



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

JR MISC. CIVIL APPLICATION NO. 357 OF 2014

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL
REVIEW BY ADVERT EYEZ LIMITED**

AND

**IN THE MATTER OF: ENFORCEMENT NOTICE UNDER
PHYSICAL PLANNING ACT LAWS OF
KENYA IN RESPECT OF A BILLBOARD
ERECTED ALONG MASARI ROAD**

REPUBLIC.....APPLICANT

VERSUS

NAIROBI CITY COUNTY.....RESPONDENT

EX PARTE: ADVERT EYEZ LIMITED

JUDGEMENT

Introduction

1. By a Notice of Motion dated 1st October, 2014, the ex parte applicant herein, **Advert Eyez Limited**, seeks the following orders:

1. **The Honourable Court be pleased to issue Orders of Certiorari to remove to this Court and quash the Enforcement Notice dated 15th September 2014 requiring the billboard erected thereon to be relocated.**
2. **The Honourable Court be pleased to issue Orders of Prohibition against the Director of County Planning Department of Nairobi County prohibiting him from demolishing the Ex Parte Applicant's billboard erected on L. R. No.209/35/5, Masari Road.**
3. **The costs of this application.**

Ex Parte Applicant's Case

2. The application is supported by verifying affidavit sworn by **Vertika Dabral**, a director of the ex parte applicant on 18th September, 2014.
3. According to the deponent, on or about the month of November 2013 the ex parte applicant procured a license to erect a billboard on L. R. No. 209/35/5, Masari Road, Parklands and subsequently, the ex parte applicant erected a billboard thereon, with the approval of the Nairobi County, way back August 2013 to July 2014, who duly permitted the erection of the said billboard and on the basis of the said permission, the ex parte applicant made various payments to the County Government.
4. It was deposed that the ex parte Applicant then sourced for clients, who pay for space on the said billboard and that currently, it is in contract with a client for space on the said billboard.
5. That notwithstanding, on the 15th day of September, 2014, the Respondent served on the ex parte Applicant an enforcement notice requiring it to relocate the said bill board though prior to the receipt of the aforementioned enforcement notice, the Respondent had not communicated to the Applicant the basis of the said Notice, nor was the Applicant afforded an opportunity to be heard.
6. It was therefore contended that the said enforcement notice was issued in a breach of the rules of natural justice and that the Respondent unilaterally made the decision to relocate the Applicants billboard for extraneous purposes at the instigation of a politician, to wit, the Member of Parliament for Embakasi South Constituency **Hon. Irshad Sumra** since the said Notice is meant to aid a neighbouring plot owner, who wishes to erect a billboard. In the applicant's view, the basis given for purported Notice are immaterial, unreasonable, illogical and extraneous hence the said administrative actions are unlawful and unreasonable and were arrived at irregularly, based on political instigation hence *ultra vires* and an abuse of office.
7. It was averred that the applicant herein stands to suffer irreparably if the billboard is brought down by the respondent based on the said seven (7) day notice.

Determination

8. I have considered the issues raised in this application and this is the view I form of the matter.
9. It must be remembered that the purpose of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285.
10. 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.”
11. In this application we are not concerned with the merits of the decision to withdraw the approval given to the applicant to erect the subject billboard which approval is not controverted as the respondent has not opposed the application.

12. Article 47 of the same 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.

13. That the cancellation of the approval was an administrative action by the Respondent is not in dispute. The Respondent was therefore under a duty to ensure that its action was expeditious, efficient, lawful, reasonable and procedurally fair. Procedural fairness necessarily requires 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. It has not been contended that the *ex parte* applicant herein was ever afforded an opportunity to be heard.

14. 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 erecting the same. As was held by the Court of Appeal in **Onyango Oloo vs. Attorney General [1986-1989] EA 456:**

“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...To “consider” is to look at attentively or carefully, to think or deliberate on, to take into account, to attend to, to regard as, to think, hold the opinion... “Consider” implies looking at the whole matter before reaching a conclusion...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*.”

15. Therefore in withdrawing the approval, the Respondent was constitutionally obligated to follow the due process of the law and not to consider such extraneous issues as political expediencies of certain individuals. Such a decision ought not to be arbitrarily made without affording the persons to be affected thereby an opportunity of being heard and any purported action which does not comply with the law must be set aside based on the three “I’s” i.e. Illegality, irrationality and impropriety of procedure.

16. With respect to whether the Respondent had the power to revoke the permission, 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.

17. Before the Respondent can determine whether a person to whom an approval has been granted has failed to adhere to the conditions specified in the approval, it is my view and I so hold that in order that the action be deemed to be fair such a person ought to be afforded an opportunity of being heard thereon. There is no such evidence on record.

18. Therefore the only issue that the Court would be entitled to determine in this application is whether based on the uncontroverted facts before the Court the decision made by the Respondent in issuance the said enforcement notice withdrawing the approval earlier given ought to stand. From the only evidence on record, it is clear that the decision to withdraw the said approval was tainted with procedural impropriety and ought not to stand. As was held by **Emukule, J** in **Republic vs. Kombo & 3 Others Ex Parte Waweru Nairobi HCMCA No. 1648 of 2005 [2008] 3 KLR (EP) 478:**

“The rule of law has a number of different meanings and corollaries. Its primary meaning is that everything must be done according to the law. Applied to the powers of government, this requires that every government authority which does some act which would otherwise be wrong (such as taking a man’s land), or which infringes a man’s liberty (as by refusing him planning permission), must be able to justify its action as authorised by law – and nearly in every case this will mean authorised directly or indirectly by Act of Parliament. Every act of government power that is to say, every act which affects the legal rights, duties or liberties of any person, must be shown to have a strictly legal pedigree. The affected person may always resort to the Courts of law, and if the legal pedigree is not found to be perfectly in order the Court will invalidate the act, which he can safely disregard.”

19. In the premises I find the Notice of Motion dated 1st October, 2014 merited and grant the following orders:

- 1. An order of certiorari is hereby issued removing into this Court and for the purposes of being quashed the Enforcement Notice dated 15th September 2014 requiring the billboard erected thereon to be relocated, which decision is hereby quashed.**
- 2. I also issue an order prohibiting the Director of County Planning Department of Nairobi County from demolishing the Ex Parte Applicant’s billboard erected on L. R. No.209/35/5, Masari Road on the strength of the impugned notice.**
- 3. The Applicants are awarded the costs of these proceedings to be borne by the Respondent.**

Dated at Nairobi this day 5th day of February, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Khasiany for the ex parte applicant

