



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO.359 OF 2015

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW
ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS**

BETWEEN

INNER CITY PROPERTIES LIMITED..... APPLICANT

AND

COUNTY GOVERNMENT OF NAIROBIRESPONDENT

JUDGEMENT

Introduction

1. By a Notice of Motion dated 30th October, 2015 filed in this Court the same day, the applicant herein, **Inner City Properties Limited**, seeks the following orders:

- 1. An order of prohibition and restraining the Respondent its officers employees servants and/or agents from demolishing, removing, breaking, damaging or in any other way interfering with the Boundary Wall erected on DAGORETTI/RIRUTA/1807 situated within the County of Nairobi.**
- 2. An order of Certiorari seeking to remove to this honourable court and to quash the decision of the respondent to arbitrarily and without legal justification to demand the demolition and removal of the boundary wall erected on DAGORETTI/RIRUTA/1807 situated within the county of Nairobi.**
- 3. That costs of this application be awarded to the applicant.**

Ex Parte Applicant's Case

2. According to the Applicant, it is in the business of property development and in the course of its business acquired Dagoretti/Riruta/1807 (hereinafter referred to as the "suit premises") situated along Ngong Road, Nairobi with the intention of developing the same and subsequently offering the developed property for sale in the open market. Pursuant to the foregoing, the Applicant caused appropriate building plans to be drawn consisting of 30, 2 bedroom apartments, which building plans were duly submitted to the respondent for approval in accordance with the law band that the same duly approved by the respondent on 13th December, 2011.

3. It was averred by the Applicant that pursuant to the grant of development permissions, it proceeded to contract the construction of the envisaged works on the suit premises and after setting out of the proposed works on site and prior to the commencement of the building works, it engaged the services of a licensed surveyor who confirmed that the proposed development was within the plot boundaries of the suit premises. The Applicant averred it was the conclusion of the Licensed Surveyor that Mama Wahu Road, which borders the suit premises along the western boundary, encroached onto the suit premises with a distance of 4 meters. The Applicant case was therefore that it is apparent from the survey plan that Mama Wahu Road did not connect with Ngong Road as exit of it to Ngong Road provided for a 3 meter drainage way leave and it is now the intention of the respondent to expand the way leave onto a Road without any due process and after the applicant has completed the development of the suit premises. However as Mama Wahu road was already in use by motorists accessing Ngong Road, the Applicant opted not to interfere with the usage and constructed its boundary wall 4 meters within its plot boundaries.

4. The applicant's position was that it duly completed the proposed construction of works on 24th December, 2014 and a certificate of practical completion was duly issued by the Project Architects signifying the completion thereof. It was however contended that despite the completion of the works in conformity with the approved plans, the respondent arbitrarily without any lawful justification issued a notice dated 7th October, 2015 demanding that the applicant demolish the boundary wall within a period of 7 days failing which, the respondent would proceed with the proposed demolition.

5. To the Applicant, the notice is wrongful, illegal and actuated by malice for the following reasons:

- a. The Boundary Wall erected by the applicant has not encroached on Mama Wahu Road either as alleged or at all;
- b. The suit premises has been developed within its plot boundaries and in accordance with the building plans approved by the respondent;
- c. The respondent never raised an issue with the location of the boundary wall for a period of over 1 year whilst the suit premises were being developed.
- d. It is indeed the applicant who has been inconvenienced and denied the full utilization of the suit premises by the fact that the usage of mama Wahu Road by motorists has encroached onto the suit premises.

6. In the Applicant's view, if the respondent's threatened illegal actions are not restrained by this court, the respondent will proceed and demolish the boundary wall thereby causing irreparable harm, injury and damage to the applicant as the Applicant had already marked the boundary wall with an "X" sign earmarking the intended demolition thereof. The applicant asserted that in the event the boundary wall is demolished and re-positioned, the applicant is *inter alia*, likely to suffer the following adverse consequences:

- a. The carbro-paved parking and driveway will be destroyed and in any event shall be inadequate for serving the residents of the suit premises;
- b. The guard house situated at the entrance of the suit premises shall be destroyed;
- c. The electric fencing will be destroyed compromising the security of the suit premises;
- d. The boundary wall itself together with the provided landscaping will also be destroyed.

All at a considerable cost expense and loss of the applicant.

7. Based on legal advice the Applicant took the position that the notice offends the provisions of the **Public Health Act** having been issued upon the lapse of over 12 months since the completion of the works and further that the same notice issued is defective and does not comply with the provisions of the

Physical Planning Act.

8. The Applicant disclosed that it had in any case sold most of the apartments erected on the suit premises to third party purchasers who would also be adversely affected by the demolition and repositioning of the boundary wall.

9. To the applicant therefore the respondent's actions were illegal hence the application herein is merited and the orders sought ought to be granted.

Respondent's Case

10. In opposition to the application, the Respondent filed the following grounds of opposition:

- 1. That the Application is misconceived, baseless and an abuse of the Court process.**
- 2. That the Respondent is the only Body statutorily mandated by the Physical Planning Act, Cap 286 of the Laws of Kenya to approve any development and/or construction of a boundary wall within the Nairobi City County.**
- 3. That the only communication of the 'intended demolition' is a public notice informing the residents of the named areas of the County Governments' intention to construct a road on the said area and that all illegal constructions and extensions should therefore be demolished beforehand.**
- 4. That the Physical Planning Act, Cap 286 of the Laws of Kenya makes it mandatory for a party to apply and be issued with development permission from the Respondent.**
- 5. That section 31 of the said Physical Planning Act provides that no person shall carry out developments within the area of the Nairobi City County without development permission from the Respondent and as such the Plaintiff is guilty of an offence punishable under the said Act.**
- 6. That the Respondent has a statutory duty to ensure compliance and enforcement of the law under the By-Laws and the Physical Planning Act.**
- 7. That in the circumstances of this case and for the interest of justice the Notice of Motion dated 30th October 2015 be dismissed with costs.**

Determinations

11. I have considered the foregoing.

12. It is not clear from the Notice dated 7th October, 2015, the provision of the law under which the same was issued. However on its face the Notice was grounded on an allegation that some of the applicant's structures fell within the road reserves and were obstructing construction works. From the submissions, the Respondent seems to have pegged the said notice under section 38 of the ***Physical Planning Act***, Cap 286 Laws of Kenya. The said provisions provides 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.

13. It is clear from the foregoing that in order for a notice to be deemed to be valid for the purposes of section 38 of the aforesaid Act, it must comply with certain requirements. The notice is required to specify the development alleged to have been carried out without development permission, or the conditions of the development permission alleged to have been contravened; 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 may also 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.

14. The Applicant however contends that its developments were as per the plan approved by the Respondent itself and it exhibited a copy of the plan which on its face shows that the same was duly approved on behalf of the Respondent. The Respondent has not sworn any affidavit either disputing the authenticity of the plan or even contending that the actual developments were not in accordance with the approved plan itself.

15. Article 47 of the Constitution provides:

(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.

16. In the absence of any rebuttal evidence this Court must treat the factual averments as deposed by the applicant as correct. Having granted permission to the Applicant to carry on with its developments it is my view that it was unreasonable and irrational on the part of the Respondent to issue the Applicant with the said Notice based on the alleged illegal structures without affording the applicant an opportunity to address it on the said allegation.

17. That the cancellation of the approval was an administrative action by the Respondent is not in dispute. The Respondent was therefore under a constitutional duty to ensure that its action was expeditious, efficient, lawful, reasonable and procedurally fair. Procedural fairness necessarily require that persons who are likely to be affected by the decision be afforded an opportunity of being heard before the decision is taken. Further, it is a Constitutional requirement that that person be given written reasons for the action.

18. 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.”

19. Therefore the Respondent was obliged to afford the applicant a hearing before it made its decision which 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 by developing the same. This was the position of the Court of Appeal in **Onyango Oloo vs. Attorney General [1986-1989] EA 456.**

20. In this circumstances where what is alleged is a breach of the right to be heard an appeal under section 38 of the Act would not be an efficacious remedy since 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.

21. Apart from the foregoing it is contended that the proprietorship of the developments have since changed and the developments sold to third parties. In **Republic vs. City Council of Nairobi ex parte North Lake Limited High Court Miscellaneous Application No. 84 of 2011 (JR)** this Court held that “a person likely to be affected by an administrative action, in my view, is not necessarily a party to the subject of the transaction...It is settled law that a benefit cannot be withdrawn until the reason for withdrawal has been given and the person concerned has been given an opportunity to comment on the reason.” Therefore, apart from the ex parte applicant herein, there was a requirement that those who had acquired interests in the subject developments be similarly notified before an action adversely affecting their interests could be undertaken.

22. In the foregoing premises I find merit in the Notice of Motion dated 30th October, 2015.

Order

23. In the result the orders which commend themselves to me which I hereby grant are as follows:

- 1. An order of prohibition and restraining the Respondent its officers employees servants and/or agents from demolishing, removing, breaking, damaging or in any other way interfering with the Boundary Wall erected on DAGORETTI/RIRUTA/1807 situated within the County of Nairobi based on the notice dated 7th October, 2015.**
- 2. An order of Certiorari removing into this Court for the purposes of quashing the said decision of the respondent dated 7th October, 2015 demanding the demolition and removal of the boundary wall erected on DAGORETTI/RIRUTA/1807 situated within the county of Nairobi which decision is hereby quashed.**

24. There will however be no order as to costs as the Application was not properly intitled. Applications for judicial review ought to be made in the name of the Republic rather than in the name of the ex parte applicant. See **Farmers Bus Service & Others vs. Transport Licensing Appeal Tribunal [1959] EA 779** and **Mohamed Ahmed vs. R [1957] EA 523.**

Dated at Nairobi this day 1st day of September, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mbeji for Mr Gachanja for the applicant

Cc Mwangi