



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC JR NO. 213 OF 2018

REPUBLIC.....APPLICANT

VERSUS

NAIROBI CITY COUNTY GOVERNMENT.....RESPONDENT

AND

PICCADILLY HOLDINGS LIMITED.....EX PARTE APPLICANT

JUDGEMENT

1. Through the judicial review application dated 16/10/2019, the *Ex parte* Applicant (“the Applicant”) sought an order of certiorari to quash enforcement notice number 2257 dated 21/11/2018 vide which the Nairobi City County Government demanded that the Applicant removes the structures including a car bazaar and offices claiming that they were illegally on the suit land. In addition, it sought an order to prohibit the Nairobi City County Government from entering land reference number (L.R. No 201/391) or L.R. Numbers 209/18886, 18887 and 18888 to implement or give effect to the Nairobi County Government’s decision communicated through enforcement notice number 2257.

2. The main ground upon which the judicial review proceedings were commenced was that the Respondent issued enforcement notice number 2257 dated 21/1/2018 without following procedure. The Applicant was apprehensive that the Respondent would demolish its structures on the suit land on the expiry of the seven days’ notice on 28/11/2018. The Applicant claimed that it sought and obtained change of user of the suit land from residential to commercial and a car bazaar from the Respondent. Further, it contended that the enforcement notice was issued on a nonexistent property since L.R. No. 209/391 had changed character on subdivision when L.R. Numbers 209/18886, 18887 and 18888 were created.

3. The Applicant contended that it had been condemned unheard and added that in issuing the enforcement notice, the Respondent had abdicated its statutory duties and abused its power. Further, that the Applicant had been deprived of its right to natural justice and equal protection of the law guaranteed under Article 27(1) of the Constitution. It added that its legitimate expectation for fair administrative action guaranteed by Article 47 of the Constitution and the Fair Administrative Actions Act had been breached. It contended that the Respondent failed to take into account relevant considerations and that its decision was a demonstration of illegality, unlawfulness, want of jurisdiction, arbitrariness, unreasonableness and irrationality.

4. The application was supported by the verifying affidavit of Elka Mutanya, a Director of the Applicant who deponed that the Applicant was the registered proprietor of the suit land situated along Ngong Road and Rose Avenue within Nairobi County. He averred that the Applicant had subdivided the suit land and leased it to various tenants who erected structures on the land in conformity with the user of the land which was for commercial purposes including car bazaars. He added that the Respondent approved the change of user of the suit land to commercial including car bazaars on 2/4/2015. He faulted the Respondent for issuing the enforcement notice dated 21/11/2018 which demanded the removal of the structures on the suit land without inviting the Applicant for a hearing. He averred that the Applicant had commenced the process of extending the change of user of the land which it had advertised in the local newspapers on 23/11/2018 and argued that the Respondent’s enforcement notice was intended to circumvent the extension of the user.

5. He annexed copies of the titles in respect of L.R. No. 209/391 and L.R. Numbers 209/19886 to 19888. He attached photographs showing the developments on the suit land and a Notification of Approval of Development Permission issued by the Respondent on 2/4/2014 which indicated that the change of user was from commercial to include car bazaar. He also attached a copy of the enforcement notice issued under Section 30 of the Physical Planning Act and Nairobi City County Building Laws. The notice made reference to illegal conversion of use from residential to motor bazaar and illegal structures without approval from the county while requiring the removal of the structures within 7 days.

6. The Respondent filed grounds of opposition on 8/1/2020 stating that this court lacked jurisdiction to determine the application because it fell under the mandatory provisions of Sections 72 and 78 of the Physical and Land Use Planning Act, 2019. Further, that this court’s jurisdiction under that Act was restricted to hearing appeals against the decisions of the County Physical and Land Use Planning Liaison Committee and that it ought not to entertain original proceedings such as the instant one.

7. Parties filed submissions which the court has considered. The twin issues for determination in this case are whether this court has jurisdiction to determine this dispute and whether it should grant the orders sought by the Applicant.

8. The Applicant contended that this court had jurisdiction because the legislation the Respondent placed reliance on was enacted after these proceedings had been commenced. It submitted that judicial review proceedings are *sui generis* and are different from the appeals envisaged by Sections 72 and 78 of the Physical and Land Use Planning Act. The Applicant relied on various decisions of the court on the purpose of judicial review orders being to check that public bodies do not exceed their jurisdiction or carry out their duties in a manner that is detrimental to members of the public. Further, it submitted that judicial review proceedings are meant to facilitate justice by ensuring that processes comply with the law and the principles of natural justice. It added that Sections 72 and 78 of the Physical and Land Use Planning Act cannot be interpreted to limit the Applicant's right to access the court for justice.

9. The Respondent submitted that the proper forum for the resolution of this dispute was the Liaison Committee created under the Physical Planning Act and cited Section 38(4) of that Act. That section granted persons aggrieved by enforcement notices served on them the right to appeal to the relevant liaison committee under that Act. The Respondent relied on the case of **Whitehorse Investment Limited v Nairobi City County [2019] eKLR** in which the Court of Appeal agreed with the Environment and Land Court (ELC) that the ELC did not have jurisdiction to deal with disputes arising from enforcement notices which were to be dealt with by the Liaison Committee.

10. The Respondent added that where there is a clear procedure for redress of a particular grievance described by the Constitution or a statute that procedure should be strictly adhered to. It maintained that only in exceptional circumstances should an order for judicial review be granted. In the Respondent's opinion, the Applicant had not demonstrated any exceptional circumstances that would divest the Liaison Committee of the jurisdiction to determine the dispute relating to the enforcement notice issued by the Respondent. The Respondent submitted that Section 38 of the Physical Planning Act was similar to Section 78 of the new act.

11. The court has looked at the decision in **Whitehorse Limited v Nairobi City County** which was an appeal challenging the decision of Eboso J. in which he found that the ELC did not have jurisdiction to determine the dispute relating to the enforcement notice issued by the Nairobi City County when an application for judicial review to quash the enforcement notice was filed before the ELC. The Court of Appeal found that the dispute was purely on matters of building plans that was covered under the Physical Planning Act with remedies for aggrieved parties embedded in that Act. The court noted that there was no good reason given as to why the Applicant had not pursued the remedies under the Physical Planning Act. The Applicant had not lodged any dispute with the Director of Physical Planning as envisaged under the Act.

12. The Applicant moved the court on 28/11/2018 on being served with the enforcement notice dated 21/11/2018 without availing itself of the remedies under the repealed Physical Planning Act. Section 38(7) of the repealed Act would have guaranteed the Applicant stay against any further action by the Respondent until its appeal was heard and determined by the relevant Liaison Committee under that Act.

13. Based on the finding by the Court of Appeal, this court agrees with the Respondent that it lacks jurisdiction to grant the orders sought there being no exceptional circumstances to warrant the grant of the judicial review orders sought by the Applicant.

14. The court declines to grant the orders sought in the application dated 16/10/2019. The Applicant will pay the Respondent's costs.

Dated and delivered virtually at Nairobi this 21st day of July 2020

K.BOR

JUDGE

In the presence of:-

Mr. V. Owuor- Court Assistant

No appearance for the *Ex-Parte* Applicant and the Respondent