**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**JUDICIAL REVIEW NO. 7 OF 2016**

**CONSOLIDATED WITH**

**JUDICIAL REVIEW NO. 8 OF 2016**

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF PROHIBITION AND CERTIORARI**

**AND**

**IN THE MATTER OF: A NOTICE OF DEMOLITION DATED 3RD MAY, 2016 BY THE COUNTY GOVERNMENT OF MOMBASA**

**AND**

**IN THE MATTER OF: ARTICLES 47, 40 AS READ TOGETHER WITH ARTICLES 10, 21 AND 22 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: THE PHYSICAL PLANNING ACT, CAP 286 LAWS OF KENYA**

**AND**

**IN THE MATTER OF: COUNTY GOVERNMENTS ACT, 2012**

**AND**

**IN THE MATTER OF: A JUDICIAL REVIEW APPLICATION BY**

**REPUBLIC …….....APPLICANT**

**VERSUS**

**MOMBASA COUNTY GOVERNMENT…….....RESPONDENT**

**AND**

**KAZUNGU MOLI CHOGO…….....…….INTERESTED PARTY**

**AFRICAN UNIVERSITY TRUST OF KENYA…EX-PARTE APPLICANT**

**RULING**

The applicant filed two separate Judicial Review applications. Both applications are dated 10th June, 2016. In application No. 7 of 2016 the applicant seeks the following orders: -

> a) **THAT** the decision made by the respondent contained in a notice dated 3rd May, 2016 which requires the applicant to stop carrying out construction works on Plot No. 5141/1/MN (for the construction of a University to be known as Mombasa International University) be brought up before this court and the said decision be quashed for all purposes.
>
> b) **THAT** the respondent be prohibited from implementing its decision contained in a notice dated 3rd may, 21016 which requires the applicant to stop carrying out construction works on Plot No. 5141/1/MN (for the construction of a University to be known as Mombasa International University).
>
> c) **THAT** the grant of leave to apply for the Judicial Review Orders sought herein do operate as a stay against the respondent, its agents and servants from interfering with the applicant's quiet and peaceful occupation and acts of development on Plot No. 5141/1/MN (for the development of a university to be known as Mombasa International University) situated at Shanzu within Mombasa County.

In application No. 8 of 2016 the applicant is seeking an order of mandamus in the following terms: -

> a) THAT an order of mandamus to compel the respondent to release to the applicant the renewed approved Development Plan No. P/07/13 for the construction works on Plot No. 5141/1/MN (for the construction for a university to be known as Mombasa International University).

The applications were filed pursuant to leave granted by this court on 19th May 2016. They are supported by the affidavit of **Burhan Basoglu**. The respondent filed replying affidavit sworn by **Jabu Salim** on 31st October, 2016. The interested party filed a replying affidavit sworn by **Kazungu Moli Chogo** on 1st October, 2016.

Mr. Gikandi appeared for the applicant. The applicant's case is that it is the proprietor of Plot No. 5141/1/MN. The applicant made an application to the respondent seeking authority to construct on the suit premises a university to be known as MOMBASA INTERNATIONAL UNIVERSITY. The application was made in the year 2013. All the relevant requirements were complied with and the respondent permitted the development via its authority dated 8th January, 2013. The building approval was for a period of twenty-four months. The applicant embarked on the project and has so far spent about Kshs.500 million. The construction was not completed within the two-year period. It is indicated the project is 60% complete. All the requisite charges were paid. The two-year period was to end on 8th January, 2016. An application for the extension of time was made online but there was no response. The applicant made follow up with the respondent and was orally told to continue with the construction. On 3rd May 2016 the respondent issued a notice asking the applicant to stop the construction and demolish the building.

Mr. Gikandi submit that the action of the respondent to stop the construction was irrational. The notice issued to the applicant indicate that the project was unlawful and a decision had been made that the buildings be demolished. This is illogical. A decision to allow the construction was made and now another decision is made to demolish the same buildings. This is contrary to the provisions of Article 10 on National Values and Principles. It violates Article 47 of the Constitution on fair administrative action. No reference was made to the initial application. No reasons were given as to why it had become

impossible to complete the project. The doctrine of reasonable and legitimate expectation applies. Having been allowed to construct, the applicant had a legitimate expectation that the licence would be extended. It is further submitted that the circumstances prevailing at the time the application for the extension of the license was made were the same circumstances as at the time the initial application was made. It was alleged that the suit premises are involved in civil suit before the Mombasa ELC Court. Those suits were filed before the approval was made. Further, the applicant has not evicted the squatters on the suit premises. The squatters can continue to occupy the land while the construction is ongoing. The Applicant is a charitable organization and has obtained funds for the construction. The balance of convenience is in favour of the applicant.

Mr. Mohamed appeared for the respondent. Counsel relied on the affidavit of Jabu Salim and on the written submissions. It is submitted that section 33 of the Physical Planning Act empowers a local authority to allow a development plan. The respondent initially approved the development. The approval was conditional. Applicant had to undertake certain issues. By the time the approval was given the respondent had no knowledge of the cases pending in court. The letter refusing the extension gave the reasons as to why the extension was denied. The development was on disputed land. It is further submitted that section 33 of the Physical Planning Act provides for the procedures to be followed by an agreed person. There is a tribunal that can arbitrate on the decision by the respondent not to extend the license. The High Court is the last resort. There is an alternative remedy provided by the law which has to be followed. Counsel relies on the case of **TURKANA COUNTY GOVERNMENT & 20 OTHERS VS THE ATTORNEY GENERAL & 7 OTHERS (2016) eKLR**.

It is further submitted that judicial review proceedings are concerned with the decision-making process and not the merits of the decision. The application is dealing with the merits of the decision. The value of the project is immaterial. The only option available to the applicant was to challenge the existence of the reasons given for the refusal. The challenge would only be done through an appeal. The courts should not assume and take over the role of statutory bodies in supervising constructions and developments. The applicants have failed to point out any procedural irregularity and process used to reject the application. The rejection cannot be termed as careless, unreasonable or irrational. The first permission to develop was issued fraudulently.

Mr. Muchiri held brief for Mr. Mutubia for the interested parties. It is submitted that there are two cases before the Mombasa Environment & Land Court. The cases are No. 123 of 2012 (O.S) and Petition No. 18 of 2016. Both cases relate to the same subject matter. The current petitions ought to have been filed in Mombasa and not Malindi. It is also submitted that the land where the development is situated is not free from active litigation. The local government cannot make an approval if there is dispute on the land. The applicant did not make that disclosure when the initial application was made. The permit was issued on wrong information given to the respondent. It was based on fraud that there was no dispute. Had that information been given to the respondent the approval could have been denied. Therefore, the initial approval is void *ab initio*. The applicant misled the respondent. The applicant gambled with its money. It is further submitted that the refusal letter dated 3rd May 2016 gives three reasons. It is indicated the building has no approved building plans. The construction was done on land with ownership dispute and that the initial conditions were breached. Therefore reasons were given. It is unreasonable to invest Kshs.500,000,000/= on land which has dispute. It is the applicant who is unreasonable. It would be absurd to allow the applicant to complete the project yet there are pending disputes. The best way forward is to first complete the dispute. The Physical Planning Act provides for a procedure to be followed which procedure is mandatory. The only option available to the applicants is to deal with the reasons given in the letter of 3rd May, 2016. The local community is not happy with the project as they have been displaced.

From the rival submissions, it is established that the applicant initially applied for the approval of the construction. There is no dispute about this fact. The construction was approved. It is also agreed that the initial approval lapsed and an application for its extension was made. It is further agreed that there are cases pending in court relating to the ownership of the land where the construction is being undertaken. It is also agreed that the respondent declined to renew the license as stated in the letter dated 3rd May, 2016. The said letter stated in part as follows: -

**a) Development without approved Building Plans (earlier approval lapsed).**

**b) Development on land with ownership dispute and unresolved squatter issue irrespective of your earlier commitments to do so.**

**c) Breaching the condition of the approval (b), (c), (f) and (h) as stipulated in PPA2 form.**

**In regard to the above observations and findings, you are required to:**

**a) Stop the development, remove the machinery, labor and restore the land**

**Failure to do that the enforcement Officers shall move in and execute such requirement without further notification made to you at your own cost.**

**The County government of Mombasa will enter on the said land and execute the requirements as outlined herein above and may recover as a civil debt in any Court of competent jurisdiction for any related expenses incurred.**

The applicant maintains that the denial of the extension is unreasonable and irrational. Reference is made to the case of **LAW SOCIETY OF KENYA VS COMMISISON OF INQUIRY ON TRIBAL CLASHES IN KENYA (Mombasa Misc. Civil Application No. 141 of 1998).** In that case the court cited the decision of **LORD DIPLOCK IN THE CASE OF COUNCIL OF CIVIL SERVICE UNION VS MINISTER FOR CIVIL SERVICE [1985] AC 374**. Lord Diplock explained illegality, irrationality and procedural impropriety as follows: -

**"By "illegality" as a ground for a Judicial Review I mean that the decision maker must understand correctly the law that regulates its decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided in the event of dispute, by those persons, the Judges, by whom the Judicial power of the state is exercisable.**

**"By "irrationality" I mean what can by now be succinctly referred to as Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd v. Wednesbury Corporation [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that Judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our Judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to viscount Radcliffe's ingenious explanation in Edwards v. Bairstow [1956] AC 14 of irrationality as a ground for a court's reversal of a decision by ascribing "it to an inf erred unidentifiable mistake of law by the decision-maker "irrationality", by now can stand upon its own feet as an accepted ground on which a decision may be attacked by Judicial Review.**

**"I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to Judicial Review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all."**

I have read the replying affidavit of Jabu Salim sworn on 31st October, 2016. Paragraphs 4, 5, 6, 7, 8 and 9 of the affidavit states as follows: -

**4. THAT normally, a renewal for a building permit is required after 2 years when the project is not complete. The exparte applicant having realized this, made another application**

**P/22/2016 when the respondent recognized the initial building permit had long expired.**

**5. THAT on the suit property are squatters, 5the interested party herein who have numerous cases which are still pending in court as evidenced by the annexures in replying affidavit of the interested party herein.**

**6. THAT we served the exparte applicant with the notice to stop development until the building permit is renewed. But this time it was with the condition that the squatter issue should be resolved by causing a sub-division to isolate the portion squatters are occupying.**

**7. THAT the above was followed with a meeting between the exparte applicant and the respondent officials. It was agreed that the exparte applicant will do the sub-division as soon as possible to enable the respondent process the application.**

**8. THAT however, the exparte applicant went back against what was agreed and never catered for the squatters.**

**9. THAT this action of theirs led us to issue the notice dated 3rd May 2016 requiring the exparte applicant to stop carrying out construction works on the suit property.**

There is no disagreement that after the applicant was issued with a approval for the construction to start. Several photographs were annexed showing how massive the project is. It is clear that indeed the applicant has invested a lot of money on the project. The conditions giving the initial approval were as follows: -

**a) Notifying the council in writing 48 hours prior to commencement of construction.**

**b) To start the construction within12 months and completing such in 24 months otherwise the approval lapses.**

**c) To execute the proposal, instruct conformity with the architectural and structural plans approved by the Director of Planning and Municipal Engineer respectively.**

**d) All buildings under construction MUST be inspected by the proponents' registered engineer and Architect otherwise the Council will not accept any responsibility for stability or any work or other shortcoming in the building. (legal Notice No. 135 Regulation 38 of 1998).**

**e) Building works to commence on site after the structural drawing have been approved by Municipal Engineer.**

**f) Not constituting part of disputed public/private land or public utility land.**

**g) No construction should commence on site unless the E.I.A. project report is prepared, submitted and approved by NEMA as per E.M.C.A. provision of 1999.**

**h) A board indicating plan no. the names of consulting Planner, Architect, Engineers, Minute no. of the approved plant MUST be placed at the site before any construction start.**

**i) Satisfying any other legal requirement of your application.**

The pleadings herein show that while the construction was ongoing, building inspectors from the respondent occasionally visited the site and gave their approval for the construction to continue. Such approvals include inspection and certification of each floor of the building. It is indicated in the refusal letter that the applicant breached conditions (b) (c) (f) and (h). Condition (b) as itemized herein above involves the commencement of the construction within twelve months and completion within twenty-four months. Condition (c) relates to strict conformity with the architectural and structural plans. Condition (f)

involves dispute on the land. Condition (h) relates to installation of a board at the site giving the names of the various consultants. It is clear to me that there is no dispute in relation to condition (b) (c) and (h). For the period the construction was ongoing there is no complaint that the constructions was not being done as per the approved plans. It is also not alleged that the construction did not begin within twelve months after the approval. There is also no complaint that the architect, physical planner and engineers engaged in the project are not qualified. The only issue is that there is dispute on the ownership of the land. Also the construction was not completed in 24 months.

The refusal letter also indicated that the development is being carried out while the earlier approval had lapsed. The affidavit of Burhan Basoglu indicate that when the initial approved period lapsed, an application was made for extension. It is averred that the applicant was orally informed that the construction should continue even if the initial period had lapsed Indeed the construction continued even after the expiry of the 24 months until late January, 2016 when the respondent started frustrating the applicant. The refusal letter does not make any reference to the request for extension. From the refusal letter, it is only the issue of dispute on the land that can be referred to as a reason for the refusal. Two cases have been cited namely Petition No. 18 of 2016. This suit was filed on the 29th April, 2016. The petitioners are the Registered Trustees of African University Trust of Kenya against Timothy Gajitu Moli Chogo. An application was filed together with the petition seeking orders of injunction. It is therefore clear that this litigation was commenced by the applicant. It was also commenced after the initial approval had been granted. It could not be the reason for the refusal.

The second litigation is ELCC No. 134 of 2013 (O.S). The suit was filed on 27th June, 2013. The applicants are **KAZUNGU MOLI CHOGO AND 6 OTHERS VS THE TRUSTEES OF AFRICAN UNIVERSITY TRUST OF KENYA AND 3 OTHERS.** This suit seeks a determination of the ownership of the suit land Plot No. MN/1/5141. The record shows that the initial approval is dated 8th January, 2013. The National Environment Management Authority (NEMA) gave its approval on 29th May, 2013. Inspection on the construction was done during the construction period upto 30th January, 2016. By 8th January, 2013 Civil Suit No. 134 of 2013 had not been filed. It is therefore clear that by the time the approval was given by both the respondents and NEMA there was no litigation on the suit premises. The affidavit of Mr. Kazungu Moli Chogo also makes reference to Misc. Application No. 103 of 2012. This is an application for Judicial Review brought by Ex-parte Benson Harry Chogo, Onesmas S. Mangaro, Pauline Kanyora and Maurice Simon Ochieng. The respondent in that suit is the Town Clerk, Municipal Council of Mombasa. The applicant herein is not a party to that suit. It is therefore clear that by the time the initial approval was made there was no suit known to the applicant. Therefore it cannot be held that the applicant failed to reveal the existence of dispute relating to the ownership of the land when it applied for the approval.

Section 33 of the Physical Planning Act (Cap 286) states as follows:

> **1. Subject to such comments as the Director may make on a development application referred to him under section 32, a local authority may in respect of such development application**
>
> **(a) Grant the applicant a development permission in the form prescribed in the Fifth Schedule, with or without conditions; or**
>
> **(b) Refuse to grant the applicant such development permission stating the grounds of refusal.**
>
> **2. The local authority shall notify the applicant in writing of its decision within thirty days of the decision being made by it and shall specify the conditions, if any, attached to the development permission granted, or in the case of refusal to grant the permission, the grounds for refusal.**
>
> **3. Any person who is aggrieved by the decision of the local authority refusing his application for development permission may appeal against such decision to the relevant liaison committee under section 13.**

**4. Any person who is aggrieved by a decision of the liaison committee may appeal against such decision to the National Liaison Committee under section 15.**

**5. An appeal against a decision of the National Liaison Committee may be made to the High Court in accordance with the rules of procedure for the time being applicable to the High Court.**

Under section 33 the local authority which in the present situation is the local county government can either grant or refuse an application for development. The local authority shall convey the decision to the applicant within thirty (30) days. If the application is refused under section 33 (3), then the aggrieved party is allowed to appeal against such decision to the liaison committee established under section 13 of the Act. Section 13 of the Act states as follows: -

**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 and 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 t 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.**

Under section 33 an appeal can be made to the High Court against a decision of the liaison committee. The respondent maintains that that procedure is mandatory and must be followed. Section 33 (3) of the Act indicates that an aggrieved party **may appeal** to the liaison committee. There is no indication that the appeal to the liaison committee excludes the filing of the dispute in court. My understanding of section 33 is that it relates to the initial application for a development. When the application is made the local authority looks at the drawings and evaluate the entire project. For its own reasons the local authority can decide not to approve the application. The liaison committee is expected to hear an appeal by the party whose application has been declined. At that stage the applicant cannot complain of having incurred any financial expenses since the project would not have started. That is why the liaison committee is put in place to hear the appeals from the local authority. Where an application is made to a local authority and it is approved then the work of the liaison committee is excluded. There would be no appeal to the liaison committee. Where the period given for the construction lapses and an application is made for extension, the applicant simply expects that the period will be extended unless there are grave grounds calling for refusal of the extension. An application for extension of the construction period can be made even when no construction had taken place in cases where the applicant did not have funds to initiate the construction or where the funds were delayed. Where an application for extension is made, the local authority should make reference to the initial application. It is not expected that an applicant for extension of the development period will undergo the same procedure of appeals as if it is an initial application. The refusal on the second application can only be limited to the initial conditions. The applicant is entitled to challenge the refusal by the local authority in court. Issues of legal expectation and irrationality are not within the purview of the liaison committee. In any case, even the refusal from the initial application can be subjected to court litigation.

I do find that there is no prohibition on the courts to deal with issues of refusal of the development plans by the county government. The applicant was entitled to come before court and present its complaint. Development in form of construction involves money. Section 13 of the physical Planning Act does not give any time limit for the liaison committee to render its decision. The appeal has to be filed within sixty (60) days after the refusal. If the sequence is that one must wait for the liaison committee to deliberate on the refusal even after the development had been initially approved and then move to the High Court on

appeal, then it is obvious that developers would incur high costs. While the developer awaits the decision of the liaison committee and the court, the contractor would be on the ground and would be charging costs for the machinery and security. I do find that it is not mandatory for an applicant for extension of a development which has already commenced to pursue his grievances once the application is refused through the liaison committee.

From the pleadings, herein I do find that the respondent did not accord the applicant fair administrative action. It is submitted that Judicial Review concerns itself with the process and not the decision. There was no process in arriving at the decision. The applicant was only served with a letter asking it to stop the development, remove the machinery, labour and restore land. Failure to do so would have called for the respondent to enter the land and execute the requirement as per the letter. There are no minutes indicating that a meeting was held and the application was deliberated upon. I do find that the contents of the letter is irrational. The letter cannot be held as a refusal of an application under section 33 of the Physical Planning Act. The refusal under that section simply calls upon the local authority to abide by physical planning laws and ensure that the developments are physically and structurally sound. The local authority can call upon an applicant to improve on the application and go back for approval. However, in the current case the approval was given. A letter dated 3rd May 2016 raised serious issues which could only be determined by the court.

The applicant was expected to complete the construction in two years. Had that time limit been complied with this case could not have been filed. The issues of squatters and pending cases are only coming in since the applicant failed to beat the deadline. I find the issues being raised now to be deliberately brought in with the sole intention of stalling the project. The respondent's position has now changed and is telling the applicant that since the project was not completed in 24 months, then it should be demolished. That cannot be allow4ed in Kenya. Failure to meet a deadline cannot be the reason to demolish a whole development. There is the issue of the squatters. Mr. Gikandi submitted that there is no intention to chase them away. I have observed that the so called squatters are claiming the land. Their pending suits indicate that the suit land is their ancestral land. I do order that the interested parties continue living on the land and carry out their daily activities including farming upto the time their cases are concluded. The applicant should not restrain the interested parties from utilizing the land. Similarly, the interested parties should not interfere with the construction.

The upshot is that the two applications are merited and are hereby granted. Orders of mandamus and prohibition are granted in terms of the two applications. Parties shall meet their respective costs.

**Dated, signed and delivered in Malindi this 6th day of April, 2017.**

**S.J. CHITEMBWE**

**JUDGE**