REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 283 OF 2015

IN THE MATTER OF AN APPLICATION BY JOSEPH GICHUHI KARIUKI, NJUGUNA MUGO

(who are the officials of AIC Kamangu) and BENSON MWANGI MUGO AND DANIEL THUO

WANJOHI (who are the officials of AIC Kikuyu District Church) FOR JUDICIAL REVIEW

ORDERS OF CERTIORARI AND MANDAMUS.

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE PHYSICAL PLANNING ACT, CHAPTER 2816 OF THE LAWS OF KENYA

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE COUNTY GOVERNMENT OF KIAMBU.....RESPONDENT

AND

ROBERT KIMANI.....INTERESTED PARTY

EX-PARTE APPLICANTS

JOSEPH GICHUHI KARIUKI, NJUGUNA MUGO (who are the officials of

AIC Kamangu) AND BENSON MWANGI MUGO AND DANIEL THUO

WANJOHI (who are the officials of AIC Kikuyu District Church)

RULING

Introduction

1. By a Notice of Motion dated 22nd September, 2015, the *ex parte* applicants herein, who describe themselves as officials of two churches of the **African Inland Church** (AIC) (hereinafter referred to as the Church") seek the following orders:

> 1. **That this honourable court be pleased to issue an order of certiorari to bring before this honourable court and quash the decision of the Respondent dated 20th August 2015 directing the Respondent to submit the approval**

plan of the Applicant's church building and change or user to the Respondent's sub country offices within seven (7) days.

2. **That this honourable court be pleased to issue an order of mandamus compelling the Respondent to withdraw the purported Planning Enforcement Notice dated 20th August 2015 pending the conclusion of the ELC Appeal Number 38 of 2014 or the issuance of the title documents to the property to the Applicants by the Interested Party, whichever will occur first.**

3. **That the cost of this application be provided for.**

***Ex Parte* Applicant's Case**

2. According to the applicants, by way of the sale agreement dated 25th March 2003 the church purchased from the Interested Party a partition measuring one acre which was to be excised from all that parcel of land known as Karai/Karai/15/18 and it was an express term of the said agreement that the Applicants would construct a church in the premises pending completion of the agreement. Pursuant thereto and in the following months and years and by a series of further agreements, the Applicants completed the sale agreement by paying the full purchase price to the Interested Party though the Interested Party failed to comply with sale agreement by citing one excuse after another.

3. This, it was averred prompted the Church to file civil case number 361 of 2010 at the Senior Principal Magistrates court Kikuyu seeking an order compelling the Interested Party to transfer the agreed one acre to the Church. However, the court in its judgement held that the parties had failed to obtain the requisite Land Control Board consent to transfer the property and therefore dismissed the suit. Aggrieved by the said decision, the Church appealed against the said judgment and the High Court in ELC Appeal Number 38 of 2014 issued temporary injunction restraining the Respondents from *inter-alia* interfering with the Church's quiet possession of the suit property.

4. It was averred that in a new attempt to evict he Applicants from the suit property, the Interested Party wrote to the Respondents requesting the Respondent to demolish the Church on the ground of non-compliance with the ***Physical Planning Act*** Cap 286 (hereinafter referred to as "the Act"). The said notice, it was contended was not served but was pinned on the church door and the applicants only came to learn about it on 31st August, 2015 when one of the Church deacons stumbled upon it.

5. Thereafter the applicant went to the Respondent's physical planner's office where they were advised that the notice was issued at the insistence of the Interested Party. The applicants contended that though they were shown the said letter from the Interested Party's Advocates by Respondent's Physical Planner, the latter refused to give them a copy of the same. Consequently the Respondent on the 20th August 2015 issued the applicants with a seven (7) days Planning Enforcement Notice directing that they submit the plans of the church building and a change of user or they enter the premises.

6. According to the applicants, the Interested Party had on several occasions tried to demolish the church and only stopped when the High Court issued injunctive orders against him on the 12th March, 2015.

7. It was this action that provoked these proceedings by which the applicant state that they have therefore appealed against the said decision. To the applicants the seven days' notice given by the Respondents obtain a change of user and submit plans of the church building, is too short and therefore unreasonable. The applicants further contended that in allowing itself to be prompted by a third party in the name of the Interested Party, the Respondent has allowed itself to be influenced by irrelevant matters in making its decision dated 20th August 2015. In their view, the fact that it is the Interested Party who pushed for the issuance of the Notice against the church is clear manifestation that the decisions of the Respondent is motivated by bad faith and is based on a ulterior motive.

8. To the Church the notice itself is vague on the action the Respondent intends to take in enforcing the same and is therefore unenforceable and liable to abuse.

9. It was the applicant's case that any entry in the church with a view of demolishing the same would violate the Applicants' constitutional right to the freedom of worship, assembly, association and fair administrative action hence the interest of justice tilts in favour of allowing the application as prayed.

Respondent's Case.

10. On the part of the Respondent, it was contended that during the month of August 2015 officers the Respondent's Department of Physical Planning undertook an audit of the developments in Kikuyu area in order to establish whether the same are in compliance with the law. One of the developments audited by the Respondent was the Applicant's development on all that parcel of land known as Karai/Karai/1518 and the officers established that the Applicants had put up a church on an agricultural land hence sought for the requisite building approvals, change of user authorizing them to have the temporary church structure. However the Applicants did not adhere to the notice and hence did not furnish any documentation to confirm that indeed they had the necessary approvals and change of user granting them permission to have the church structure and as such and did not have any valid approval to carry out any development on the said suit property.

11. It was disclosed that it was further established the Applicant was undertaking a church development on an agricultural land without obtaining any change of use of land on the same.

12. According to the Respondent, it was at this juncture that the officers in the said department issued an enforcement notice pursuant to the provisions of section 38 of the Act requiring the Applicants to submit building plans and change of user for scrutiny and approval.

13. To the Respondent, it is within it's mandate and powers to issue enforcement notice which is clearly backed up and provided for in law hence the Applicants allegation that the Respondent issuance of the enforcement notice was prompted by a third party has no basis since the Respondent was merely carrying out its mandate to ensure that structures within its jurisdiction have fully complied with the requirements as set out by statute.

14. To the Respondent, it is a stranger to the dispute between the Applicants and the interested Party arising out of the sale and transfer of the suit property and that the said dispute cannot be used as a hindrance as against the Respondent from discharging its statutory obligations.

15. The Respondent's position was that 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. In considering such applications for change of use of land, the Respondent through the said department has to consult with other authorities within the County and National Government after which 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.

16. It was contended that the proper procedure mandates the Applicants after being granted an approval for change of use in land to submit the building plans for approval before commencing any construction after which the Respondent will issue an applicant with a construction permit as evidence of approval to commence any construction which permit is issued together with an inspection card. In this case, it was averred that the Applicants had not annexed a construction permit and inspection card which are mandatory documents for any developer carrying out any construction within the County and that 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.

17. It was therefore the Respondent's case that the Applicants acted illegally in commencing and putting up a church structure without first obtaining the approvals which they admitted not having adhered to following proper procedure and as such were not entitled to the orders sought. Further, the activities of the Applicants in attempting to construct a building without complying with the law was illegal, selfish, haphazard and a Court of law cannot aid a party who comes to it with unclean hands. In addition, the Respondent's decision to issue an enforcement notice requiring them to submit the plans of the church building and a change of user 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 Act, which public interest as vested in the Respondent override those of the Applicants and the public will be gravely prejudiced if the Applicants are allowed to have the church structure in total disregard of the law and without approval for the same.

18. In the Respondent's view, if the orders of certiorari and mandamus 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.

19. The Respondent therefore took the position that the Applicants had not made out a case for the grant of the orders sought.

20. Further, it was its case that the Applicants rushed to court without exhausting other remedies open to them once they are issued with an enforcement notice as envisaged by Section 38 of the Act.

Interested Party's Case

21. According to the Interested Party, the Applicants herein entered into an agreement with him for the sale of a portion of his parcel of land L.R. Karai/Karai/1581 but due to non completion on their part, he rescinded the sale and asked them to vacate. However, the Applicants sued him at Kikuyu Law Courts in Civil Suit Number 36 of 2010 for specific performance but the suit was dismissed as the transaction was void and illegal for want of Land Control Board's consent.

22. Upon dismissal of the said suit, the semi permanent structure used as a church was demolished and the building materials, to wit, iron sheets were carted away. However, the Applicants filed an appeal in the High Court at Nairobi being Civil Appeal Number ELC 38 of 2014 and obtained a temporary injunction, though in the Interested Party's view, the order did not given them a right to reconstruct the semi permanent structures on his piece of land. Despite this, the Applicants proceeded to construct another semi permanent structure without following the laid down procedure set out in the Act hence they cannot fault the Enforcement Notice issued by the County Government of Kiambu.

23. The Interested Party however denied that he instigated the County Government of Kiambu to issue the said notice although he contended that as a good citizen, he had a civic duty to report any breach of the law. To him, the allegation that he wrote to the County Government is baseless as no letter to that effect has been annexed and amounts to hearsay.

24. It was contended that the Applicants have not come to this Court with clean hands as they did not comply with very clear rules of the law even after having been advised by **Justice Onguto** after delivery of the ruling giving them temporary injunction order, that they needed to comply with the Physical Planning Act before reconstructing.

25. This Court was therefore urged not to countenance a breach of the law by giving the orders sought by the Applicants.

Determinations

26. Having considered the foregoing, it is my view that the plank of the applicants' case is that the respondent had no powers in the circumstances to in effect cancel development approval and issue the enforcement notice.

27. It is important to remember that Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the judge disagrees with what the public body has done, but whether there is some recognisable public law wrong that has been committed. Whereas private law proceedings involve the claimant asserting rights, judicial review represents the claimant invoking supervisory jurisdiction of the Court through proceedings brought nominally by the Republic. See **R vs. Traffic Commissioner for North Western Traffic Area ex parte Brake [1996] COD 248.**

28. The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to to uplift the quality of public decision making, and thereby ensure for the citizen civilised governance, by holding the public authority to the limit defined by the law. Judicial review is therefore an important control, ventilating a host of varied types of problems. The focus of cases may range from matters of grave public concern to those of acute personal interest; from general policy to individualised discretion; from social controversy to commercial self-interest; and anything in between. As a result, judicial review has significantly improved the quality of decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint it is a sufficient tool in causing the body in question to remain accountable.

29. 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.**

30. 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."**

31. 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.***

32. The first issue for determination is whether these proceedings are properly before this Court.

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

> ***(1) When it comes to the notice of a local authority that the development of land has been or is being carried out after the commencement of this Act without the required development permission having been obtained, or that any of the conditions of a development permission granted under this Act has not been complied with, the local authority may serve an enforcement notice on the owner, occupier or developer of the land.***
>
> ***(2) An enforcement notice shall specify the development alleged to have been carried out without development permission, or the conditions of the development permission alleged to have been contravened and such measures as may be required to be taken within the period specified in the notice to restore the land to its original condition before the development took place, or for securing compliance with those conditions, as the case may be, and in particular such enforcement notice may require the demolition or alteration of any building or works or the discontinuance of any use of land or the construction of any building or the carrying out of any other activities.***

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

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

15. In this case, there is no evidence that the applicants ever submitted an application for approval of their development plan. In fact there is no allegation at all that there was such an application made leave alone the same having been considered and allowed. In that event the position clearly falls within the ambit of section 38 aforesaid. The enforcement notice did not require the applicants to obtain the change of user or the approval within 7 days as the applicants would like this Court to believe. It only required the applicants to apply for the same within 7 days. That enforcement notice in my view clear complied with section 38 of the Act and cannot be faulted. It matters not, in my view, whether or nor there was a dispute between the applicant and the interested party. Even if the applicants were the owners of the suit land, they were not thereby precluded from complying with the provisions of the Act.

16. It follows that if the applicants were unhappy with the said notice they were expected to challenge the same by way of an appeal to the liaison Committee as required under section 38(4) above. This, the applicants seem not to have done. Instead they argue that they were not bound to do so since judicial review proceedings are special proceedings which are neither civil nor criminal. Whereas that position is correct, the legal position was made clear by this Court in **Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE** Judicial Review Case No. 441 of 2013 where the Court expressed itself as hereunder:

"…one must not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by Ochieng, J in John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003, 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. Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute. This position was re-affirmed by the Court of Appeal in Speaker of The National Assembly vs. Karume Civil Application No. Nai. 92 of 1992, where it was held that there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."

17. It was similarly held in **Republic vs. National Environment Management Authority [2011] eKLR**, 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.

18. It is now a 'cardinal principle that save in the most exceptional circumstances, the judicial review jurisdiction would not be exercised and the court must not exercise it where there exist alternative remedy or the decision of the court is likely to affect 3rd parties without notice and without affording such parties effective remedy. 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.

34. This position has now acquired statutory underpinning by the enactment of the ***Fair Administrative Action Act***, No. 4 of 2015 under which section 9(2) provides:

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.

35. Subsection (3) thereof provides:

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 sub-section (1).

36. Subsection (4) of the said section however provides:

Notwithstanding subsection (3), the High Court or a 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.

37. It therefore follows that even though judicial review proceedings are special proceedings, such proceedings are not removed from the need to exhaust alternative remedies before invoking the said jurisdiction.

38. I am also mindful of the decision of this Court in **Constitutional Petition Number 359 of 2013 Diana Kethi Kilonzo vs. IEBC and 2 Others** in which 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 other authorities."**

39. It follows that the applicants ought to have exhausted the remedy provided under section 38(4) of the ***Physical Planning Act*** before they could invoke this Court's jurisdiction. No attempt has been made to show that there exist exceptional circumstances in this matter which would justify the invocation of this Court's revisionary jurisdiction. It has not been contended that the remedy available under the said provision is less convenient, beneficial and effectual.

40. It follows that the Notice of Motion dated 22nd September, 2015 is incompetent and is misconceived and the same is struck out with costs.

41. Orders accordingly.

Dated at Nairobi this 5th day of April, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Said for Mr Kenyatta for the Applicant

Cc Mutisya