REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUIONAL, JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 20 OF 2015

IN THE MATTER OF: RULES 14 AND 15 OF THE PHYSICAL PLANNING BUILDING AND DEVELOPMENT RULES

AND

IN THE MATTER OF: THE PHYSICAL PLANNING ACT CHAPTER 286 LAWS OF KENYA

AND

IN THE MATTER OF: THE NATIONAL PLANNING AND BUILDING REGULATIONS

AND

IN THE MATTER OF: APPLICATION FOR JUDICIAL REVIEW ORDERS OF MANDAMUS AND PROHIBITION

BETWEEN

REPUBLIC……...……...…..APPLICANT

VERSUS

COUNTY GOVERNMENT OF MOMBASA.……...RESPONDENT

EX PARTE APPLICANTS:

1. FARID MOHAMMED AL-MAARY

2. HIBA ADNAN ALAMMEDIN

3. SURYAKANT M. SAVANI

RULING

1. In their Notice of Motion dated and filed on 12th June, 2015 Farid Mohammed Al-Maary, Hiba Adnan Alammedin and Suryakant M. Savani (collectively the Applicants) sought the following orders -

(a) An order of mandamus to compel the County Government of Mombasa (the Respondent) to remove stalls at the side passage to the wall of the building belonging to the Applicants situate on Land Parcels Numbers Mombasa/Block XX/213, 214, 215, 216, 208 and 2011;

(b) An order of prohibition to prohibit the Respondent from putting up, erecting or allowing to be erected any other building within the meaning of Section 3 of the Physical Planning Act (Cap 286, Laws of Kenya) on the passage at the side of the buildings belonging to the ex-parte Applicants situate on the suit parcels of land;

(c) the ex parte Applicants be awarded costs of and incidental to the application.

2. The Application was supported by the Affidavit of Farid Mohamed Al-Maary Verifying the Facts sworn on 12th June, 2015 and the Amended Statutory Statement dated 12th June, 2015 accompanying the Application.

3. In addition to the Statutory Statement and the Affidavit Verifying the Facts, the Applicants counsel also filed on 22nd April, 2016 written submissions dated 22nd April, 2016 as well as a list of authorities in support of the application.

THE APPLICANTS' CASE

4. The Applicants say that they are the respective owners of the suit properties on which they have respectively erected a building or buildings which are let as shops (the premises). Access to the premises is by a passage way along one side of the premises which is used by both vehicular and pedestrian traffic to loading zones. This access, the Applicants say is an accord with the National Planning and Building Regulations. The Applicants say that contrary to, and in derogation of Rules 14 and 15 of the Physical Planning (Building and Development Control) Rules 1998, the Respondent has erected structures in the form of stalls on the said access way, and that this is detrimental to, and has adversely affected the business operations of the Applicants' tenants, as access to the premises is blocked.

5. The Applicants also plead that the presence of the stalls poses potential danger as blocking the passage would deny access of emergency services such as ambulance and firefighting equipment.

6. The Applicants further say that as owners of the premises, they had legitimate expectation that the access passage would be maintained as required by the rules and that failure to maintain the access passages is breach of the Applicants' legitimate expectation.

7. The Applicants further plead that the erection of the stalls was in error of law and illegal, and that in the interests of justice and good governance, and the circumstances of the application, the orders sought should be granted.

THE RESPONDENT'S CASE

8. The Respondent however opposed the Application, through **firstly**, Grounds of Opposition dated 23rd March, 2016, and filed on 24th March, 2016, **secondly**, the Replying Affidavit of Jimmy Waliaula sworn on 18th September, 2015 and filed on 21st September, 2015, and the Supplementary Replying Affidavit of Jimmy Waliaula sworn and filed on 29th September, 2015, and **thirdly**, the written submissions of counsel for the Respondent dated and filed on 28th April, 2016. In brief the Respondent's case may be summarized into two broad ground –

(1) that the court has no jurisdiction to grant the reliefs sought by the Applicants by virtue of Section 9(2) of the Fair Administrative Action Act, 2015, and

(2) that he Application is incurably defective for want of compliance with the mandatory

provisions of Section 13 and 15 of the Physical Planning Act, (Cap 286, Laws of Kenya) as read with Rule 28 of the Physical Planning (Building and Development Control) Rules, 1998.

9. The other ancillary issue was that the application was an abuse of the process of the court and that it failed to meet the threshold required in judicial review proceedings for being grounded upon the demerits and merit of the Respondent's actions, whereas judicial review is about the decision-making process.

ANALYSIS OF SUBMISSIONS

10. The first issue to deal with in this matter is the question of jurisdiction. In the case of **OWNERS OF THE MOTOR VESSEL "LILLIAN S" VS. CALTEX OIL (KENYA LIMITED) [1989] KLR1**, Nyarangi JA said at page 14 (20-25) –

"…I think 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 without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for 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."

11. The Application herein is grounded upon the provisions of Rules 14 and 15 of the Physical Planning (Building and Development Control) Rules 1998. Those rules provide as follows –

"13. Access to rear of building from street

1. **No person shall erect a building in such a manner as to provide any back-to-back dwelling.**
2. **The expression "back-to-back" dwelling shall include any dwelling the whole of the habitable portion of which is not adequately and efficiently through ventilated by means of ventilating aperture communicating directly with the external walls."**

14. Access to rear of building from street Access of not less than 1.6 (5 ft.) in width should be provided from the street to the rear of the building other than through the building where such access is not provided from a side passage or rear line;

15. Access to dwelling and other buildings

(1) …

(2) …

(3) Where any roadway is laid out and constructed for the purpose of providing access from any building to any road, street or lane it shall be extended from the boundary of the plot to the edge of the carriageway within the road, street or lane and the siting of such access road shall be in accordance with the specifications of the local authority."

12. Though the Respondent's counsel referred to Rule 13 (above), the issue here does not concern back-to-back dwelling. The issue here is about access to a rear of building, and rule 14 requires access of not less than 1.6 (5 ft.) metres in width from the street to the rear of the building, other than through the building itself in particular where such access is not provided from a side passage or rear line.

13. The further issue here is really about alleged reduced access to the Applicants' loading zones or to their tenants. It is not even about the 1.6 metre width of access from the road to the back of the building, and not through the building itself. In such circumstances, the Applicants say that they should have been accorded a right to be heard and they were not, before the stalls were constructed. For this reason, they say their application should be allowed.

14. I note that Rules 13-28 fall under Part II entitled **"Sitings, Amenities Density and Use Zoning Rules"** of the Physical Planning (Building and Development Control) Rules 1998. That means that before the Respondent erected stalls along the access or passage ways, it itself had to comply with the requirements of those rules, and in particular Rule 3 thereof which requires –

> **"any person intending to erect a new building or re-erect an existing building to comply with the provisions of the existing building code local authority by-laws and the physical planning requirements and such conditions as may be imposed by the approving authority regarding the siting, weight, shape and appearance of such building in order to safeguard, maintain or impose the dignity or preserve the amenity and general appearance of street, square, public place or have effect on the complemented appearance of such street, square or public place."**

15. And Rule 6, From Frontage says –

> **"(1) …**
>
> **(2) No building shall, except with the prior written consent of the Director of planning so erected as to have its principal access to or its principal frontage abutting on a service lane, alley or passage."**

16. The proper answer to Rule 28 (appeals), **"any person aggrieved with the decision of the local authority under the foregoing rules may appeal to the respective liaison committee"** is that it does not, with respect, arise in this application. It does not arise because, here is a local authority (now the County Government) which is itself the enforcer of the Physical Planning (Building and Development Control) Rules contravening those very Rules by erecting stalls on what the Applicants have had, they depone, as access passage for over 50 years past. To my mind therefore, the Respondents cannot answer that claim by use of Rule 28 of the said Rules and deny the court legitimate jurisdiction to inquire as to whether they followed the law, the Physical Planning Act itself, and the said Rules. Neither indeed is Section 9(2) of the Fair Administrative Action Act, of any assistance to them. The Liaison Committee (under Rule 28), is not the proper answer. In these circumstances, I would agree with Korir J, in **REPUBLIC VS. CITY OF NAIROBI, ex parte Inder Pal Singh & 2 others [2013] eKLR** –

> **"The availability of an alternative remedy is not a bar to the commencement of judicial review proceedings. Judicial review proceedings are more often than not aimed at correcting defects in the decision-making process whereas as an appeal is directed at the merits of a decision. In my view, the court can only determine whether an appeal was the more efficacious remedy after considering the facts and the circumstances surrounding each particular case."**

17. The claim that this court has no jurisdiction, or that an appeal would have been a more efficacious remedy has no basis at all, and it is hereby rejected.

DETERMINATION OF THE APPLICATION

18. The Applicants have two major grounds for seeking judicial review orders **firstly**, that as owners of the premises, persons concerned were neither consulted nor heard when access to their loading zones or passages thereto were reduced and/or virtually eliminated by the construction of stalls along the passage way. **Secondly**, and put differently, they complain that it was their legitimate expectation that they would be given notice of the intended erection of stalls on access and passage to their tenants shops. Either way they were denied opportunity to be heard. In this regard therefore, I agree with Odunga J in **REPUBLIC VS. NAIROBI CITY COUNTY, ex parte Gurcharn Singh Sihra & 4 others [2014] eKLR** where the learned Judge said –

> **"Where a party has not been heard, to contend that the applicant could appeal the decision of the First 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.

…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 civilized 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 polity to individualized 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.

19. Under both Articles 23(3) (f) (the court may grant an order of judicial review), and 47(1), (the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair), and Section 7(2) of the Fair Administrative Action Act, 2015, judicial review has become a constitutional and statutory supervision of public authorities involving a challenge to the legal validity of decision-making. But it does not allow the court of review to examine the evidence with a view to forming its own opinion about the substantial merits of the case. It may be as stated in the case of **REID VS. SECRETARY OF STATE FOR SCOTLAND [1999] ACZAC 512,** 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 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."**

20. "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 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 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."

21. Indeed as stated in **Re BIVAC SA (Bureau Veritas) [2005] 2EA 43** –

"Judicial review stems from the doctrine of <u>ultra vires</u> and the rules of natural justice and has become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three "I's") and has become the most powerful enforcer of constitutionalism. One of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. It has been said that the growth of judicial review can only be compared to the never-ending categories of negligence after the celebrated case of Donoghue vs. Stephenson in the last century…"

22. I have already made reference to rule 14 (access to rear of building from street), whereas the rule refers to an access of not less than 1.6 metres (5 ft.), in width, be provided from the street to the rear of the building… this is a requirement in respect of proposed development of a plot with a dwelling house or commercial building. That is not the issue at hand. The issue here is the erection of stalls along existing access or passage(s).

23. Erection of stalls or other structures along existing access or passages constitutes planning and

reconstruction of the already existing plan area. Where such replanning and reconstruction is intended or planned for, Section 24 (preparation of local physical development plan) of the Physical Planning Act requires the Director of Physical Planning to include in a local physical development plan any or all of the matters specified in the Second Schedule. A local physical plan means "a plan for the area or part thereof of a city, municipal, town or urban council, and includes a plan with reference to any trading or marketing".

24. In this regard the Second Schedule to the Act sets out matters which are to be dealt with or considered in a local physical development plan. For purposes of replanning and reconstruction of the plan area or any part thereof, Section 4(f) of the Second Schedule requires the director (of Physical Planning) to make provision **"necessary for adjustment of rights between owners or other persons interested in such lands, roads, streets or right of way"**.

25. Quite clearly, this was not done by the Respondent, hence the technical reply by way of Grounds of Opposition. There was no Replying Affidavit to traverse the averments by the Applicants. In other words, there was no factual denial of the complaints of the Applicants that access to their loading zones (which they have enjoyed for over 50 years), had been obstructed by the stalls without reference to them as they legitimately and reasonably expected. The action by the Respondent was not only contrary to Article 47, of the Constitution, and no less the Fair Administrative Action Act 2015, but was out rightly contrary to rule 4 (f) of the Building (Control) Rules.

26. The submissions by counsel for the Respondent did not meet these objections. It is quite clear that the provisions of Rule 4(f) were not taken into account. Put differently, the Respondent took into account irrelevant matters in erecting stalls blocking/or reducing the Applicants' access to their premises or of their tenants.

27. The Applicants sought orders of mandamus and prohibition. An order of mandamus is a command to a subordinate court, or body or authority to do or carry out public duty as by law ordained. This relief is now known as a "mandatory order". As the erection of stalls by the Respondent on the Applicants' access was done contrary to the Building Planning (Control) Rules, it is the duty of the Respondent to systematically remove the stalls from the access passages/lanes/streets.

28. In the circumstances, an order of mandamus shall issue as prayed by the Applicants that the illegally installed stalls be removed within forty five (45) days from the date hereof.

29. The Applicants also sought an order of prohibition. A prohibition is an order of the High Court preventing or prohibiting a body from acting contrary to law, the Physical Planning (Building and Development) (Control) Rules 1998 and in particular Rule 4(f) of the Second Schedule to the Physical Planning Act, (Cap 286, Laws of Kenya).

30. The Respondent was bound to afford the Applicants a hearing before it made a decision to erect stalls along the passage of access, a decision which undoubtedly adversely affected the interests of the Applicants and by extension the interests of their tenants by depriving them of their rights to enjoyment of their properties which they own.

31. For those reasons, there shall also issue an order of prohibition to prohibit the Respondent from erecting stalls on the access to the Applicants' properties.

32. As the Applicants substantially succeed herein, they shall also have the costs of the application.

33. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 12th day of July, 2016.

M. J. ANYARA EMUKULE, MBS

JUDGE

In the presence of:

Ms. Ali for Applicants

Miss Obura holding brief for Obinyu for Respondents

Mr. Silas Kaunda Court Assistant