REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW CASE NO 262 OF 2015

IN THE MATTER OF THE LAND ACT NO. 6 OF 2012 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE LAND REGISTRATION ACT NO. 3 OF 2012 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE REGISTERED LAND ACT CAP 300 OF THE LAWS OF KENYA (REPEALED)

AND

IN THE MATTER OF AN APPLICATION BY DAGORETTI SLAUGHTERHOUSE COMPANY LIMITED FOR LEAVE TO COMMENCE JUDICIAL REVIEW PROCEEDINGS FOR AN ORDER OF CERTIORARI TO REMOVE AND BRING INTO THE HIGH COURT OF KENYA TO QUASH THE DECISION OF THE COUNTY GOVERNMENT OF KIAMBU DELIVERED ON 7TH AUGUST, 2015

AND

IN THE MATTER OF AN APPLICATION BY DAGORETTI SLAUGHTERHOUSE COMPANY LIMITED FOR LEAVE TO COMMENCE JUDICIAL REVIEW PROCEEDINGS FOR AN ORDER OF PROHIBITION AGAINST THE COUNTY GOVERNMENT OF KIAMBU RESTRAINING IT FROM DEMOLISHING ITS BUSINESS PREMISES

BETWEEN

REPUBLIC .....……...APPLICANT

AND

COUNTY GOVERNMENT OF KIAMBU….....…...….RESPONDENT

EXPARTE

DAGORETTI SLAUGHTERHOUSE COMPANY LIMITED

JUDGEMENT

Introduction

1. By a Notice of Motion dated 10th September, 2015, the *ex parte* applicants herein, **Dagoretti Slaughterhouse Company Limited,** seeks the following orders:

> **1. An order of Certiorari removing to bring into this honourable court for the purposes of being quashed.**
>
> > **a. The decision purportedly issued through a letter dated 7th August 2015 (hereinafter referred to as "the letter") by the Respondent that the Applicant's property – DAGORETTI/THOGOTO/1646 (hereinafter referred to as "the property") is on a road reserve.**
> >
> > **b. The decision purportedly issued in the letter by the Respondent that the Applicant's business premises constructed on the property has been illegally put up on the road reserve without the Respondent's authority.**
> >
> > **c. The directed and/or order purportedly issued in the letter requiring the Applicant to remove its business premises by latest 17th August 2015.**
>
> **2. An order of prohibition restraining the Respondent or its agents, servants and/or employees from entering the property to demolish the Applicant's business premises.**
>
> **3. Costs of and incidental to the application be provided for.**
>
> **4. Such further and other reliefs that the honourable court may deem just and expedite to grant.**

Ex Parte Applicant's Case

2. According to the Applicant, it is the registered proprietor of the property known as DAGORETTI/THOGOTO/1646 (hereinafter known as "the suit property"), its title being absolute and freehold from where the *A*pplicant has been operating a cafeteria business for over 5 years now, while the business structure has been in place for over 15 years.

3. According to the Applicant, it has been lawfully operating its business and paying for its business permit for which the Respondent has been renewing annually.

4. However the Respondent served the Applicant with a letter dated 7th August, 2015, whereby it informed the Applicant that its business premises which is built within the property was illegally put up on a road reserve and gave the Applicant 7 days' notice within which to remove its business premises or otherwise risk it being demolished by the Respondent without warning.

5. According to the Applicant, it was unreasonable for the Respondent to turn around and claim that the Applicant's business is illegally constructed on the road reserve after having renewed the Applicant's business permit up till 2014 and as evidenced from the permit the renewal was in respect of Plot No. 1646. In March 2015, the Applicant was directed by the Respondent to pay for the renewal; but was not issued the bill or renewal on account of a case pending before this Court wherein members of the business community within Kikuyu have challenged a purported increase in business permit renewal charges levied by the Respondent through the ***County Finance Act*** 2014-2015.

6. The Applicant disclosed that **Jane Wangari Ndingurin** (hereinafter refereed to as "Wangari") is the Applicant's tenant as the structure belongs to the Applicant who built it over 15 years ago hence the proper person who should have been served with the letter dated 7th August, 2015 is the Applicant. In its view, the only reason the Applicant is a stranger to the Respondent is because it did not care to find out

who the true owner of the structure is. **Wangari** nevertheless informed the Respondent or its agent upon service of the notice that the Applicant was located on the adjacent property but they ignored her.

7. It was the Applicant's case that the Respondent should have conducted due diligence on the structure's owner instead of unilaterally and unreasonably assuming the fact and serving the notice on **Wangari**, who as the Applicant's tenant, usually consults the Applicant whenever there is an issue with the structure or plot within which it is constructed. On this occasion she ran to the Applicant when the Respondent or its agent ignored her plea for them to serve the notice on the Applicant, who was next door.

8. It was contended that the Respondent's impetuous service of the notice denied the Applicant its constitutional right to be heard.

9. The reason for failure to seek approval for its structure, according to the Applicant, was due to the fact that it was constructed entirely using iron sheets and it is a well known fact within Kikuyu Sub-County that the Respondent does not seek for approvals for *mabati* structures. It averred that not only does the ***Physical Planning Act*** apply, the Respondent should be guided by the ***County Governments Act, 2012***. It was further averred that the Respondent's actions directly breach the Objects and Principles of County Planning and Development as espoused in Part XI of the ***County Governments Act, 2012***.

10. It was asserted by the Applicant that the business permit granted to **Wangari** clearly indicated that the structure was within Plot 1646, which belongs to the Applicant and that the exclusion of the plot number from the enforcement notice can only point towards the Respondent's blatant error in assuming that the property is on the road reserve. To the Applicant, the Respondent's assertion was therefore simply preposterous as the Respondent merely ought to have inquired into the ownership of the structure, after which it should have given the Applicant an opportunity to explain any issues that the Respondent wanted resolved.

11. The Applicant contended that **Wangari** was not issued with the single business permit for the year 2014 by mistake, as she had been issued with business permits since 2011 by the then Kikuyu Town Council. Having assumed the functions of the Town Council relating to business premises after the general elections in the year 2013, the Respondent did not issue the permits for 2013 since it was the year of its inception. It was the applicant's case that claiming that the business permit for 2014 was mistakenly issued was ludicrous; especially when the Respondent went ahead and issued Wangari with the permit for the year 2015 after the Applicant lodged the present application.

12. It was contended that the enforcement notice is highly prejudicial and unreasonable as the structure is within the Applicant's property and not on the road reserve. Even if development permission was required for a *mabati* structure, the Applicant contended that the Respondent could have inquired from the Applicant about it and perhaps informed it that that was the reason for the notice. It added that in any event the notice was too unreasonably short for the removal of the structure as **Wangari's** livelihood is staked on it, and the Applicant had rented it to various users for the past 15 years.

13. It was contended that since the status of the liaison committees under the devolved system of government is unclear, the Applicant's safest option to safeguard its interests lie in this Court owing to the nature and duration of the notice. To the Applicant, it is procedurally and manifestly unjust for the Respondent to issue a notice which will allow them to invade the Applicant's property and destroy its legally built structures. The Applicant further contended that the Respondent had further reinforced the Applicant's legitimate expectation by issuing the single business permit for the year 2015.

14. In the Applicant's view, granting the orders sought will ensure that the injustice is not befallen on the Applicant by Respondent's actions and that contrary to the precedent alleged to be set as alleged by the Respondent, dismissing the orders sought will set a bad precedent whereby hardworking business people will be unable to earn a living if the Respondent is allowed to issue such illegal notices and infringe on people's constitutional rights as it intends on doing in the present case. It was averred that the grant of Prohibition is absolutely necessary to prevent the Respondent from illegally invading the Applicant's land.

15. According to the Applicant, the Respondent needs to make its intentions clearer because even if the Applicant were to remove the structure, the purported development of the road will still require going through the Applicant's land and this Court ought to prohibit them from destroying the Applicant's structure to prevent unjust deprivation of property. It asserted that the Applicant ought to be granted the Orders of Certiorari as prayed since they are the proper party and should not be condemned because of the Respondent's improper service of the enforcement notice.

16. The Applicant asserted that this Court's jurisdiction in this matter cannot be ousted by the ***Physical Planning Act*** and that this application is necessary for the Honourable Court to grant the Applicant leave to file the substantive motion which will then be brought in the name of the Republic.

17. To the Applicant, all the plots running from Plot Number 401 to Plot Number 1476, with the exception of Plot Numbers 427 and 428 (which are government leases), are freehold property. The Applicant contended that the Respondent was irrelevantly considering that the Applicant's business is put up on the road reserve, rather than relying on the relevant consideration that it is in fact within the Applicant's property hence the decision was unreasonable for this blatant error by the Respondent.

18. To the Applicant, he legitimately expected that it would not be unfairly prejudiced by the Respondent as it had been lawfully operating the business within the property. In the Applicant's view, the contents of the letter served by the Respondent on the Applicant were tantamount to illegal acquisition of the Applicant's lawfully acquired property and the illegal trespass and destruction of its business hence the Applicant was left with no alternative but to approach this Honourable Court to seek its intervention.

19. It was its case that it was in the interest of justice that the Applicant be granted the Orders for Certiorari and Prohibition as prayed in the Application.

Respondent's Case.

20. In response to the application, the respondent admitted that it was by letter dated 7th August 2015 attached to the Applicant's verifying affidavit, the Respondent, through its Kikuyu sub-county served an enforcement notice on one **Jane Wangari Ndinguri** to remove an illegal structure (a kiosk constructed on the road reserve). The Respondent contended that the owner of the structure (kiosk) and who was actually served was **Jane Wangari Ndinguri** and confirmed that it did not serve any notice on the Applicant, who is a stranger to it and has no basis for instituting this suit.

21. According to the Respondent, it was unaware that the Applicant had been operating a cafeteria for 5 years and or that there has been a structure of building on the suit property. The Respondent contended that the Applicant had not made any application with the Respondent for approval of any development on the property and had not been issued any business permit by the Respondent.

22. It was asserted by the Respondent that the provisions of the ***Physical Planning Act*** applies to the Applicant's property and under the Act there is no person who is permitted to carry out development within the area of a local authority without development permission granted by the local authority. To the Respondent, under the Schedule to the Act, applications for development permissions as a mandatory requirement must be accompanied by plans and drawings to ensure among others that the development is within the boundaries and beacons of the property to be developed. Without an application for development permission and its approval, there is nothing to show that **Wangari's** kiosk, the subject of the enforcement notice is on the Applicant's property. The Applicant contended that the mere fact that the single business permit bill issued to **Jane Wangari Ndinguri** has on it Plot No. 1646, does mean it is on the Applicant's property since the enforcement notice has no plot number and so is the single business permit for the year 2014.

23. It was contended that **Jane Wangari Ndinguri**, who is not a party in this suit was by mistake issued a single business permit for the year 2014 to carry on the business of a soup kiosk, and not a cafeteria and that the Respondent has since established the kiosk is on a road reserve and that is the reason for the service of the enforcement notice.

24. The Respondent's position was that the Respondent issued the enforcement notice within the provisions of the Act having come to its notice that the kiosk and or building was on a road reserve and there was no development permission granted to hear on any other person. To it, if the said **Jane Wangari Ndinguri** or the Applicant was aggrieved by the enforcement notice, the correct procedure would be to file an appeal to the relevant liaison committee, to the national liaison committee and it is only upon exhausting the appeals to the liaison committee that the aggrieved person can appeal to the High court.

25. The Respondent asserted that the enforcement notice was issued lawfully in accordance with the law for control of development in the county and the Respondent did not in any way exceed its jurisdiction. To it, there cannot be any legitimate expectation of the Applicant to be issued with a business permit for a structure or kiosk which is on road reserve or without a development approval as that would amount to condoning, abetting and aiding an illegality.

26. The Respondent averred that granting the orders sought and particularly the prohibition and stay to demolish the illegal kiosk would encourage other people to construct similar structures or developments without the mandatory statutory permission from the Respondent, will set a bad precedent and it will be impossible for the Respondent to control and plan physical developments as by law mandated. To it, the Applicant, not being the party served with the notice cannot be granted the prayers sought of certiorari and that even if the Applicant was aggrieved by the notice, which was not served on itself, the filing of this suit seeking prerogative orders was premature and uncalled for having not exhausted the appeals in the Act and the filing of this suit is incompetent, defective and ought to be struck off.

27. It was averred that the application is wrongly insisted and is defective and ought to be struck out since being an application for prerogative orders it ought to have been instituted in the name of the Crown or the Republic as the Applicant with the Applicant being an ex-parte Applicant.

Determinations

28. I have considered the issues raised by the parties to this application. The applicant case, in summary is that though he the registered proprietor of the suit property, he was not served with the enforcement notice requiring him to remove his property constructed on the suit land and vacate the same. He further contended that even if he had been served, the period of notice of 7 days was too short.

29. 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.**

30. 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 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.

31. Judicial review is therefore 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.**

32. Article 47 of the Constitution provides as follows:

> ***(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***
>
> ***(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.***

33. That the Respondent's action was an administrative one is not in dispute. The Respondent was therefore under a duty to ensure that its action was expeditious, efficient, lawful, reasonable and procedurally fair.

34. Article 47 of the Constitution in my view does not only deal with decision but also encompasses processes of arriving at decisions. As was stated by **Nyamu, J** (as he then was) in **Republic vs. The Commissioner of Lands *Ex parte* Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998*:***

> **"Availability of other remedies is no bar to the granting of the judicial review relief but can however be an important factor in exercising the discretion whether or not to grant the relief...The High Court has the same power as the High Court in England up to 1977 and much more because it has the exceptional heritage of a written Constitution and the doctrines of the common law and equity in so far as they are applicable and the Courts must resist the temptation to try and contain judicial review in a straight jacket...Although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been extended using the principle of proportionality...The court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectations...Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them...Judicial review is a tool of justice, which can be made to serve the needs of a growing society on a case-to-case basis…The court envisions a future growth of judicial review in the human rights arena where it is becoming crystal clear that human rights will evolve and grow with the society."**

35. With respect to procedural fairness, it was held in **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300** that procedural impropriety is one of the grounds upon which a Court would be entitled to grant judicial review orders and according to the court:

> **"Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to**

be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

36. Therefore the respondent is under an obligation to afford a person who stands to be adversely affected by its decision an opportunity of being heard before such a decision is arrived at. In this case, the applicant contends that it is the registered proprietor of land reference Dagoretti/Thogoto/1646 and he has annexed a copy of the title to prove the same. In the single business permit issued to **Jane Wangari Ndinguri**, the plot number is clearly indicated as 1646 and the plot is indicated as located in Dagoretti.

37. While the Respondent contends that the Applicant has no interest in the suit property, there is no attempt to explain on what basis the Respondent issued a permit for plot no. 1646. In other words the Respondent has not satisfactorily rebutted the Applicant's contention that plot 1646 for which the permit was issued is the same as its parcel of land.

38. In the premises I find that the applicant has proved on a balance of probabilities that he has an interest in the suit land. As it is admitted that the Applicant was never served with the enforcement notice, it is clear that in issuing the said notice, the Respondent violated the applicant's right to a hearing hence contravened the rules of natural justice as decreed in Article 47 of the Constitution. By so acting, the Respondent's decision, undoubtedly, affected the interest of the applicant by depriving it of its rights to the enjoyment of a property to which it lay claim. In **Onyango Oloo vs. Attorney General [1986-1989] EA 456** the Court of Appeal expressed itself as follows:

"The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice.....A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...Denial of the right to be heard renders any decision made null and void *ab initio.*"

39. It was however contended that the Applicant ought to have opted for the remedies under the ***Physical Planning Act*** before coming to Court. In **Republic vs. The Commissioner of Lands *Ex parte* Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998,** the Court 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.

40. Where a party has not been heard, to contend that the applicant could appeal the decision of the respondent is to miss the point by a wide margin. It is the body making the adverse decision which is obliged to afford the party to be affected an opportunity of being heard and not the appellate body.

41. 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.***

42. In my view the person upon whom the enforcement notice is to be served depends on the nature of the non-compliance alleged. In cases such as this, where the contention is occupation of a road reserve, the proprietor of the land ought to be served with the notice. To serve the person in occupation who is not the registered proprietor of the land in my view falls short of the spirit of the legislation.

43. In my view, for a person to avail himself or herself of the appellate process under section 38(4) the notice must have been given pursuant to section 38(1) thereof. In this case the notice which was purportedly given alleged that the development was illegal in so far as it was not served on the registered proprietor of the suit land. In my view without a valid notice having been given pursuant to section 38(1) of the Act, the provisions of section 38(4) cannot be said to have been triggered. In other words I am not satisfied that the alternative appellate process was an equally convenient, beneficial and effective remedy.

44. In **Republic vs. National Environment Management Authority [2011] eKLR**, 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."**

45. Having considered the application herein, I find that the respondent acted un-procedurally hence its decision was tainted by procedural impropriety and cannot stand.

Order

46. In the result an order of Certiorari is hereby issued removing into this Court the decision purportedly issued through a letter dated 7th August 2015 by the Respondent that the Applicant's property – DAGORETTI/THOGOTO/1646 and the development made thereto are illegal for being on a road reserve which decision is hereby quashed.

47. Having quashed the said decision it follows that the same cannot be implemented hence there is no need to issue the other orders sought.

48. The Applicant will have the costs of this application to be borne by the Respondent.

49. It is so ordered

Dated at Nairobi this 7th day of June, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Wachanga for Mr Miroro for the Applicant

Miss Oswera for Mr Kiugu for the Respondent

Cc Mutisya