision of some kind or the other. He submitted that when there was no determination or decision but only an investigation or inquiry, the rules of natural justice did not apply...I cannot accept Mr Fay's submission. It is true, of course, that the inspectors are not a court of law. Their proceedings are not judicial proceedings. They are not even quasi-judicial, for they decide nothing; they determine nothing. They only investigate and report. They sit in private and are not entitled to admit the public to their meetings. They do not even decide whether there is a prima facie case. But this should not lead us to minimise the significance of their task. They have to make a report which may have wide repercussions. They may, if they think fit, make findings of fact which are very damaging to those whom they name. They may accuse some; they may condemn others; they may ruin reputations and careers. Their report may lead to judicial proceedings. It may expose persons to criminal prosecutions or to civil actions. It may bring about winding up of the company, and be used as material for the winding up...Seeing that their work and their report may lead to such consequences, I am clearly of the opinion that the inspectors must act fairly. This is a duty which rests on them, as on many other bodies, even though they are not judicial, but are only administrative. The inspectors can obtain the information in any way they think best, but before they condemn or criticise a man, they must give him a fair opportunity for correcting or contradicting what is said against him. They need not quote chapter and verse. An outline of the charge will usually suffice....That is what the inspectors here propose to do, but the directors of the company want more. They want to see the transcripts of the witnesses who speak adversely of them, and to see any documents which may be used against them. They, or some of them, even claim to cross-examine the witnesses. In all these the directors go too far. This investigation is ordered in the public interest. It should not be impeded by measures of this kind."

46. In my view, the fair conduct of investigations required that the applicant's views on the matter the subject of investigations be sought before the Respondent could "advice" the applicant to stop further developments. By not seeking the applicant's views on the matter, the Respondents clearly violated the applicant's rights and contravened the rules of natural justice. In **Onyango Oloo vs. Attorney General [1986-1989] EA 456** the Court of Appeal expressed itself 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 principle 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*...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded

unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...*Denial of the right to be heard renders any decision made null and void ab initio*." [Emphasis mine].

47. This was a restatement of **Lord Wright's** decision 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."

48. In **Ridge vs. Baldwin [1963] 2 All ER 66** at 81, **Lord Reid** expressed himself 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."

49. It follows that as the rules of natural justice were flouted by the Respondent, this application is merited.

Order

50. In the result the Motion on Notice dated 15th August, 2016, succeeds and I issue the following orders orders:

1) An order of Prohibition against the Director of Physical Planning prohibiting him from stopping any further developments on plot numbers 209/4904 and 209/4905/1 in Riverside Gardens by the Applicant without affording the applicant a hearing.

2) An order of Prohibition against the Director of Physical Planning prohibiting a review of approvals given by the City County of Nairobi for developments on plot numbers 209/4904 and 209/40905/1 in Riverside Gardens by the Applicant without affording the applicant a hearing.

3) An Order of Certiorari removing into this Honourable Court and quash the decision of the Respondent contained in a letter dated 12th July, 2016 ordering the ceasing of all developments by the Applicant on plot numbers 209/4904 and 209/4905/1 in Riverside Gardens and ordering for a review of the approvals given to the Applicant by the City County of Nairobi for the developments therein.

51. The applicant will have the costs of these proceedings to be borne by the Respondent.

52. It is so ordered.

Dated at Nairobi this 7th day of February, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Kamau for Mr Wandabwa for the ex parte applicant

Miss Maina for Miss Chilaka for the Respondent

Mr Mutua for the 1st interested party

Mr Lusi for the 2nd interested party

CA Mwangi