



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NUMBER 91 OF 2016

**IN THE MATTER OF: THE PHYSICAL PLANNING ACT (CAP. 286 LAWS OF KENYA) AND
THE FAIR ADMINISTRATIVE ACTION ACT (NO. 4 OF 2015)**

AND

**IN THE MATTER OF: DEMOLITION OF ILLEGAL STRUCTURES ON LAND REFERENCE
NUMBER 209/9613 (GRANT NUMBER I.R 44980)**

AND

**IN THE MATTER OF: AN APPLICATION BY NDIARA ENTERPRISES LIMITED FOR
ORDERS OF MANDAMUS**

BETWEEN

REPUBLIC.....APPLICANT

AND

NAIROBI CITY COUNTY GOVERNMENT.....RESPONDENT

EX PARTE

NDIARA ENTERPRISES LIMITED

JUDGMENT

1. Pursuant to leave granted by the Honourable Mr Justice Korir on the 28th day of April, 2016 the exparte applicant Ndiara Enterprises Limited filed Notice of Motion dated 10th day of May, 2016 under the provisions of Sections 29 and 30 of the Physical Planning Act (Cap 286, Laws of Kenya); Sections 4, 7, 8, 9 and 11 of the Fair Administrative Action Act (No. 4 of 2015); Section 3A of the Civil Procedure Act (Cap 21, Laws of Kenya); Order 53 Rules 1 and 3 of the Civil Procedure Rules (2010) and all other enabling provisions of Law) seeking the following judicial review order:

i. An Order of MANDAMUS directed to the Respondent, namely, NAIROBI CITY COUNTY GOVERNMENT, compelling the Respondentto, within fourteen (14) days of the Order being made, demolish the illegal structures erected on the land situate on Land Reference Number 209/9613 (Grant Number I.R. 44980) and evict its illegal occupants.

*ii. An Order of **MANDAMUS** directed to the Respondent, namely, NAIROBI CITY COUNTY GOVERNMENT, compelling the Respondent to, within fourteen (14) days of the Order being made, approve the Ex Parte Applicant's plans for the construction of a perimeter wall on the land situate on Land Reference Number 209/9613 (Grant Number I.R. 44980) and supervise the unhindered construction of the said perimeter wall.*

iii. An Order do issue that the costs of this Application be awarded to the Ex Parte Applicant.

2. The motion is predicated on the grounds set out on the body of the application as supported by the statutory statement and verifying affidavit in support of the Chamber summons for leave and the further supplementary affidavit sworn by **WILLIAM NGUITHI**, who is the exparte applicant's Director.

3. The Ex Parte Applicant's case is that it is the duly registered owner of land comprised in Land Reference Number 209/9613 (Grant Number I.R. 44980) (hereinafter referred to as "the Property") and that has diligently executed its obligations with respect to the Property such as the payment of land rates to the Respondent.

4. That it has repeatedly alerted the Respondent of the presence of illegal structures on the Property which have been erected by unknown persons but that notwithstanding the foregoing, the Respondent has completely failed, ***refused and/or neglected to demolish the said illegal structures on the Property and evict its illegal occupants despite several reminders from*** the Ex Parte Applicant over the past seven (7) years despite the Respondent's promises to effect the same.

5. It is alleged by the exparte applicant that the Respondent's omissions are in breach of its statutory duties under Sections 29 and 30 of the Physical Planning Act and Sections 4 and 7 of the Fair Administrative Action Act.

6. In addition, it is averred that that the Respondent has not complied with the Ex Parte Applicant's numerous requests and demands in contravention of its public duty to demolish the aforesaid illegal structures and evict its occupants.

7. It is therefore claimed that by the foregoing omissions, the Respondent has acted in a manner that is unfair, oppressive, unreasonable and prejudicial to the Ex Parte Applicant, in breach of the provisions of Article 47 of the Constitution, the provisions of the Fair Administrative Action Act and against the Ex Parte Applicant's legitimate expectation that it would be treated fairly and reasonably in accordance with the law.

8. Further, that the Ex Parte Applicant is increasingly apprehensive that unless the prayers sought are granted, the Ex Parte Applicant will continue to be adversely affected on account of its lack of access to the Property to occupy and develop the same.

9. **That** it is therefore in the interests of justice and equity that the Orders sought in this Application be granted.

THE RESPONDENT'S CASE

10. The Respondent Nairobi City County opposed the application by the exparte applicant through a replying affidavit sworn by Eric Odhiambo Abwao on 31st August 2016 contending that the Application is defective and brought under the wrong provisions of the law; That the Application is premature as neither has a complaint ever been lodged with the Liaison Committee as per the provisions of the Physical Planning Act (Cap. 256 Laws of Kenya) nor demolition Orders sought by the Ex Parte Applicant from the Environment and Land Court. Accordingly, the Orders sought in the Application are not appropriate remedies.

11. Further, that the plans as alleged cannot be approved without due procedure being followed hence it will be a violation of the natural rule of law; That even if the Orders sought are granted the dispute will

not have been sorted out as the owners of the so called illegal structures will want to prove that the structures were put up legally after approval hence a waste of the Court's judicious time; That for the plans to be approved they must be submitted along with a copy of the title and the title must be verified yet in judicial review proceedings we cannot have viva voce evidence.

12. That the Ex Parte Applicant has not disclosed any cause of action against the Respondent as the Enforcement Notice annexed to the Application is an action taken by the Respondent; That If the Orders sought are issued then a 3rd party would be affected yet the 3rd party is not a party to the Application; That a mandatory Order can only be issued in the clearest of all cases yet this is not one of such cases; That Judicial Review proceedings deal only with the procedure and whether procedure has been followed or not and no such allegation has been made here, hence this matter is not fit for Judicial Review; That The Applicant is guilty of misrepresentation hence does not deserve the Orders sought as they are equitable in nature; and That It is only fair and just that the document herein be verified for the Court to make out what the position is at the ground.

THE EXPARTE APPLICANT'S RESPONSE TO THE RESPONDENT'S REPLYING AFFIDAVIT

13. The exparte applicant filed a supplementary affidavit in response to the respondent's replying affidavit above reiterating the previous averments and depositions and maintaining that its Application is brought under the correct provisions of the law; That the provisions of the Planning Act (Cap 256, Laws of Kenya) deals with approvals for planning and decisions emanating there from, which provisions do not provide remedies to omissions by the Respondent, the subject matter of the Application; That an Order from the Environment and Land Division for demolition can only be issued to parties who are known by the Ex Parte Applicant. That in this particular instance, the persons who have erected the illegal structures are unknown to the Ex Parte Applicant; That the Respondent has not stated with any degree of exactness the issues that would need to be determined herein. Its defence in this regard is therefore baseless; the Ex Parte Applicant has followed the necessary procedure in this matter for the approval of its plans; that the Respondent has not tendered any approved plans issued for the structures currently on the property; the Ex Parte Applicant has produced a valid title to the property which remains unchallenged by the Respondent; the Enforcement Notices issued by the Respondent are incomplete as the same were not actually followed through by the Respondent; the Respondent has not specified which 3rd party would be affected. It can be concluded that the unknown persons who have erected illegal structures do not have any valid records at the Respondent's registries and/or offices thereby validating the merits of the Ex Parte Applicant's Application; that this is not an interlocutory stage and as such the Orders sought can be validly issued. Further, that the Ex Parte Applicant has laid out a clear basis for its claim as Enforcement Notices were issued by the Respondent but the Respondent was least bothered to follow up on the same; that indeed the issues herein are concerned with the procedure of the Respondent; and that the Respondent seeks to challenge the veracity of the documents produced by the Ex Parte Applicant on the basis of a baseless accusation; that it cannot be in dispute that the Ex Parte Applicant owns the Property, sought the Respondent's assistance to demolish illegal structures and in respect of which requests, the Respondent issued Enforcement Notices which it did not follow through on;

14. Further, that the Ex Parte Applicant's Notice of Motion dated 10th May, 2016 has merit and accordingly, this Honourable Court should allow the Application with costs to the Ex Parte Applicant for the reasons stated herein above and the entirety of the contents of the Supporting Affidavit sworn on 19th February, 2016.

SUBMISSIONS

15. Both parties' advocates filed written submissions which they adopted and urged the court to consider and reach a decision. They also filed authorities.

THE EXPARTE APPLICANT'S SUBMISSIONS

16. The exparte applicant submitted that the Courts have inherent jurisdiction by virtue of Section 3A of

the Civil Procedure Act, Sections 4 and 7 of the Fair Administrative Action Act, Order 53 of the Civil Procedure Rules to review the exercise of powers granted to the Public Officers (what can be described as having a public element), where the exercise of those powers so granted impinges upon recognised interests. This jurisdiction is exercised on the broad basis that statutory powers must be exercised strictly within the provisions of the law.

17. That at law, the Respondent's officials are Public Officers whose powers are contemplated to being amenable to Judicial Review. Their offices are established and vested with powers under the Constitution of Kenya and the Physical Planning Act. That the failure by the Respondents to adhere to the provisions of the empowering statutes and the rules made there under is a matter directly amenable to the jurisdiction of the Court in Judicial Review. The applicant referred the court to Section 3 of the Interpretation and General Provisions Act (Cap 2, Laws of Kenya) for definition of a Public Officer.

18. Accordingly, it was submitted that Judicial Review may lie against the Respondent and indeed, a *prima facie* case for bringing the Respondents within the ambits of Judicial Review has already been made on this matter to the extent that on 28th April, 2016, the Ex Parte Applicant sought and obtained leave to commence Judicial Review proceedings.

19. It was further submitted that the Ex Parte Applicant has the locus to bring these proceedings on account of being the entity directly adversely affected by the impugned omission.

20. On the Respondent's contention that neither has a complaint ever been lodged with the Liaison Committee as per the provisions of the Physical Planning Act (Cap. 256 Laws of Kenya) nor demolition Orders sought by the Ex Parte Applicant from the Environment and Land Court and therefore that the Orders sought in the Application are not appropriate remedies, it was submitted by the exparte applicant that Judicial Review is essentially a mechanism to be used where there is no other remedy available. In this particular instance, the provisions of the Physical Planning Act (No. 6 of 1996, Laws of Kenya) only deal with approvals for planning and decisions emanating there from. That the said provisions do not provide remedies to omissions by the Respondent, such as refusing and/or neglecting to demolish illegal structures in line with its statutory mandate. **Sections 7 and 4 of the Fair Administrative actions Act and Sections 29 and 30 of the Physical Planning Act** were referred to.

21. It was submitted that Judicial Review Orders are intended to correct a wrong or illegal performance or non-performance of the inferior tribunals or bodies or persons who could be judicial and quasi-judicial but now include administrative bodies or persons. Further, that properly used, these order are intended to bring out faster but more effective results. Reliance was placed on **R vs. Disciplinary Committee, Law Society of Kenya Ex parte Wanja G. Wambugu t/a W.G. Wambugu and Company Advocates[2013]**.

22. It was further submitted that Mandamus is intended to compel performance of statutory or public duties in cases of omission to the detriment of an aggrieved party. That the Respondent's noncompliance with the Ex-Parte applicant's numerous requests and demands are in contravention of its public duty to demolish the afore-said illegal structures and evict its occupants.

23. That in issuing the Enforcement Notices to the ex parte Applicant, the Respondent acknowledges the existence and/or continued breach of law by persons it alleges to be 3rd parties. That therefore the Respondent has a duty to comply with its own Notices. It was submitted that as a result of the Respondent's failure, the Ex-Parte Applicant has been unable to access the Property to occupy and develop the same.

24. On the grounds for the reliefs sought, it was submitted that the respondent was guilty of procedural impropriety. It was submitted by the applicant that the Respondents in its failure to comply with the requests of the Ex Parte applicant did so illegally, brazenly improperly and manifestly *ultra vires* the provisions of the **Physical Planning Act (No 6 of 1996, Laws of Kenya)**.

25. It was submitted that on 31st July, 2009, the Ex Parte Applicant wrote a letter to the Respondent to

the effect that there was invasion on the Property and the said invaders had begun construction without the Ex Parte Applicant's consent. The same letter requested the Respondents to halt the said construction and, demolish the work already done and evict the invaders, as shown by annexure **"WN-2" copies of the letter dated 31st July, 2015 at page 5.**

26. that following the numerous oral and written requests and demands by the Ex parte Applicant citing the contravention of its public duty demolish the afore-said illegal structures and evict its occupants, the Respondent has completely failed, refused and/or neglected to do so despite the numerous reminders from the Ex parte applicant over the past seven (7) years and the Respondent's promises to effect the same, as per annexure **"WN-4" copies of photographs of the alleged illegal structures on the Property at pages 10 to 18.**

27. Ultimately, it was submitted that the Respondent has only acted in so far as issuing an enforcement notice dated 26th March 2013 and 23rd October, 2014 to the effect that the construction of illegal permanent structures without its prior approval occasioning illegal subdivision of the same contrary to the Physical Planning Act be stopped, demolished, proof of ownership be produced and with fair warning as to the said structures being demolished. However, that pursuant to the said letter, the Respondent has failed to act or carry out any orders as indicated in the aforementioned letters to date, as shown by annexure **"WN-2" copies of the said letters dated 26th March, 2013 and 23rd October, 2014 at pages 6 and 7 respectively.**

28. It was submitted that the Ex Parte Applicant relied on the described steps to be undertaken by the Respondent in its enforcement notice that the illegal structures and illegal occupants on the Property would be, on the own motion of the Respondent, demolished and removed from the premises if they did not do so themselves.

29. That the Respondent has, contrary to the Ex Parte Applicant's **legitimate expectations**, completely failed refused, and/or neglected to demolish the said illegal structures on the property, erected without the Respondent's approval, and evict its illegal occupants despite several reminders from the Applicant over the past seven (7) years and the Respondent's promises to effect the same.

30. It was further submitted that the Respondent's omissions, which infringe upon the Ex Parte Applicant's rights have rendered the Ex Parte Applicant's operations particularly expensive and redundant. This is especially in light of the investment the Ex Parte Applicant made in the purchase of the property and the opportunity cost it continues to suffer on account of lack of access to and use of its property by virtue of the illegal structures.

31. The exparte applicant's counsel further submitted that the Ex Parte Applicant has performed certain obligations in compliance with the provisions of the Physical Planning Act; which obligations include, but are not limited to, the payment of land rates. That to date, the Ex Parte Applicant has diligently performed the said obligations as the duly registered owner of the property and has diligently executed its obligations with respect to the property as evidenced by the Lease and Land Rates receipts annexed to the affidavits filed herein **WN-1"and "WN-3" being copies of the Lease in respect to the Property and the current Land rates receipts respectively.**

32. It was submitted that the Ex Parte Applicants repeatedly alerted the Respondents via verbal discussions and correspondence of the presence of illegal structures on the property erected by unknown persons. Consequently, that it is within the powers of this Court to compel the Respondents to comply with the law and to discharge their respective public duties., and that indeed, the only recourse available to the Ex Parte Applicants is the Application before this Honourable Court to intervene since **no other remedy exists at law** to compel the Respondents to carry out their aforesaid public duty and no other remedy is available for the illegal decision.

33. The foregoing notwithstanding, the exparte applicant submitted that this Honourable Court ought to consider the inordinate delay by the Respondents in acting upon its promise to deliver on the said enforcement notices and thereby allow the Application; and that in any event the manifestation of the

Respondents' bad faith in this regard is highlighted by the fact that to date the said illegal occupants and the illegal structures continue to exist on the Property.

THE RESPONDENT'S SUBMISSIONS

34. On the part of the respondent, written submissions were filed on 14th September, 2016 wherein it was submitted that a mandatory injunction can only be granted in the clearest of case and that in this case, the *exparte* applicant⁵ had not proved that it is the owner of the suit land. That for this court to grant orders of eviction of third parties from the premises there must be proof that indeed the structures in the premises are illegal and put up by trespassers.

35. It was further submitted that the enforcement notices and the title documents do not show how the structures were put up and how the people who built them gained access to the said land.

36. That the mandatory injunction shall affect third parties who have not been made parties to these proceedings and that *viva voce* evidence would be required to prove that they are trespassers.

37. That in any event, this is a land matter where a mandatory injunction can only be gotten from the Environment and land Court since there is no law that mandates the respondent herein to evict trespassers hence the applicants private rights can only be enforced in the normal manner of filing suit for eviction.

38. It was also submitted by the respondent that the proceedings herein are premature as the applicant has not sought the intervention of the Liaison Committee as prescribed under the Physical Planning Act.

39. It was further submitted that the applicant had not even annexed any plans which it wished the court to compel the respondent to approve.

40. According to the respondent, the applicant had not demonstrated that it will suffer any irreparable damage if the orders sought are not granted.

41. The respondent submitted that this is not a fit case for grant of judicial review orders as judicial review is concerned with the decision making process unlike in this case where orders sought require proof of trespass and evidence adduced orally to prove that the third parties who are in occupation of the suit land are there illegally thereby warranting their eviction. That the third parties are not a part of decision making process in the public office hence the respondent cannot be compelled to evict them. Reliance was placed on the cases **of RV DPP and Another JR 102 OF 2016; JR Misc. 460 of 2013 R v Kenya Revenue Authority *exparte* Universal Corporation Limited; JR Misc. 32 OF 2010 Rv Registrar of Titles and Kenya Shell Limited; and R v Judicial Service Commission and PARENO [2004] KLR 203-209** which cases espouse the principles for the grant of judicial review remedies and the scope of judicial review order of mandamus. It was submitted that the applicant herein has not demonstrated that there is a decision made by the respondent which is tainted with illegality, irrationality and procedural impropriety to warrant grant of judicial review orders hence the application herein should be dismissed. Furthermore, that there was no decision capable of being challenged through judicial review proceedings.

DETERMINATION

42. I have considered the foregoing. In my view, and from the pleadings, affidavits and submissions by both parties' advocates, the main issue for determination is whether the court has jurisdiction to hear and determine these judicial review proceedings and secondly whether the *exparte* applicant is entitled to the judicial review orders sought.

43. The *exparte* applicant maintains that it is entitled to the orders sought herein as it is the registered owner of the suit land which is occupied by strangers whom the respondent had refused to evict to allow the applicant to develop its land, despite the respondent issuing enforcement notices to the said trespassers, which it has not followed up to ensure compliance. Further, that the respondent has refused to

approve its plan for erection of a perimeter wall around the said land.

44. The respondent contended that the prayers sought are not available to the exparte applicant because there is an alternative remedy for the applicant that of filing an appeal with the Liaison Committee established under the Physical Planning Act, Cap 286 Laws of Kenya. Further, that the Judicial Review court is a special court with specific/special powers and it is only available to deserving cases and that the orders sought by the exparte applicant's do not fall within the purview of the specific/special powers of the Judicial Review Court.

45. It is trite law that Judicial Review Court is not an appellate court Judicial Review remedies are only available to a party who has no other avenue of redress or where the other available remedies are not efficacious.

46. Article 165(6) of the Constitution provides that:

“ The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.”

47. In **Michael Mungai V Attorney General & 9 Others[2015] e KLR** the learned **Odunga J** observed as follows, regarding the nature of Judicial Review orders, and I agree.

“.....A party in my view ought not to invoke public law proceedings in order to enforce reliefs which ought to be enforced by way of private law proceedings such as execution proceedings such as execution proceedings under order 22 of the Civil Procedure Rules save in circumstances under which a relief by way of mandamus is the only available remedy. Judicial Review, it has been said time and again is a relief of last resort and ought not to be treated as an alternative mode of redress to remedies available under the Civil Procedure Act or process.”

48. It is also now settled law that where the Constitution or any law provides a procedure for settlement of disputes, that procedure shall be followed before resort to the High Court or any other procedure provided by law. That, in essence, is the effect of Articles 50(1) and 159(2) of the Constitution which provides that:

“ 50 (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent or impartial tribunal or body.”

49. Under Article 159(2) of the Constitution, the courts and tribunals in exercising judicial authority which is derived from the people of Kenya, shall be guided by the following principles:

a) *Justice shall be done to all, irrespective of status:*

b) *Justice shall not be delayed;*

c) *Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause*

d) *Justice shall be administered without undue regard to procedure technicalities and*

e) *The purpose and principles of this Constitution shall be protected and promoted.*

50. In this case, the exparte applicant claims that it is the registered proprietor and absolute owner of land Reference No. 209/9613 (Grant Number I.R. 44980 and that it has diligently executed its obligations with respect to the Property such as the payment of land rates to the Respondent and that despite repeatedly

alerting the Respondent of the presence of illegal structures on the Property which have been erected by unknown persons, the Respondent has completely failed, **refused and/or neglected to demolish the said illegal structures on the Property and evict its illegal occupants despite several reminders from** the Ex Parte Applicant over the past seven (7) years despite the Respondent's promises to effect the same.

51. It is alleged by the ex parte applicant that the Respondent's omissions are in breach of its statutory duties under Sections 29 and 30 of the Physical Planning Act and Sections 4 and 7 of the Fair Administrative Action Act.

52. In addition, it is averred that that the Respondent has not complied with the Ex Parte Applicant's numerous requests and demands in contravention of its public duty to demolish the aforesaid illegal structures and evict its occupants.

53. It is therefore claimed that by the foregoing omissions, the Respondent has acted in a manner that is unfair, oppressive, unreasonable and prejudicial to the Ex Parte Applicant, in breach of the provisions of Article 47 of the Constitution, the provisions of the Fair Administrative Action Act and against the Ex Parte Applicant's legitimate expectation that it would be treated fairly and reasonably in accordance with the law.

54. Further, that the Ex Parte Applicant is increasingly apprehensive that unless the prayers sought are granted, the Ex Parte Applicant will continue to be adversely affected on account of its lack of access to the Property to occupy and develop the same.

55. Annexure WN1 is a copy of title document issued to the ex parte applicant for the subject land reference and in the absence of any other evidence to the contrary, prima facie, the ex parte applicant has demonstrated that it owns the title property. had there been the issue of ownership thereof, this court would *suo motu* in the first instance decline jurisdiction as Article 162(2) (b) of the Constitution and Section 13(1) of the Environment and Land Court Act confers on the Environment and Land Court to hear and determine disputes relating to environment, title to occupation and ownership of land.

56. However, the main orders sought by the ex parte applicant against the respondent are mandamus compelling the City County of Nairobi to ***demolish the illegal structures erected on the land situate on Land situate on LR No. 209/9613(Grant Number I.R 44980) And to approve the ex parte applicant's building plans for the construction of a perimeter wall on the said land and supervise the unhindered construction of the said perimeter wall.***

57. Commencing with the second prayer of mandamus, the court notes that annexure **WN1** attached to the supplementary affidavit is a letter of approval of the erection of a boundary wall by the ex parte applicant which approval was granted on 17/05/2013 by the respondent's City Planning Department. The construction was however subject to certain conditions among others:

a) Submission of satisfactory structural details including lintols; and trusses;

b) submission of certificate as to workmanship;

c) satisfactory ground soakage septic tank installation at owner's risk;

58. From the grounds and the depositions and annexures, there is no evidence that the applicant complied with all the requirements stipulated in the approval above. The building plan itself is not even annexed to the application herein. The respondent having approved the building subject to the set conditions, the applicant must show that despite compliance with all the set conditions, the respondent had refused to allow it to commence construction of the perimeter wall as per the building plan in order for this court to find that the applicant is entitled to the order of mandamus to compel performances of that specific statutory public duty. in the absence of such evidence, the view of this court is that the second prayer for mandamus is a nonstarter and unavailable to the ex parte applicant as there is no evidence that the respondent has unreasonably withheld the approval of the building plan for the construction of the

perimeter wall around the said land reference number/property.

59. In addition, the court notes that the complaint that the respondent has refused to approve the building plans is not properly before this court. Section 7 of the Physical planning Act Cap 286 Laws of Kenya establishes Liaison Committees. The functions of the liaison Committees for each Local Authority-read County Government are stipulated under section 9 of the Act as follows:

“9 (2) the functions of other liaison committees shall be—

a) to inquire into and determine complaints made against the Director in the exercise of his functions under this Act or local authorities in the exercise of his functions under this Act or local authorities in the exercise of their functions under this Act;

b) to enquire into and determine conflicting claims made in respect of applications for development permission;

c) to determine development applications for change of user or subdivision of land which may have significant impact on contiguous land or be in breach of any condition registered against a title deed in respect of such land;

d) to determine development applications relating to industrial location, dumping sites or sewerage treatment which may have injurious impact on the environment as well as applications in respect of land adjoining or within a reasonable vicinity of safeguarding areas; and

e) to hear appeals lodged by persons aggrieved by decisions made by the Director or local authorities under this Act.

60. Thus, the Act provides for a forum for ventilation of grievances where there is a complaint regarding refusal of approval of development plan. In this case, the applicant complains that its development plan was not approved to enable it develop the land. The Act provides for an internal appeal mechanism and that venue is to appeal to the Liaison Committee in the manner contemplated in section 13 of the Act which stipulates:

13. 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.

61. An appeal from the Liaison Committee lies to the National Liaison Committee whose functions are as stipulated in section 10 of the Act. Further, appeals from the National Liaison Committee lies to the High Court as stipulated in section 15 of the Act. The provision is as follows:

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.

62. In **Samson Chembe Vuko V Nelson Kilumo & 2 others [2016] eKLR** the Court of Appeal, citing other decisions with approval, among them: **Speaker of the National Assembly Vs Karume [2008] 1 KLR 425** where the Court of Appeal held, inter alia:

“.....where there is a clear procedure for the redress of any particular grievances prescribed by the Constitution or the Act of Parliament, that procedure should be strictly followed.”

63. In **Mutanga Tea & Coffee Company Ltd vs Shikara Limited & Another [2015] e KLR** the Court of Appeal reiterated the foregoing as follows:

“.....where there is a clear procedure for the redress of any particular grievances prescribed by the Constitution or the Act of Parliament, that procedure should be followed.... And further held as follows.....

“.....this court has in the past emphasized the need for aggrieved parties to strictly follow any procedures that are specifically prescribed for resolution of particular disputes (Speaker of the National Assembly V Karume (supra) was a 5(2) (b) applicant for stay of execution of an order of the High Court issued in Judicial Review proceedings rather than in a petition as required by the Constitution.” In granting the order, the court made the often quoted statement :“ where there is a clear procedure for the redress of any particular grievances prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.(See also Kones v Republic & Another ex parte Kimani Wanyoike & 4 Others[2008] e KLR (ER) 296. It is readily apparent that in the above cited cases the court was speaking on issues of the correct procedure rather than of the correct forum for resolution of a dispute. However, we entertain no doubt in our minds that the reasoning of the court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by the Constitution or a statute, to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court.

The basis for that view is first, that Article 159 (2) (e) of the Constitution has expressly recognized alternative forms of alternatives forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The use of the word “including” leaves no doubt that Article 159(2)(c) is not a closed catalogue. To the extent that the Constitution requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the High Court would not be promoting, but rather, undermining a clear constitutional objective. A holistic and purposive reaching of the Constitution would therefore entail construing the unlimited original jurisdiction conferred on the High Court by Article 165(3) (a) of the Constitution in a way that will accommodate the alternative dispute resolution mechanisms. Secondly, such alternative dispute resolution mechanisms normally have an advantage of ensuring that the issues in dispute are heard and determined by experts in the area; and that the dispute is resolved much more expeditiously and in a more cost effective manner.....

.....We are therefore satisfied that the learned judge did not err by striking out the appellant's suit and application which sought to invoke the original jurisdiction of the High Court in circumstances whereas the relevant statutes prescribed alternative dispute resolution mechanisms and afforded the appellant the right to access the High Court by way of an appeal, which mechanisms he had refused to invoke. To hold otherwise would, in the circumstances of this appeal, be to defeat the constitutional objective behind Article 159(2) (c) and the very raison d'être of the mechanisms provided under the two Acts....."

a. In addition under Section 9(2) of the Fair Administrative Action Act No. 4 of 2015, ***(1) the High Court or a subordinate court under Subsection (1) is expressly prohibited from and "shall not" review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.***

(3) The High court or a subordinate court shall, if it is not satisfied that the remedies referred to in Subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under Subsection (1)

(4) Notwithstanding Subsection (3) the High Court or subordinate court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice...."[emphasis added].

64. From the above provisions of the law and decided cases, it is clear that even the Fair Administrative Action Act which the exparte applicant in this case claims has been violated mandates an applicant to show that they have exhausted the alternative remedies available under any other written law or avenue before resorting to court by way of judicial review. However, the onus is on the applicant to demonstrate to the court that there exist exceptional circumstances to warrant his or her exemption from resorting to the available remedies; and on application for such exemption.

65. In this case, no doubt, the applicant had an avenue for ventilating its grievances where the respondent refuses to approve the building plans. There is no evidence that the applicant lodged any such complaint or appeal to the Liaison Committee, the National Liaison Committee and or to the High Court. The Physical Planning Act provides elaborate mechanisms for resolution of disputes relating to approval of development plans and therefore no party is permitted to bypass those mechanisms and jump into a judicial review Court to obtain orders which are discretionary.

66. In **Joseph Njuguna Mwaura & Others vs. Republic Criminal Appeal No. 5 of 2008** it was held:

"It is incumbent upon any court intending to render an opinion or determine a matter to first ascertain the entry point to the doors of justice, and that is jurisdiction. The authority of the court is determined by the existence or the lack of jurisdiction to hear and determine disputes. In essence, jurisdiction is the first hurdle that a court will cross before it embarks on its decision making function. In our understanding, courts have no jurisdiction in matters over which other arms of government have been vested with jurisdiction to act."

67. Further in **Alice Mweru Ngai vs. Kenya Power & Lighting Co. Ltd [2015] eKLR Olao, J** held and I concur that:

"Where the law has granted jurisdiction to other organs of Government to handle specific grievances, the Courts must respect and up-hold the law... In view of the clear legal provisions cited above and which stipulate the forum that ought to deal with a dispute of this nature and which forum the plaintiff has not approached as a first point of call, it would be an unwarranted intrusion into the jurisdiction of another organ if this Court were to purport to handle this dispute. It is in the interest of the proper, orderly and efficient administration of justice that proper procedures provided for in the hierarchy of dispute resolution be followed and that the

organs mandated to arbitrate over such disputes be respected and allowed to perform their Statutory responsibilities. That is why those procedures were formulated and such organs established. It is clear from the above that the Preliminary Objection on this Court's lack of jurisdiction to hear this dispute is well taken."

68. In **Republic vs. National Environment Management Authority [2011] eKLR**, it was held that where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted. The Court of Appeal had this to say at page 15 and 16 of its judgment:

"The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal process, it is only in exceptional circumstances that an order for judicial review would be granted, and that 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. – see for example R v BIRMINGHAM CITY COUNCIL, ex parte FERRERO LTD case. The Learned judge, in our respectful view, considered these strictures and come to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute with respect we agree with the judge."

69. In other words, there is now a surplus of authorities from the High Court as well as the Court of Appeal that where a statute has provided a remedy to a party, this Court must exercise restraint and first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided in the relevant statute. This principle was well articulated by the Court of Appeal in **Speaker of National Assembly vs. Njenga Karume (supra)**.

70. In **Re Preston [1985] AC 835 at 825D Lord Scarman** was of the view that a remedy by judicial review should not be made available where an alternative remedy existed and should only be made as a last resort. I therefore associate myself with the position adopted by Emukule, J (as he then was) in **Revital Healthcare (Epz) Limited & another v Ministry of Health & 5 others [2015] eKLR at paragraph 10** where the learned Judge cited with approval the case of **Damian Belfonte v The Attorney General of Trinidad and Tobago C.A 84 of 2004** in which it was held -

"...where there is a parallel remedy, Constitutional relief should not be sought unless the circumstances of which the complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature, which, at least arguably indicates that the means of least redress otherwise available would not be adequate. To seek constitutional relief in the absence of such feature would be a misuse, an abuse of the Court's process."

71. Accordingly, where there is an alternative remedy provided by an Act of Parliament which remedy is effective and applicable to the dispute before the Court, the Court ought to ensure that that dispute is resolved in accordance with the relevant statute. In that case therefore, I agree with the decision in **Pasmore vs. Oswaldtwistle Urban District Council [1988] A C 887** that where an obligation is created by statute and a specific remedy is given by that statute, the person seeking the remedy is deprived of any other means of enforcement.

72. I further concur with the holding by Majanja J in **Dickson Mukweluine vs. Attorney General & 4 Others Nairobi High Court Petition No. 390 of 2012** that alternative dispute resolution processes are complementary to the judicial process and by virtue of Article 159(2)(c) of the Constitution of Kenya, 2010, the Court is obligated to promote these modes of alternative dispute resolution; and that it is not inconsistent with Articles 22 and 23 to insist that statutory processes be followed particularly where such processes are for the specific purpose of realising, promoting and protecting certain rights. Accordingly the Court is entitled to either stay the proceedings until such a time as the alternative remedy has been

pursued or bring an end to the proceedings before the Court and leave the parties to pursue the alternative remedy.

73. In **Narok County Council vs. Trans Mara County Council & Another Civil Appeal No. 25 of 2000**, the Court of Appeal expressed itself as follows:

“Although section 60 of the Constitution gives the High Court unlimited jurisdiction, it cannot be understood to mean that it can be used to clothe the High Court with jurisdiction to deal with matters which a statute has directed should be done by a minister as part of his statutory duty; it is otherwise where the statute is silent on what is to be done in the event of a disagreement...Where the statute provides that in case of a dispute the Minister is to give direction, the jurisdiction of the Court can be invoked only if the Minister refuses to give a direction or in purporting to do so, arrives at a decision which is grossly unfair or perverse. In the latter, his decision can be challenged by an application to the High Court for a writ of certiorari because under the relevant section the decision is to be made on a fair basis. But if the Minister simply refuses to discharge his statutory duty, his refusal can also be challenged in the High Court by way of mandamus to compel the Minister to perform his statutory duty but not by way of a suit... If the Court acts without jurisdiction, the proceedings are a nullity... The extent of the jurisdiction of the High Court may not only, be that which is conferred or limited by the constitution but also, that which the constitution or any other law, may by express provisions or by necessary implication, so confer or limit...The jurisdiction of the High Court can be ousted by an Act of Parliament and in such cases all that the High Court can do is to enforce by judicial review proceedings, the implementation of the provisions of the Act; certainly not, to usurp the powers of the Minister... Even though resort to the judicial review process, may in appropriate cases not be a bar to other proceedings such as a plaint, this may not apply in peculiar circumstances such as this one, so as to entitle the Judge to do not only what he was not requested to do, but also, to do what he had no jurisdiction to embark upon...Where the law provides for procedure to be followed, the parties are bound to follow the procedure provided by the law before the parties can resort to a Court of law as the Court would have no jurisdiction to entertain the dispute”.

74. In the result I am of the view and I hold that the Court’s jurisdiction under Article 165 of the Constitution can be limited and/or restricted by an Act of Parliament and therefore this court’s jurisdiction to hear and determine these proceedings as regards the approval of development plan of the exparte applicant’s land is concerned is improperly before this court and must be dismissed.

75. On whether the first prayer for mandamus which seeks that this court compels the respondent to demolish illegal structures erected on the said property and evict its illegal occupants, the respondent's opposition is hinged on the fact that the prayer is not available because the applicant is seeking orders which require that the court determines the legality of the occupation of the suit land by third parties who are not parties to this case. I agree.

76. For this court to grant the prayer No. 1 hereinabove it must first determine whether the alleged occupation of the plot by the third parties who are sought to be evicted is illegal and secondly, whether it is the respondent that has authorized the said alleged illegal occupants to occupy the applicants' land.

77. This being a court exercising judicial review jurisdiction, it cannot determine the legality of the occupation of the applicant's land by trespassers and neither can it compel eviction of third parties who are not parties to this case from the suit property.

78. Jurisdiction is everything without which this court will be acting in vain. Article 162(2)(b) of the Constitution and section 13(1) of the Environment and Land Court Act is clear that the court that has jurisdiction to determine disputes relating to environment, occupation of or title to land is the Environment and Land Court. The Mandamus order sought herein is no doubt a mandatory injunction being sought by the applicant against the respondent to evict third parties/ alleged trespassers. This court cannot issue orders which will affect parties who are not parties to these proceedings. in addition, this

court has no jurisdiction to issue eviction order from land as that is jurisdiction vested in the Environment and land court and more so, Article 165(5) of the Constitution expressly prohibits the High Court from hearing and determining disputes reserved for the courts contemplated in Article 162(2) of the Constitution and for the exclusive jurisdiction of the Supreme Court under the Constitution.

79. This is not an appellate court. It exercises supervisory jurisdiction over subordinate courts, tribunals, bodies or authorities exercising judicial or quasi-judicial authority. It is not a court of original jurisdiction in disputes relating to the environment and the use and occupation of, and title to land.

80. Indeed, the issue raised in this application is the illegal occupancy of the applicant's land by alleged trespassers who have made it impossible for the exparte applicant to develop his plot. What the applicant should have done, is to seek for a mandatory injunction before the Environment and Land Court to have the trespassers vacate the property or in default they be evicted there from and for the ELC to issue such orders, it will have to hear evidence on whether the third parties' occupancy of the suit property is illegal. That would no doubt be the most effective remedy available to the exparte applicant in the circumstances of this case otherwise seeking judicial review through the High Court in a purely civil matter where it is alleged that some third parties have trespassed on the exparte applicant's land is urging this court to exercise jurisdiction which it is expressly prohibited by the Constitution itself (see Articles 162(2) and 165(5)).

81. In **Owners of the Motor Vessel "Lilian S" v. Caltex Oil (Kenya) Limited [1989] KLR 1** Nyarangi, JA cited with approval Words and Phrases Legally defined – Vol. 3:1 page 113 as follows:

“By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”....

82. The learned Judge had earlier expressed himself thus:-

“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”.

83. In **Owners and Masters of The Motor Vessel "Joey" v Owners and Masters of The Motor Tugs "Barbara" and "Steve B" [2008] 1 EA 367**, the Court of Appeal expressed itself as follows:

“The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and 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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once

raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado.”

84. Similarly the Supreme Court in **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others** [2012] eKLR, expressed itself as follows:

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.

85. The Court of Appeal in **J.E. Kamau & another (Suing as officers of Tena Residents Associates) v Job** [2016] eKLR the Court of Appeal citing with approval the **Samuel Kamau Macharia**(supra) case where the Supreme Court stated:

“This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application No. 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

86. In this is a case, it is clear to me that the applicant herein had no prima facie arguable case though it was granted leave to institute these judicial review proceedings.

87. This court on the whole finds that the judicial review proceedings herein are incompetent. The Court is devoid of jurisdiction to hear and determine the proceedings as filed and moreso, there is no merit in the prayers sought in the sense that the applicant does not require orders of this court compelling the respondent to evict illegal squatters from the applicant’s property if at the end of the day it is shown that they are occupying the property illegally or without colour of right, unless it is demonstrated that the said trespassers had express or implied authority of the respondent to occupy the land; in which case then the respondents would only be enjoined to such proceedings before the Environment and Land Court.

88. The fact that the respondent issued the said third parties with enforcement notices to vacate the property is an indication that the respondents did not authorise the occupation of the suit property by any trespasser.

89. In the end, i find that this is not a proper case where judicial review orders of mandamus would issue. I find the application misplaced and misconceived and proceed to dismiss the notice of motion dated 10th May 2016 with costs to the respondent.

Dated, signed and delivered in open court at Nairobi this 3rd Day of May, 2017.

R. E. ABURILI

JUDGE

In the presence of

Miss Ngonde for the exparte applicant

N/A for Mrs Mogusu for the respondent

CA: Mohamed