



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

MISCELLANEOUS CIVIL APPLICATION JR NO. 3 OF 2018

IN THE MATTER OF; AN APPLICATION BY TATU CITY LIMITED AND KOFINAF FOR LEAVE TO INSTITUTE JUDICIAL REVIEW ORDERS UNDER FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

IN THE MATTER OF; KIAMBU CHIEF MAGISTRATE, CIVIL CASE NO. 561 OF 2017

BETWEEN

REPUBLIC..... APPLICANT

AND

SENIOR PRINCIPAL MAGISTRATE'S

COURT AT KIAMBU.....1ST RESPONDENT

STEPHEN MBUGUA MWAGIRU.....2ND RESPONDENT

MICHEAL OSUNDWA SAKWA.....3RD RESPONDENT

DANIEL GITAU MBUGUA.....4TH RESPONDENT

EX PARTE.....TATU CITY LIMITED AND KOFINAF COMPANY LIMITED

JUDGMENT

By a Notice of Motion Application dated **10th May 2018**, the Ex parte Applicants sought for the following orders against the Respondents;

1. THAT an order of Certiorari does issue to bring into the Environment and Land Court the orders issued by the 1st Respondent on 31st October 2017, in Kiambu Chief Magistrate's Court, Civil Case No. 561 of 2017 for the purpose of being quashed and the said orders be quashed.

2. THAT an order of prohibition does issue restraining the 1st Respondent from conducting or further conducting any proceedings or taking any other step or making or issuing any further orders directions, decisions, rulings or determinations in Kiambu Chief Magistrate Court Civil Case No. 561 of 2017.

3. THAT an order of prohibition does issue restraining the 2nd, 3rd and 4th Respondents from conducting, continuing or prosecuting or taking any other steps in relation to the proceedings in Kiambu Chief Magistrate Court Civil Case No. 561 of 2017, before the 1st Respondent or instituting, continuing or prosecuting any other suit or proceeding concerning the Applicants planning permission before the 1st Respondent or such other subordinate Courts or administrative tribunal that is not empowered to grant any relief to any person aggrieved by any planning permission granted by the Interested Party relating to the Applicant's development.

4. A declaration be made that the proceedings in Kiambu Chief Magistrate Court Civil Case No. 561 of 2017, amounts to abuse of the Court process.

5. THAT an order does issue, striking out, terminating or otherwise discharging the proceedings in Kiambu Chief Magistrate Court Civil Case No. 561 of 2017.

6. **THAT an order of injunction does issue restraining the 2nd, 3rd and 4th Respondents whether by themselves or through their employees servants, employees agents or otherwise howsoever from pursuing any conduct which amounts to harassment of the Applicants including instituting any suit in relation to the planning approvals granted to the Applicants that is either vexatious or otherwise amounts to an abuse of the process of the Court whether in the superior Courts or in any subordinate Court, either against the Applicants or against their directors, employees, servants or agents.**
7. **THAT General Damages be awarded to the Applicants against the Respondents jointly and severally.**
8. **THAT exemplary damages be awarded to the Applicants against the 2nd, 3rd and 4th Respondents jointly and severally.**
9. **Interests be awarded on the sums to be paid under (g) and (h) above from date of Judgment until payment in full.**
10. **THAT costs of this Application be awarded to the Applicants.**

The Application is supported by the statutory statement of **Christopher Barron** dated **16th April 2017**. It was averred that on **26th September 2017**, the 2nd Respondent acting through the 3rd Respondent wrote to the Interested Party asking to be supplied with information relating to the planning permissions relating to the 1st Applicant's development known as **Tatu City**, which according to the 2nd and 3rd Respondents had been issued to the Interested Party irregularly. Further that the Interested Party requested the 2nd and 3rd Respondents to supply it with information to enable the Interested Party address the 2nd and 3rd Respondents request. That on **9th October 2017**, the 2nd Respondent acting through the 3rd Respondent commenced High Court Civil case **No. 24 of 2017**. That the reliefs sought by the 2nd Respondent included orders that any planning approval granted by the Interested Party in respect of **Tatu City Project** and the properties known as **L.R 11288, 10883, 11285, 11287, 10877 and 11486**, be cancelled, revoked, suspended and the Interested Party be restrained from approving any such planning permissions.

Simultaneously, the 2nd Respondent filed a Notice of Motion application dated **9th October 2017**, before the High Court at Kiambu seeking interim injunction whose effect was to suspend any planning, permissions previously given to **Tatu City Development** and restrain the Interested Party from approving any planning applications pertaining to above properties. That when the Application came up for hearing, the Judge transferred the suit to **Environment & Land Court at Thika**, because the matter fell within its jurisdiction. Further that Kiambu High Court Civil **Case No. 24 of 2017**, was consequently transferred to this Court and on **26th October 2017**, the Court declined to grant the orders suspending the approvals. It was contended that following the above Court proceedings, the 3rd Respondent filed a **Notice of Withdrawal of the Suit** dated **30th October 2017**, and the 2nd Respondent indicated his intention to wholly discontinue and withdraw **Thika ELC 786 of 2017**, against the Interested Party. The 2nd and 3rd Respondents thereafter caused the Notice of Withdrawal to be endorsed by the Deputy Registrar.

Further that following the withdrawal, the 4th Respondent filed Kiambu Chief Magistrate **Civil Case No.561 of 2017**, on **31st October 2017**, seeking the same orders that this court declined to grant. That on **31st October 2017**, the 1st Respondent issued interim order restraining the Interested Party from approving any building plans pertaining to **Tatu City development**, and the same were extended on diverse dates. It was contended that the 1st Respondent lacked jurisdiction to issue the orders as the orders were made without jurisdiction or in excess of its jurisdiction by virtues **Section 9(1) of the Fair Administrative Action Act No. 4 of 2015**. That **Article 22(3)** of the Constitution has not conferred upon the 1st Respondent the jurisdiction to review planning permission as granted by the Interested Party under **section 30 for the Physical planning Act**. It was contended that the 2nd, 3rd and 4th Respondents never exhausted the mechanisms for appeal or review to challenge planning permissions given by the Interested party. It was further contended that the purpose of the Application is to paralyze the Applicants operation in order for the 2nd Respondent to create leverage for himself.

Further that the Applicants are incurring substantial costs to defend frivolous and vexatious claims by the 2nd Respondent that lacks merit. It was averred that the 2nd Respondent is responsible for the harassment of the Applicants and their continued harassment will persist unless restrained by the Court order. That the Applicants have suffered loss and damage and unless the orders of Judicial Review Sought are granted, the Applicants will no longer be able to preserve, promote and enhance land value through sustainable development within Tatu City.

The Application is further supported by the Verifying Affidavit of **Christopher Barron** sworn on **18th April 2018**, who reiterated the contents of the Statement of Facts. It was his contention that he has been advised by his Advocate which Advise he believes to be true that the 1st Respondent is not empowered under section 7 of the Magistrates Court Act to sit on appeal over the finding and determination made by the **Honourable Justice Ngugi** dated **10th October 2017**, that the **Environment & Land Court** had jurisdiction to deal with the matter and to set aside, vacate and discharge orders issued by this Court on **26th October 2017**, declining to suspend the building plans. He further averred that the Interested Party has been implementing the Interim Orders and has not given the approvals in respect of the planning permissions in respect of certain developments being undertaken within Tatu City. The Court was urged to allow the Judicial Review Application.

The application is opposed and the 2nd Respondent **Stephen Mbugua Mwagiru**, swore Replying Affidavit on **17th September 2018**, and averred that he has been advised by his Advocate that the Judicial Review Application is not properly brought before this Court since the 2nd, 3rd and 4th Respondents are private persons while Judicial Review proceedings can only be brought against a public body and as such orders sought by the Applicants cannot be issued against private persons. He further averred that he has been advised by his Advocate, advise which he believes to be true that the Application is an offshoot of a legitimate Judicial Process and that if the applicants are aggrieved with the decision of the Chief Magistrate in **Kiambu Civil Case No. 561 of 2017**, they should follow through the provided tiers of appeal or joinder and other recourses available to them in law. He further averred that Judicial Review Applications are concerned with the decision making process and not merit and that for an order of **Certiorari** to be issued, it must be demonstrated that the Respondents acted without

and or in excess of jurisdiction without adhering to the rules of natural justice.

It was his contention that they instructed **Mr. Osundwa** Advocate to pursue the matter in Court on their behalf and he was bound by their instructions and as such he should not be exposed to unnecessary litigation as he had a duty to act in the best interest of his clients. He further averred that he has protected beneficial interest by virtue of being a shareholder of the Applicants Company.

The 3rd Respondent **Micheal Osundwa Sakwa** swore a Replying Affidavit on **17th September 2018**, and averred that it was his professional duty as an Advocate to take instructions in the Kiambu High Court Civil Case **No. 24 of 2017**, and **ELC 786 of 2017**, and act in accordance with the law. He averred that the nature of an Advocate's work is to proceed on the clients instructions and it is not an avenue for the Advocate to pursue personal interest. He further averred that as per the pleadings annexed, it is clear that he was acting in his capacity as his client's Advocate and the allegations that he is responsible of intimidating the Applicants through hostile actions is irretrievably inconceivable and only made in bad faith. It was his contention that the impression created in the Application is unprofessional and disregard of the scope of **Cab rank rule**. He averred that he has been advised by his Advocate that it is his duty to zealously defend his clients interest and that all through the vents complained of by the Applicants, he understood his roles as an Advocate and his limitations for maintenance of an Advocate – Client confidentiality with his clients. He contended that there was no illegality committed in the institution of various Court cases and that the pleadings in the Chief Magistrate's Court shows that the 4th Respondent had an interest in the said case and filed the matter in his own capacity. It was his contention that his joinder was a conduct unbecoming of the Applicants Advocate and the application is incompetent as far as he is concerned.

He further averred that Judicial Review Orders have been wrongly sought against him and his client as private persons and the institution of the suit has enormous negative impact on his role, since it deters him from pursuing his client's case. He urged the Court not to grant orders sought against him and also urged the Court to dismiss the Judicial Review Application.

The Application was canvassed with by way of written submissions. The Ex parte Applicants through the Law Firm of **Issa & Company Advocates** relied on various provisions of law and decided cases and submitted that the 1st Respondent did not have jurisdiction to determine the matter as it is not empowered under **Section 7 of the Magistrates Court Act** to either sit on appeal, set aside review and or discharge the orders issued by the two superior Courts. It was further submitted that **section 14 and 15 of the Physical Planning Act** provide for the procedure to be invoked and the complaint by the 2nd to 4th Respondents falls within the ambit of section 14, the Respondents should have appealed to the liaison committee. It was their submissions that the suit was an abuse of the court process and the proceedings in **Kiambu Chief Magistrates Court Civil Case No. 561 of 2017**, are therefore irregular, void and of no legal effect.

The 2nd, 3rd and 4th Respondents filed their submissions on **3rd June 2019**, through the Law Firm of **Osundwa & Company Advocates** and submitted that this Court lacks jurisdiction as the Applicant being dissatisfied by the orders granted by the subordinate Court should have proffered an appeal, which they failed to follow and in allowing the Application, the court would be entertaining an application for Judicial Review, when it is clear that Judicial Review is not the only alternative remedy or judicial path available. They relied on various decided authorities and urged the Court to dismiss the Judicial Review Application.

The Attorney General submitted that the High Court's inherent powers is designed to achieve salutary public purpose which is that the Court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. It was submitted that the 1st Respondent failed to ensure that its Court's proceeding did not degenerate into a weapon of harassment by sustaining the proceedings. It was further submitted that he proceedings in the lower Court were an abuse of the Court process.

The Court has carefully considered the Exparte Applicants' Judicial Review Application and the annexures thereto. The Court has also considered the **Replying Affidavits** by the 2nd, 3rd and 4th Respondents, the written submissions, cited authorities and the relevant provisions of law and the Court renders itself as follows:-

The issues for determination are;

- a) *Whether the Applicants have met the threshold for granting of Judicial Review Orders of Certiorari and Prohibition.*
- b) *If so, whether the application dated 10th May 2018 is merited.*
- c) *Who is entitled to costs of these proceedings.*

From the outset, it is important to set out the purpose of Judicial Review. In the case of **Municipal Council of Mombasa...Vs...Republic Umoja Consultants Ltd, Nairobi Civil Appeal No.185 of 2007(2002) eKLR**, the Court of Appeal held that:-

“The Court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who make the decision have the power i.e the jurisdiction to make it. Were the persons affected by the decision heard before it was made. In making the decision, did the decision maker take into account relevant matters or did they take into account irrelevant matters. These are the kind of questions a court hearing a matter by way of judicial review is concerned with and such court is not entitled to act as a Court of Appeal over the decider. Acting as an appeal court over the decider would involve going into the merits of the decision itself - such as whether this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of Judicial Review”.

Further circumstances under which orders of Judicial Review can be issued were elaborated by **Justice Kasule in the Uganda case of Pastoli ...Vs..Kabale District Local Government Canal & Others (2008) 2EA**

“In order to succeed in an application for Judicial Review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.

Illegality, is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provision of a law or its principles are instances of illegality----.

Irrationality, is when there is such gross unreasonableness in the decision taken or act done that no reasonable authority, addressing itself to the facts and the law before it would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.

Procedural impropriety, is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice to act or to act with procedural fairness towards one to be affected by the decision – it may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislature instrument by which such authority exercises jurisdiction to make a decision. (Al-Mehidswi... Vs...Secretary of State for the Housing Department (1990) AC 876”.

So what does the Judicial Review orders entails? This was elaborated in the case of **Kenya National Examination Council...Vs...Republic Exparte Geoffrey Gathenji & 9 Others, Nairobi Civil Appeal No.266 of 1996**, where the Court held that:-

“That now bring us to the question we started with, namely the efficacy and scope of mandamus, prohibition and certiorari. These remedies are only available against public bodies such as the council in this case. What does an Order of Prohibition do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules or natural justice. It does not. However, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See Halsbury’s Law of England, 4th Edition vol.1 at Pg.37 paragraph 128.”

From the foregoing cases, the applicable law in cases of Judicial Review Applications have already been established and this Court will now consider the above applicable law and then juxtapose with the available facts to determine whether the **Exparte Applicants** are deserving of the orders sought.

a) Whether the applicants have met the threshold for granting of Judicial Review Orders of Certiorari and Prohibition.

As was stated in the case of **Kenya National Examination Council...Vs...Republic (Exparte Geofrey Gathenji & Another (Supra)**, the Order of *Certiorari* can quash a decision already made as an Order of *Certiorari* will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with or so such like reasons. So have the **Exparte Applicants** established existence of the above condition to warrant this Court quash the orders issued by the 1st Respondent on **31st October 2017** vide **Kiambu CMCC no. 561 of 2017**.

The Exparte Applicants have alleged that the 1st Respondent made a decision without having jurisdiction to deal with it as the 1st Respondent could not purport to sit on appeal. Further that as per **section 14** of the **Physical Planning Act**, the 1st Respondent did not have jurisdiction to hear and determine the said matter.

The question as to whether the 1st Respondent had made the orders in excess of jurisdiction warrants a Judicial Review question. The Ex parte Applicants have averred that the 1st Respondent did not have jurisdiction to hear and determine the ruling as this Court had already made a determination on the issue. However, it is clear that the suit was withdrawn without having been heard on merit. Though there is allegations that this Court made an order the said order has not been attached to this proceedings.

The Court will further determine whether the 1st Respondent had jurisdiction to determine the matter that fell within the **Physical Planning Act**. It is not in doubt that the Application in **Civil Case No. 561 of 2017**, was brought under **Section 29 and 30** of the **Physical Planning Act**, which deal with development permissions and power of the local authority. The **Physical Planning Act** provides that;

14. Appeals to liaison committees

(1) 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.

(2) Subject to subsection (3), the liaison committee may reverse, confirm or vary the decision appealed against and make such order as it deems necessary or expedient to give effect to its decision.

(3) When a decision is reversed by the liaison committee it shall, before making any order under subsection (2), afford the Director an opportunity of making representations as to any conditions or requirements which in his opinion ought to be included in the order, and shall also afford the appellant an opportunity to replying to such representations.

15. appeals to the National liaison Committee and to High Court

(1) Any person aggrieved by a decision of a liaison committee may, within sixty days of receipt by him of the notice of such a decision, appeal to the National Liaison Committee in writing against the decision in the manner prescribed.

(2) The National Liaison Committee may reverse, confirm or vary the decision appealed against.

(3) The provisions of this Act relating to the determination by the Director or local authority of objections to physical development plans or development applications, as the case may be, or the determination of an appeal under section 13, shall apply mutatis mutandis to the determination of appeals by the National Liaison Committee under this section.

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

From the above provisions of the law, it is clear that if a party is dissatisfied with the decision of the Director of Physical Planning, the party should appeal to the Liaison Committee and if dissatisfied, then the party should appeal to the National Liaison Committee and further if the party is dissatisfied with the decision by the National Liaison Committee, then the party should appeal to the High Court.

Excess of jurisdiction is defined as:-

“a case where a judge has gone beyond his or her powers when agreeing to hear a case or when making a ruling or etc; where an authority has gone beyond its powers eg in making a decision.”

Further in the case of **The owners of the Motor Vessel ‘Lilian S’...Vs... Caltex oil (Kenya) Ltd 1989 KLR 1**, the Court held that:-

“..Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

From the above provisions of law, it is clear that a party that is aggrieved should appeal to the High Court and given that the 1st Respondent is not a High Court, it is this Court’s considered view that the 1st Respondent acted in excess of its jurisdiction.

The Ex parte Applicants have also sought for prohibition orders as against the 2nd to 4th Respondents. As already stated above in the case of **Kenya National Examination Council...Vs...Republic Exparte Geoffrey Gathenji & 9 Others, Nairobi Civil Appeal No.266 of 1996**, (supra) where the Court held that:-

“That now bring us to the question we started with, namely the efficacy and scope of mandamus, prohibition and certiorari. These remedies are only available against public bodies such as the council in this case.”

In this instant, the 2nd to 4th Respondents being private persons it would only mean that the said orders cannot be applied against them. Further in Judicial Review Application the Court is only concerned with the process and the question of abuse does not go into the process. Therefore, the court finds and holds that the prayer of prohibition order is not merited.

Having found that the 1st Respondent did not have jurisdiction and thus acted in excess of its jurisdiction, the Court further finds that the **Exparte Applicants** have partially established the **threshold for granting of Judicial Review Orders**.

b) If so whether the application dated 10th May 2018 is merited?

The Exparte Applicants herein are seeking an Order of Judicial Review of *Certiorari* to quash the decision of the 1st Respondent and an **Order of Prohibition**.

The Court has found that the 1st Respondent acted in excess of its jurisdiction. These are enough grounds to warrant the Court to issue an Order of *Certiorari* to quash the decision of the 1st Respondent. In the case of **Republic ...Vs...Kenya Revenue Authority Exparte Yaya Towers Ltd (2008) eKLR**, the Court held that:-

“The remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected.....”

Having now carefully considered the facts of this case and the available provisions of law, the **Court finds that the Exparte Applicants are partially deserving of the orders sought**.

c) Who is to bear costs of these proceedings?

Ordinarily, costs do follow the event and **Section 27** of the **Civil Procedure Act** provides that **‘costs are granted at the discretion of the**

Court. Consequently, *the Exparte Applicants gets costs of these proceedings as against the 1st Respondent only*

The upshot of the foregoing is that the Court finds and holds that the *Exparte Applicants* are partially *deserving of the orders sought in the Notice of Motion* dated *10th May 2018*, and *proceed to grant prayers No. 1, 2 and 5* the said *Judicial Review Application* dated *10th May 2018 Application with costs to be borne by the 1st Respondent.*

It is so ordered.

Dated, signed and Delivered at **Thika** this **18th** day of **June 2020**.

L. GACHERU

JUDGE

18/6/2020

Court Assistant - Jackline

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 Rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

By Consent of :

No consent for the Applicants

No consent for the 1st Respondent

M/s Osundwa & Co. Advocates for the 2nd, 3rd and 4th Respondents

M/s Issa & Co. Advocates for Exparte Applicants

L. GACHERU

JUDGE

18/6/2020