REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR ELC CASE NO. 39 OF 2010

REPUBLIC..APPLICANT

VERSUS

CITY COUNCIL OF NAIROBI..RESPONDENT

AND

STEPHEN ODALO & 17 OTHERS...1ST GROUP OF INTERESTED PARTIES

ALEXANDER WAWERU & 13 OTHERS

(Suing on their behalf and as the officials and

committee members and on behalf of 700 other

members of Buruburu

Riverside Self Help Group)**....2ND GROUP OF INTERESTED PARTIES**

Ex-parte

BENSON NDERITU

ALICE WANGUI

KIMANI NJOROGE

JOSEPH OUGO

NJENGA KAMAU

JOHN KIBIRIO

HARRISON MURITHI

JANE WANJIRU

LUCIA WAMBUI NJUMBI

(Suing on their own behalf and on behalf of 34 members of Buruburu River Bank Development Committee)

JUDGEMENT

1. This judicial review application was filed by Benson Nderitu and eight others suing on their own behalf and on behalf of 34 members of Buruburu River Development Committee. The City Council of Nairobi, now the Nairobi City County Government is the Respondent. Stephen Odalo, Shadrack Kamau Zakaria, Harrison Otieno, Patrick Gitau Kimani, Gladis Atieno, Florence Aoko, Evalyne Malele Ethaboke, Eric Omondi Otieno, Tony Mau Aluoch, Isaiah Mboya, Douglas Odongo Ochere, Jacob O Oyombura, Peter O Nyakidi, Dorothy Achieng, Welloing Odhiambo, Lucas Onyango and Walter Jabuya were on 2nd October, 2014 by consent allowed to join these proceedings as the 1st group of interested parties. Through the same consent, Alexander Waweru, Johnston Kabugi, Samuel Kamau, Anthony Irungu, Anna Wambui, Peter Muiruri, Nicholas Kiai, Hudson Chege, Jacob Irungu, James Kivuva, Peris Wairimu, Julius Ndungu, Patrick Maina and John Kimungu suing on their own behalf and on behalf of 700 other members of Buruburu Riverside Self Help Group were also allowed the participate in these proceedings as the 2nd group of interested parties.
2. When Wendoh, J granted leave to the exparte applicants ("the applicants") to commence these proceedings, she at the same time directed that the said leave would operate as stay of the Respondent's Town Planning Committee's resolution of 17th March, 2010 or any other date purporting to undertake formalisation of settlement and preparation of part development plan in respect of Buruburu River Bank Settlement Scheme at Uhuru Ward Phase 1. The stay order was to be in force for sixty days but has since then been extended from time to time.
3. The applicants' case is brought out in the statement of facts and the verifying affidavit of Benson Nderitu which were filed on 2nd June, 2010 with the application for leave. It is also supported by the further verifying affidavit sworn on 7th June, 2010 by the said Benson Nderitu and the documents exhibited through the affidavits. The applicants' case is that they are all members of Buruburu River Bank Development Committee. On 17th March, 2000 they were given plots by the Government of Kenya through negotiations with the Respondent. They took over the plots and developed them. The Respondent thereafter compiled an approved survey map for their plots among other plots in the area clearly demarcating their plots.
4. The applicants state that on 17th March, 2010 the Respondent's Town Planning Committee resolved to undertake formalisation of settlement and preparation of part development plan in respect of Buruburu River Bank Settlement Scheme. In furtherance of this resolution the Respondent's officers visited the area in preparation for the re-planning of the applicants' plots.
5. The applicants through the notice of motion application dated 18th June, 2010 therefore pray for an order of prohibition to prevent the Respondent from implementing the said resolution of the Town Planning Committee. They also pray for an order of certiorari to remove the said resolution into this Court and have it quashed.
6. According to the statement of facts dated 31st May, 2010 and filed on 2nd June, 2010, the grounds upon which relief is sought are:

> **"a) The Respondent is purporting and colluding to take possession of the Applicants' plots.**
>
> **b) The Respondent is purporting to re-plan the said premises.**
>
> **c) The Respondent is purporting to survey the said premises.**
>
> **d) The Respondent failed to inform the Applicants of its intended unlawful**

actions.

e) The actions by the Respondent hereof are irrational, unlawful, capricious, unreasonable and against the rules of natural justice."

The applicants therefore urge the Court to grant the orders on the cited grounds.

7. The Respondent opposed the application through a replying affidavit sworn on 18th March, 2014 by its Assistant Director of Legal Affairs Abwao Erick Odhiambo. In the first instance it is the Respondent's case that the impugned decision has not been tendered and hence the orders sought cannot issue. Secondly, the Respondent contends that the applicants have merely alleged that they were allocated the plots but have not tendered any proof in support of the allegation, and there is therefore no basis for the grant of the orders sought. The Respondent argue that consequently any development commenced or carried out by the applicants on the suit property without title thereto can only be illegal and such an illegality cannot be used to sustain their claim.
8. The Respondent denies that it illegally, maliciously, unreasonably or without right issued notice to the applicants to remove themselves from the suit property for re-planning or demolished the applicants' premises. The Respondent asserts that there is no evidence adduced by the applicants show that its actions were unreasonable, irrational, malicious, illegal, biased, unlawful or against the rules of natural justice.
9. Fourthly, the Respondent contends that its actions were lawful as the Physical Planning Act, Cap. 286 and in particular sections 29, 30 and 38 gives it the statutory mandate to control and approve development within the City of Nairobi and the mandate to take enforcement measures where development laws and policies are flouted.
10. Mr. Abwao avers that in 2002 squatters were to be resettled in Buruburu open area. The Part Development Plan (P.D.P.) was never advertised as it was altered several times. There was a committee of 14 members under the name Buruburu Riverbank Welfare Association which was formed to co-ordinate the matter. Complaints of double allocation and the missing of names of initial beneficiaries arose prompting the said committee to allocate land set aside for roads, social amenities and public utilities. In 2008 the residents made a request for a re-planning of the area.
11. The re-planning was aimed at opening up roads, preparation of a P.D.P., advertisement of the same and submission to the Ministry of Lands. The re-planning would also entail movement of people from the riparian area and issuance of fresh allotment letters by the Respondent to the squatters.
12. It is the Respondent's case that the re-planning was necessitated by several reasons; need for access roads for putting out fire outbreaks; stoppage of continuing allocation of plots by a few members to new people; and the need for the Respondent and the Ministry of Lands to formally recognise the settlers. Further, that in the year 2010, the District Commissioner together with the Senior Development Officer Kamukunji cancelled the certificate issued under the name "Buruburu Riverbank Development Committee", took away the original certificate and announced the same in a public baraza. It was also resolved that the process of the completion of the P.D.P. be co-ordinated between the Office of the District Commissioner and the Planning Department of the Respondent. None of the groups registered from the settlement was to be involved. It was also agreed that nobody was to be moved without being shown where to go. All the structures were to be given fresh allotment letters and the sizes of the plots were to remain as they were. The plots would then be formally entered in the Respondent's ledger books.
13. It is the Respondent's assertion that on 1st July, 2011, the P.D.P. was advertised for perusal by the general public and whoever had an issue was to take it up with the Town Planning Committee within 60 days. The P.D.P. was also displayed in the office of the area chief and its existence advertised in public barazas. The Respondent expressed its desire on 26th July, 2011 to complete the re-planning process and upgrade the settlement to an estate. Further, that the applicants did not obtain the Respondent's permission to carry out any development of the suit property.
14. Apart from the supporting affidavit sworn on 11th August, 2014 by Stephen Odalo in support of the notice of motion for enjoinment, the 1st group of interested parties did not file any papers in response to the substantive notice of motion. Through the said affidavit, it is revealed that this set

of interested parties had constructed permanent and semi-permanent structures on the suit property and they were likely to be affected by the outcome of these proceedings.

15. The 2nd group of interested parties opposed the substantive notice of motion through an "affidavit of interest in the matter" sworn by Alexander Waweru on 20th November, 2014. Through the said affidavit Waweru avers that he is the Chairperson of Buruburu Riverside Group which has over 700 members. The members of the group are residents of Buruburu Riverside Estate which is an informal settlement within Nairobi County.
16. Mr. Waweru avers that both the applicants and the interested parties had no official titles and or registered interest in the various plots they occupy until the Respondent through its Town Planning Committee vide the resolution of 17th March, 2010 initiated a project to formalize the occupation of the estate and prepare a P.D.P. of Buruburu River Bank Settlement Scheme, Uhuru Ward Phase 1. Consequently notices were issued and members of his group were involved in the development plan which was geared towards issuance of lease documents so as to protect the rights of the residents to housing, social and economic enjoyment on the land they live on. It is their case that the intentions of the Respondent were bona fide and intended to ensure that they can accord the residents of the estate the essential socio-economic amenities through proper planning.
17. Mr. Waweru avers that sometimes on 12th April, 2011 following a request made by his group, the Respondent issued P.D.P. Ref. CP/FP/ZONE 8/158/02/11 for the proposed Buruburu City Carton Resettlement Scheme for inspection. Objections were invited from members of the public. He deposes that his group, whose members include the applicants, made representations to the Respondent and submitted all the names of the members for consideration for resettlement. He avers that on 13th September, 2012, the General Purposes Committee met and approved the recommendation of the Director of City Planning for the regularization of settlement of Buruburu Riverside Estate (City Carton). According to Waweru, the project has been implemented and all members of the estate including the applicants were issued with allotment letters and some of the beneficiaries have paid the requisite charges. It is the case of the 2nd group of interested parties that the applicants did not raise any issue with the resolution of 13th September, 2012 by the Respondent's General Purposes Committee.
18. Further, that the consent order dated 28th August, 2014 nullifying their allotment letters had affected them and the same would not have been granted had all the material facts been placed before the Court by the applicants.
19. Finally, the 2nd group of interested parties assert that it is in the wider public interest to have proper planning of Buruburu Riverside Estate by the Respondent.
20. The questions to be answered in these proceedings are whether the applicants have established grounds for grant of judicial review orders and if so, whether the said orders should issue as prayed.
21. The parameters of judicial review, a remedy available in public law, are now well settled. The orders will issue to right a decision made without jurisdiction or outside the law. Judicial review orders will also issue where a decision has been made without compliance with the rules of natural justice and/or where the same is unreasonable-see **Municipal Council of Mombasa v Republic & Umoja Consultants Limited, Nairobi Civil Appeal No. 185 of 2001 ([2002] eKLR)**, **Council of Civil Service Union v Minister for the Civil Service [1985] AC 2;** and **Pastoli v Kabale District Local Government Council & others [2008] 2 EA 300**
22. I have already reproduced the grounds upon which the applicants seek relief. The Respondent and the interested parties assert that the application should fail for various reasons.
23. The Respondent and interested parties contend that the applicants have not exhibited the alleged resolution of 17th March, 2010 and as such judicial review is not available. Their submission is correct. Order 53 Rule 7(1) of the Civil Procedure Rules, 2010, states that:

> **"7. (1) In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court."**

The above cited rule requires the impugned decision to be exhibited and where it is not exhibited reasons for non-compliance should be disclosed. The applicants have not complied with the rule.

24. In **Nairobi Civil Appeal No 160 of 2008 Republic v Professor Mwangi S. Kimenyi & another Ex-parte Kenya Institute for Public Policy and Research Analysis (KIPPRA)** the Court of Appeal stressed the importance of identifying the decision to be quashed in judicial review proceedings. The Court stated that:

    "The learned judge in his judgment was correct in stating that the court cannot act in vain against a non-existent decision. There was no decision or letter dated 24th August 2004 that could be called and removed into the High Court to be quashed. This being so, the learned judge erred in quashing the alleged decision of 24th August 2004 when the said decision is non-existent. Further, the learned judge erred in issuing orders to quash the letter of 16th December 2004 when the court had not determined that the decision made on 3rd December 2004 was in existence. A court of law should not descend into the realm of speculation. The decision to be quashed must first be ascertained and determined to be in existence. This is the rationale for calling and removing into court a decision to be quashed….."

For that reason alone, the applicants' case should fail.

25. The application is also opposed on the ground that the conditions for grant of judicial review orders have not been met. The Respondent and the interested parties have submitted that the Respondent is mandated by the Physical Planning Act to prepare development plans and it was therefore performing its duty when the resolution of 17th March, 2010 was made. That submission is indeed correct. The Respondent was authorised by the Physical Planning Act to prepare a local development plan for the Buruburu Riverside Settlement. The procedure that needed to be followed is found in the Act.
26. Section 24 of the Physical Planning Act gives the Respondent the mandate to prepare local physical development plans as follows:

    "24. Preparation of local physical development plan

    (1) The Director may prepare with reference to any Government land, trust land or private land within the area of authority of a city, municipal, town or urban council or with reference to any trading or marketing centre, a local physical development plan.

    (2) A local physical development plan may be a long-term or short-term physical development or for a renewal or redevelopment and for the purpose set out in the Third Schedule in relation to each type of plan.

    (3) The Director may prepare a local physical development plan for the general purpose of guiding and coordinating development of infrastructural facilities and services for an area referred to in subsection (1), and for the specific control of the use and development of land or for the provision of any land in such area for public purposes.

    (4) The Director may include in a local physical development plan any or all of the matters specified in the Second Schedule."

It is clear from a reading of the above Section that the authority extends to the land the applicants occupy.

27. One of the grounds upon which the applicants seek relief is that they were not informed about the intention to prepare a development plan for the area. The 2nd group of interested parties who live

in the same area told the Court that everybody was involved in the matter. The Physical Planning Act would also have provided an opportunity for the applicants to raise any queries before the P.D.P. could be adopted-see Section 26(2) as read with Section 19.

28. In my view, this application was filed prematurely as the process had not started. Allowing the application would amount to denying the Respondent the opportunity of executing its statutory mandate.
29. The applicants relied on the decision in **Nairobi H.C.J.R. No. 96 of 2012 Ignatius Kabiru Mwariri & 14 others v City Council of Nairobi & another ([2014] eKLR)** in support of their argument that orders of certiorari and prohibition can issue in circumstances similar to those of their case. In that case the applicants had been given seven days to vacate the suit property. The learned Judge granted an order of certiorari quashing the quit notice and prohibited the Respondent from removing the applicants from the said property unless a reasonable notice was duly given. The Judge found that a notice of seven days was unreasonable. Upon going through the cited decision, I find that the facts of that case are different from those in the case before this Court. In the case before me the applicants were not given quit notices. Unlike in the cited case where the applicants were licensees the applicants herein own the plots. The Respondent herein simply wants to perform its duties and has no interest in removing the applicants from the suit land.
30. Finally, the applicants' case fails because they failed to disclose the fact that these proceedings were likely to affect other parties. They also failed to notify all the interested parties of the existence of this matter. The 2nd group of interested parties have clearly demonstrated that if the application is allowed, the orders would adversely affect them. The applicants, however, failed to serve them and other parties.
31. The end result is that the applicants' case fails. Their substantive notice of motion dated 18th June, 2010 is therefore dismissed. There will be no order as to costs.

Dated, Signed and delivered at Nairobi this 6th day of May , 2015

W. KORIR,

JUDGE OF THE HIGH COURT