



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

JR. MISC. CIVIL APPLICATION NO. 352 OF 2016

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW BY GLOBE
DEVELOPERS LIMITED**

AND

**IN THE MATTER OF: CANCELLATION OF AUTHORITY FOR REPAIR OF BOUNDARY
WALL ON PLOT NAIROBI/BLOCK 91/159 GIGIRI**

AND

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

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

NAIROBI CITY COUNTY.....RESPONDENT

EX-PARTE APPLICANT GLOBE DEVELOPERS LIMITED

JUDGEMENT

Introduction

1. In these proceedings, the applicant herein, **Globe Developers Limited**, seeks the following orders:

1) An order of Prohibition do issue against the Respondent prohibiting it from demolishing the Applicant's Boundary wall erected on PLOT NAIROBI/BLOCK 91/159 GIGIRI.

2) An order of Certiorari do issue to remove into this Honourable Court and quash the decision of the Respondent in the letter dated 23rd June 2016 cancelling its authority for repair of boundary wall on plot NAIROBI/BLOCK 91/159 GIGIRI or preventing repair of the boundary wall.

3) An order of Mandamus do issue to compel the Respondent to extend the authority for repair of the boundary wall on plot NAIROBI/BLOCK 91/159 GIGIRI.

4) The costs of this application be in the cause.

Ex Parte Applicant's Case

2. According to the Applicant, it is the owner of Plot Nairobi/Block 91/159 Gigiri while the Interested Party is his immediate neighbour. Pursuant to the heavy rains which occurred on or about the month of April and May 2016, the boundary wall on Plot Nairobi/Block 91/159 Gigiri bordering the side of the interested party's land was destroyed by the rains.

3. According to the applicant, it applied for and was given permission to construct the boundary wall by the Respondent which authorization was granted on 10th May 2016 after the Applicant paid the requisite fees. The Respondent through its agents however visited the Applicant's premises and without any notice to the Applicant proceeded to demolish the gate and part of the boundary wall in the Applicant's premises. This led to the Applicant instituting Judicial Review proceedings on 22nd of June 2016 via Nairobi High Court Judicial Review Application No. 271 of 2016 in which the Court on 23rd of June 2016 granted leave to the Applicant to apply for an order of Prohibition against the Respondent. Consequently the Respondent was served with the Court Order on 24th of June 2016 at 3.25pm.

4. It was averred that on 1st of July, 2016, a letter was received by the applicant's employees dated 23rd June 2016, which purported to cancel the authority to repair the boundary wall which letter the applicant suspected to have been delivered after the institution of JR 172 of 2016 proceedings and after service of the Court Order dated 24th June 2016 upon the Respondents. The applicant however averred that the wall was demolished by the Respondent before the letter dated 23rd June 2016 was delivered to the premises of the Applicant and yet the Applicant was neither notified of this cancellation, nor was it invited to voice its opinion on the matter. In addition no reason was given therein as to why the repairs on the boundary wall should be stopped notwithstanding the fact that to fail to repair the wall and to replace the gate torn down by the agents of the Respondent grossly affects the security at the site.

5. In the applicant's view, the letter was brought in bad faith and was meant to mislead this Court into sanitizing the unlawful actions of the Respondent of maliciously destroying the Applicant's property.

6. It was therefore the applicant's case that it would be in the interest of justice if the decision of the Respondent contained in the letter dated 23rd June 2016 was quashed and the Respondent prohibited from interfering with the construction of the wall.

Respondent's Case.

7. According to the Respondent, the said application is premature, misconceived and bad in law and the Respondent will raise a point of law, to be determined *in limine*, that the Applicants have not complied with section 13(1) of the **Physical Planning Act** Cap 286 Laws of Kenya which requires that any person aggrieved by a decision of the Director concerning any physical development plan or matters connected therewith, may within sixty days of receipt by him of notice of such decision, appeal to the respective liaison committee in writing against the decision in such manner as may be prescribed. In the Respondent's view, the Application is an abuse of Court process as the same matter is still pending before the Honourable Court pending for under another in HCC JR. No. 271 of 2016.

8. In the Respondent's view, the subject matter relates to a development which lacks approvals from the Respondent as required by the law. It was its view that the Applicant's suit is hopelessly misconceived, frivolous, totally devoid of merit and *mala fides* for the reason *inter alia*, that the Plaintiffs/Applicants followed the wrong procedure in that it should have instituted an appeal in the liaison Committee.

9. It was further contended that this court has no jurisdiction to grant the orders herein as this is a Land

and Environment matter which ought to be tried in the Environment and Land Court.

10. The Respondent however averred that immediately after the wall collapsed on Plot Nairobi Block 91/159 Gigiri the Respondent visited the sight and found that the said development lacked proper approvals from the Respondent as required by law and further that the developments therein, a garage, posed danger to a residential development on one side and that further collapse of the wall could injure people in the vicinity and the occupants of the subject plot therefore, an enforcement notice was issued to have the subject wall marked for demolition. Accordingly, a renovation letter was granted for the repair of the collapsed wall, a departure from the enforcement notice and intended enforcement action upon expiry of which the Respondent began to demolish the same but the Applicant started rebuilding it.

11. It was averred that upon the commencement of the reconstruction by the Applicants, the Respondent visited the subject plot and requested for approved architectural drawings and structural designs for the construction works but the Applicant only showed resistance towards the Respondents officers and failed to produce any of the aforementioned approvals.

12. The Respondent asserted that section 30(3) of the **Physical Planning Act** makes any development without the Respondent approval illegal and any dealings regarding the development is null and void and that the Applicant cannot found a cause of action when they are in clear breach of the law. It was therefore the Respondent's case that it cancelled the authority to construct the boundary wall that dated 23rd June 2016 as the construction was un-approved by the Respondent as required by the law and that the Respondent is authorized by sections 29 and 30 of the **Physical Planning Act** to regulate use and development of land and buildings within its jurisdiction hence the actions of the Respondent is within the confines of the law.

13. The Respondent argued that the grant of orders sought in the said Application would greatly prejudice the Respondent who is mandated by law to regulate any physical planning and developments within its jurisdiction pursuant to section 29 of the **Physical Planning Act**. Further, the Respondent's approval is a mandatory requirement before any development is done within the jurisdiction of the Respondent. Consequently the said development was being done in absence of the approval hence the decision to issue the Enforcement Notice. To the Respondent, the essence of an approval is a wider public interest to regulate an orderly development in the society.

14. It was therefore the Respondent's position that the Applicant has not shown that it has an arguable Application or *prima facie* case worth meritorious consideration and determination by this Honourable Court on perusal of the materials presented to it by the Applicant. To the applicant therefore this Honourable Court ought not to exercise its discretion to grant the Orders sought in the said Application as the Applicant has not adduced any or any cogent evidence to demonstrate to this Honourable Court that the construction of the boundary wall has been approved neither has it demonstrated that substantial difficulties would be encountered if the said Enforcement Notice is enforced.

15. The grounds relied upon in the Application, according to the Respondent, are not for Judicial Review but a civil claim hence the applicant is not entitled to any of the reliefs prayed in the Application or at all as an Application similar to the current one is still pending hearing and determination under HCC JR. No. 271 of 2016.

Applicant's rejoinder

16. In its rejoinder, the applicant admitted that it had filed Judicial Review proceedings in Judicial Review No. 271 of 2016 against the Respondent and one **Paul Owora** as an Interested Party seeking for Orders of Prohibition to issue against the Respondent prohibiting them from demolishing the boundary wall erected on Plot Nairobi Block 91/159 Gigiri. However, the instant suit was pursuant to the letter dated 23rd June 2016 by the Respondent cancelling its authority for repair of boundary wall on Plot Nairobi Block 91/159 Gigiri. It was therefore the Respondent's position that Judicial Review Misc. Appl. No. 271 of 2016 and current application are not similar and that in cancelling the authority to repair, the Respondent was trying to subvert the course of justice by attempting to sanitise their actions against the

orders granted in Judicial Review Misc. Appl. No. 271 of 16 hence this is the correct and proper forum.

17. The applicant asserted that the Respondent admitted to granting the renovation approvals and thereafter admitted to demolishing the boundary wall after expiry of an enforcement notice which notice has not been provided in Court.

18. The Applicant denied that the construction lacked the necessary approvals from the Respondents since the previous owner of the property had applied for development permission and change of user from Residential to commercial from the Ministry of Lands and Settlement and the Nairobi City Council (now defunct), the predecessor of the Respondent. Both approvals were given. The Applicant further applied for approvals for the buildings put on the property including the boundary wall and the same were granted and disclosed that since the Respondent holds all records of approvals that it has granted, it cannot claim that it was unaware of granting the building approvals.

19. The applicant insisted that the cancellation of the approval for repair of the boundary wall was therefore done in bad faith, contrary to the Applicant's rights of natural justice and was unprocedural and illegal.

20. In the applicant's view, this Judicial Review Application was the most appropriate forum as the main purport of the cancellation of authority was to ensure that whatever orders the Court made in JR No. 271 of 2016 were rendered inconsequential and ineffective and that by failing to show the procedure followed and evidence of enforcement notice, the Respondent therefore failed to show that it did not breach the Applicant's Constitutional rights of right to fair administrative action and the rights of natural justice.

Determinations

21. In my view the main issue for the determination by this Court is the procedural propriety or otherwise of the Respondent's action.

22. Section 38 of the *Physical Planning Act*, Cap 286 Laws of Kenya provides as follows:

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

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

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

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

23. Since under section 38(4) the right of appeal to the Liaison Committee only accrues upon service of the enforcement notice, where no such notice is served the alternative remedy of challenging the decision by the Respondent is non-existent and hence the applicant cannot be driven from the seat of justice on the

basis of the existence of such alternative remedy. In **Republic vs. National Environment Management Authority [2011] eKLR**, the Court of Appeal had this to say at page 15 and 16 of its judgment:

“...in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it.”

24. Therefore, whereas the availability of an alternative remedy is a factor to be taken into consideration, the Court cannot deny an otherwise deserved remedy on the basis of an alternative remedy where such alternative remedy is a mere mirage or is less convenient, effective and beneficial. To send a litigant empty handed from the seat of justice when the Court has what it takes to do justice in cases where there is no dispute resolution mechanism covering the circumstances of the case, would be to abet injustice and a court of law has no jurisdiction to do injustice. Therefore where the purported alternative remedy leaves an aggrieved party with no effective remedy or at all, such remedy is no remedy at all and the Court ought not to shirk from its Constitutional mandate to ensure that the provisions of Article 50(1) of the Constitution are attained with respect to ensuring that a person’s right to have any dispute that can be resolved by the application of law is decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body, is achieved.

25. In this case I find that as the conditions necessary to be taken by the Respondent in order to trigger or provoke an appeal had not been fulfilled, the appellate avenue was not efficacious.

26. In this case, it is contended, which contention is not seriously disputed, that during the pendency of similar proceedings, the Respondent proceeded to issue the impugned notice in order to steel a match from this Court and the Applicant. In my view, where a party takes an action with the intention of removing the rug from the feet of the judicial seat, that action would be frowned upon by the Court as the same may be construed to have been intended to overreach in which event the same may constitute an abuse of power. It is therefore clear that power ought to be properly exercised and ought not to be misused or abused. According to **Prof Sir William Wade** in his book ***Administrative Law***:

“The powers of public authorities are...essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land...regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose...But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them...”

27. As was held in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] 2 KLR 240** while citing **Reg vs. Secretary of State for the Environment Ex Parte Nottinghamshire County Council [1986] AC:**

“A power which is abused should be treated as a power which has not been lawfully exercised...Thus the courts role cannot be put in a straight jacket. The courts task is not to interfere or impede executive activity or interfere with policy concerns, but to reconcile and keep in balance, in the interest of fairness, the public authorities need to initiate or respond to change with the legitimate interests or expectation of citizens or strangers who have relied, and have been justified in relying on a current policy or an extant promise. As held in *ex parte Unilever Plc (supra)* the Court is there to ensure that the power to make and alter policy is not abused by unfairly frustrating legitimate individual expectations...The change of policy on such an issue must pass a much higher test than that of rationality from the standpoint of the public body...A public authority must not be allowed by the court to get away with illogical, immoral or an act with conspicuous unfairness as has happened in this matter, and in so acting abuse its powers. In this connection Lord Scarman put the need for the courts intervention beyond doubt in the *ex-parte Preston* where he stated the principle of intervention in these terms: “I must make clear my view that the principle of fairness has an important place in the law of judicial review: and that in an appropriate case, it is a ground upon which the court can intervene to quash a decision made by a public officer or authority in purported exercise of a power conferred by law.” The same principle was affirmed by the same Judge in the House of Lords in *Reg vs. Inland Revenue Commissioners, ex-parte National Federation of Self Employed and Small Business Ltd [1982] AC 617* that a claim for judicial review may arise where the Commissioners have failed to discharge their statutory duty to an individual or have abused their powers or acted outside them and also that unfairness in the purported exercise of a power can be such that it is an abuse or excess of power. In other words it is unimportant whether the unfairness is analytically within or beyond the power conferred by law: on either view, judicial review must reach it. Lord Templeman reached the same decision in the same case in those helpful words: “Judicial review is available where a decision making authority exceeds its powers, commits an error of law commits a breach of natural justice reaches a decision which no reasonable tribunal could have reached or abuses its powers.” Abuse of power includes the use of power for a collateral purpose, as set out in *ex-parte Preston*, reneging without adequate justification on an otherwise lawful decision, on a lawful promise or practice adopted towards a limited number of individuals. I further find as in the case of *R (Bibi) vs. Newham London Borough Council [2001] EWCA 607, [2002] WLR 237*, that failure to consider a legitimate expectation is a failure to consider a relevant consideration and this would in turn call for the courts intervention in assuming jurisdiction and giving the necessary relief.”

28. It is now trite that there are circumstances under which the Court would be entitled to intervene even in the exercise of discretion. This Court is empowered to interfere with the exercise of discretion in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See **Republic vs. Minister for Home Affairs and Others Ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 [2008] 2 EA 323.**

29. In this case, it is my view and I hold that the Respondent’s action was in bad faith and amounted to abuse of power. Consequently I find the merit in the Notice of Motion dated 15th August, 2016

Order

30. In the result I grant the following orders:

1) An order of Prohibition against the Respondent prohibiting it from demolishing the Applicant’s Boundary wall erected on Plot Nairobi/Block 91/159 Gigiri without following the due process of the law.

2) An order of Certiorari removing into this Court and quashing the decision of the Respondent in the letter dated 23rd June 2016 cancelling its authority for repair of boundary wall on plot Nairobi/Block 91/159 Gigiri or preventing repair of the boundary wall.

31. Once the impugned decision is quashed it follows that the *status quo ante* reverts hence it is unnecessary to issue the order of *mandamus* in the manner sought.

32. The costs of these proceedings are awarded to the applicant to be borne by the Respondent.

33. 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 the ex parte applicant

Miss Mwai for the Respondent

CA Mwangi