



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISC. APPL. NO. 73 OF 2015 (J.R.)

IN THE MATTER OF ARTICLE 47 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF FECHIM INVESTMENTS LIMITED

AND

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW
ORDERS OF CERTIORARI AND PROHIBITION PURSUANT TO ORDER 53 OF THE CIVIL
PROCEDURE RULES, 2010**

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

COUNTY GOVERNMENT OF KIAMBU.....RESPONDENT

EX-PARTE

FECHIM INVESTMENTS LIMITED

JUDGEMENT

Introduction

1. By a Notice of Motion dated 18th March, 2015, the *ex parte* applicant herein, **Fechim Investments Limited** seeks the following orders:

1) That an order of certiorari removing into this honorable court for the purposes of being quashed, the Planning Enforcement Notice issued by the Respondent on 4th February 2015.

2) That an order of prohibition prohibiting the Respondent from stopping the ex-parte Applicant's development of a shopping mall on Ruiru/Ruiru East Block 7/16 situated in Gatongora Ward off the Eastern By Pass Road in Kiambu County.

3) That costs of this application be borne by the Respondent.

Ex Parte Applicant's Case

2. According to the applicant, it is an investment company that deals in real estate among other classes of investments and is in the process of developing a shopping mall on Ruiru/Ruiru East Block 7/16 situated in Gatongoro Ward along the Eastern Bypass in Kiambu County (hereinafter referred to as "the Suit Property"). As part of the regulatory and statutory requirements, it applied for development permissions from the County Government on the 19th July 2012 under the **Physical Planning Act** No. 6 of 1996.

3. The applicant averred that its application was approved and it was issued with an Approval dated 21st August 2012. Acting on the approval, the *ex parte* Applicant sourced for and engaged various consultants and a building contractor and commenced construction of an ultra modern mall that is estimated to cost Kshs. 600 million on completion. In so doing, the applicant contended that it complied with all the conditions appearing on the approval and an official from the Kiambu County Government had been going to the site and approving the construction. The construction started on 3rd November 2014.

4. In the applicant's view, the approval created a legitimate expectation that the Respondent would allow the *ex parte* Applicant an opportunity to construct the mall without interruption hence the *ex parte* Applicant mobilized enormous resources to initiate the construction. However, the Respondent issued a Notice of Stoppage of Construction without giving reasons for the stoppage. The Planning Enforcement Notice seeking for stoppage of construction was couched on the following terms: "*Stop any further construction and submit building plans and evidence of approved Change of User to the Ruiru Sub County*". The reason given for stoppage of the construction was "Construction of Commercial Development without **appropriately approved** building plans and approved Change of User to Ruiru Sub County".

5. It was averred that despite making inquiries as to what the Sub County meant by stating that the building plans were obtained *inappropriately*, there was no response. Instead the Respondent's officers verbally threatened to arrest anyone who proceeds with construction.

6. To the applicant, the Respondent's actions are illegal, unreasonable, in breach of the rules of natural justice and legitimate expectations and call for intervention of the court by way of judicial review. According to it, there was no reason for issuing the Approval and cancelling it whimsically without affording him an opportunity to present a defence to any allegations or purported breach. It was further contended that the said breach was vague and the Respondent's refusal to disclose the exact reason of stoppage was oppressive and must invite judicial sanctions.

7. The applicant therefore sought an order quashing the said Planning Enforcement Notice and prohibiting the Respondent from stopping construction or purporting to impeach the Approval hitherto in place.

Respondent's Case.

8. In response to the application, the respondents filed the following preliminary objections which it argued in opposition to the application:

1) The application dated 18th March 2015 and filed on 19th March 2015 is fatally and incurably defective for want of compliance with mandatory provisions of the Physical Planning Act, Cap 286 Laws of Kenya.

2) This honorable court has no jurisdiction to entertain the application dated 18th March

2015.

9. It was the Respondent's case that during the months of January and February 2015, its officers undertook an audit of the developments in Ruiru area in order to establish whether the same are in compliance with the law and that one of the developments audited was the Applicant's development on the suit property. On scrutiny of the approval documents presented by the Applicant, the Respondent's officers discovered that the documents were fraudulently backdated, stamped, signed and as such, the Applicant did not have any valid approval to carry out any development on the said suit property. Further to the foregoing, it was established the Applicant was undertaking a commercial development on a residential property without obtaining any change of use of land on the same.

10. According to the Respondent, it was at this juncture its officers issued an enforcement notice pursuant to the provisions of section 38 of the **Physical Planning Act** Cap 286 stopping the applicant from any further construction and further requiring the Applicant to re-submit building plans for scrutiny and re-approval. In its view, it is within the Respondent's mandate and powers to issue enforcement notice which is clearly backed up and provided for in law.

11. It was averred that whereas the Applicant alleged to have applied for development permission from the Respondent on 19th July 2012, no document or receipt was attached as evidence of payment to show that the same was indeed applied for at that time. Instead, the Applicant annexed a receipt for payment dated 10th October 2014 which on the face of it is indicated as being for payment of approval fees, change of use of land and other payments. However, there is no application preceding the payment.

12. The Respondent contended that a further scrutiny at the building plans annexed to the Applicant's application, the stamps thereon show that the same were purportedly approved and stamped on 25th September 2013 and 3rd January 2014 respectively, yet it is not clear how the Applicants got the plans to be approved even before paying for the same since the only receipt showing evidence of payment is the one annexed and dated 10th October 2014. It was averred that according to the documents held by the Respondent, there is pending an application for change of user of the suit property land from Residential to commercial which application was made on 30th June 2014. Further to the foregoing, the records held by the Respondent show that the Applicant submitted the application for change of use of land together with a planning brief on the same date, 30th June 2014 and made payment for the approval for change of use of land on the same date and was issued with an official receipt for the same. No approval was however granted by the Respondent to the Applicant for change of use of land of the suit property.

13. It was the Respondent's position that from the documents annexed in support of the ex-parte applicant's application, it is ironical that the Applicant again made another second payment for change of use of land and other approvals on 10th October 2014 which second payment has never been justified or explained in the circumstance from the applicant. To it, it is the procedure that an Applicant who desires to do any development within the County has to get approvals from the Respondent first before commencing any development whatsoever failure of which is a breach of the law and liable to consequences as set out in the law and in considering such applications for change of use of land, the Respondent has to consult with other authorities within the County and National Government. However, after proper consideration and consultations with all the relevant authorities the Respondent may grant an applicant an approval for change of use land subject to the applicant fulfilling certain conditions as set out in the notice of approval in the form P.P.A.2. However, the Applicant has not annexed any notification of approval from the time when the payments were made giving them green light to proceed with construction and development on the suit property, as such, it is clear that the Applicant has no approval to carry out any development. The Respondent asserted that the alleged approval annexed to the Applicant's application and dated 14th October 2014 is not only not in the prescribed form but does not also originate from the Respondent as the same is a forgery.

14. Upon discovery of the existence of fraudulent approvals, the Respondent wrote an internal memo to its departments highlighting the fraudulent approvals and sought concurrence from other departmental heads to refer the matter to the Department of Criminal Investigations for forensic examination of the

approvals. It wrote a letter to the Applicants informing them that the documents in their possession were fraudulently backdated stamped signed and as such were invalid and illegal. Further to that he informed the applicant that the matter had been forwarded for forensic investigation and upon inquiry was informed that the inquiry in respect of the documents forwarded for forensic examination was complete and the police file had been forwarded to the office of the Director of Public Prosecution Thika for further action.

15. In the Respondent's view, the proper procedure mandates the applicant after being granted an approval for change of use in land to submit the building plans for approval before commencing any construction. The Respondent will then issue an applicant with a construction permit as evidence of approval to commence any construction. The construction permit is issued together with an inspection card. However, the Applicant herein has not annexed a construction permit and inspection card which are mandatory documents for any developer carrying out any construction within the County.

16. The Respondent denied that it had sent officers to supervise the development on the applicant's construction site and averred that any officer sent has to sign an inspection book and the inspection card which the applicant ought to have.

17. The Respondent disclosed that the Applicant withheld material evidence to this court by failing to disclose that on receiving the enforcement notice dated 4th February 2015, it adhered to it and submitted documents for re-approval. Further to the foregoing, the Applicant wrote a letter to the Ruiru Sub-county planner of the Respondent admitting that due process was not properly adhered to in obtaining approvals for the project and requested for a special appeal to resume construction in the shortest time possible.

18. The Respondent averred every County Government has the power to prohibit or control the use and development of land and buildings within its jurisdiction and also to consider and approve all development applications and grant all development permissions. In this case, the Applicant acted illegally in obtaining fraudulent approvals which they have admitted not having adhered to following proper procedure hence having committed an illegality is not entitled to the orders sought. To the Respondent, the activities of the Applicant in attempting to construct a building without complying with the Law is to say the least, illegal, selfish, haphazard and a Court of Law cannot aid a party who comes to it with unclean hands. The said construction poses a real danger to the public in whose interest the Respondent acts in. Its decision to issue an enforcement notice stopping any further construction on the suit property was neither unreasonable, unjustified nor against the rules of natural justice but in the interest of the general public and pursuant to the provisions of the **Physical Planning Act**. In its view, the interests of the public as vested in the Respondent override those of the Applicant and the public will be gravely prejudiced if the Applicant is allowed to continue with construction over the suit property in total disregard of the law and without approval for the same. If the orders of certiorari and prohibition sought by the Applicants against the Respondent are granted, the same will amount to a clog or fetter on the Respondent's mandate to control development within its area of jurisdiction and as statutorily conferred upon it. It was therefore the Respondent's case that the Applicant had not made out a case for the grant of the orders sought.

19. In addition the Respondent contended that the Applicant rushed to court without exhausting other remedies open to it once it was issued with an enforcement notice as envisaged by Section 38 of the **Physical Planning Act** Chapter 286 Laws of Kenya.

Determinations

20. I have considered the application, the affidavits both in support of and in opposition to the application and the submissions filed.

21. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at

common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through the taking into account of an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See **Reid vs. Secretary of State for Scotland [1999] 2 AC 512.**

22. In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** it was held that:

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”

23. In **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR** it was 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 and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury’s Laws of England 4th Edition Vol (1)(1) Para 60.***

24. Judicial review, it has been held time and again, is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See *R vs. Secretary of State for Education and Science ex parte Avon County Council* (1991) 1 All ER 282, at P. 285.

25. The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court. See *Chief Constable of the North Wales Police vs. Evans* (1982) 1 WLR 1155.

26. In this case, the Respondent furnished the applicant with the reasons for issuing the enforcement notice. It is not for this Court to decide whether or not the said reasons were merited. On receipt of the said notice, the applicant responded vide a letter dated 19th February, 2015 in which the it resubmitted documents for re-approval. Further to that vide its letter of the same date, the applicant acknowledged that the due process was not properly adhered to in obtaining approvals for its project and regretted the oversight which it apologised for. It therefore made a special appeal to the planner to allow its construction to continue.

27. The decision whether or not to grant judicial review reliefs is an exercise of discretion. As is stated in ***Halsbury’s Laws of England 4th Edn. Vol. 1(1) para 12 page 270:***

“The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)...are all discretionary. *The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court*

will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow ‘contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders.’ [Emphasis added].

28. In this case it is clear that subsequent to the enforcement notice the applicant acknowledged that there were defects in the procedure that led to the issuance of the approval. Whether that acknowledgement was mistaken or not is a matter that cannot be determined in these proceedings.

29. In its further affidavit, the applicant contends that investigations have revealed that the grounds upon which the enforcement notice was issued are untenable. It is not for this Court to delve into that issue. That is an issue which goes to the merit of the impugned decision rather than the process and if the applicant is aggrieved with the same, the ***Physical Planning Act*** provides a machinery for challenging the said decision. Section 38(4) thereof provides:

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

30. In **Republic vs. The Commissioner of Lands Ex parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998** it was held that availability of other remedies can be an important factor in exercising the discretion whether or not to grant the relief. In **The Republic vs. The Rent Restriction Tribunal and Z. N. Shah & S M Shah Ex Parte M M Butt Civil Appeal No. 47 of 1980** the Court of Appeal held that if there is an equally convenient, beneficial and effective remedy available a Court will generally decline to exercise its discretion in favour of an applicant for a prerogative order. The rationale for this position was stated by **Ochieng, J** in **John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003**, in which the learned Judge held that for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate.

31. In **Diana Kethi Kilonzo vs. IEBC and 2 others, Constitutional Petition no. 359 of 2013** it was held that:

“We note that the constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the constitution found it fit that the powers of decision making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for the other authorities.”

32. Having considered the application herein, I find the prayers sought herein unmerited. Firstly, the

applicant's conduct of acknowledging the defects in the process which led to the issuance of the approval disentitles it to the said orders. Secondly, the availability of the alternative remedies which are equally convenient, beneficial and effective is pursuant to section 9(2) of the *Fair Administrative Action Act, 2015*, a barrier to the exercise of this Court's favourable discretion. The said section provides that:

The High Court or a subordinate court under subsection (1) 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.

33. As the applicant has clearly not exhausted the remedies available to it under section 38 of the *Physical Planning Act* this application is also misconceived.

Order

34. In the result the Notice of Motion dated 18th March, 2015 fails and is hereby dismissed with costs.

35. It is so ordered

Dated at Nairobi this day 11th day of March, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Nakhone for Mr Gitonga for the Applicant

Mr Tebino for Mr Kithii for the Respondent

Cc Mutisya