



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC PETITION CASE NO. 4 OF 2019

IN THE MATTER OF ARTICLE 19, 22, 23, 40, 47, 50 & 64 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF GOVERNMENT LANDS ACTS AND THE TRUST LANDS ACT

IN THE MATTER OF CONTRAVENTION OF RIGHTS OF REGISTERED PROPRIETOR

IN THE MATTER OF PURPORTED SUSPENSION OF DEVELOPMENT APPROVAL

NANCY WANGARI KIMANI.....APPLICANT

AND

COUNTY EXECUTIVE MEMBER – LANDS, HOUSING,

PHYSICAL PLANNING AND URBANIZATION.....1ST RESPONDENT

COUNTY GOVERNMENT OF NYERI.....2nd RESPONDENT

RULING

1. The Petitioner/Applicant herein vide her application dated the 23rd October, 2019 seeks for the following orders;

i. Spent

ii. An order of certiorari do issue to bring in this honorable Court for the purpose of being quashed the first Respondent's letter dated 3rd October 2019 purporting to suspend the Petitioner's ongoing development project in all that parcel of land comprised in titles No. Nyeri/ Municipality/Block 1/1404.

iii. An order of prohibition do issue to prohibit the Respondents by themselves servants, agents or whomsoever from interfering with the Petitioner's project based on irrelevant issues.

iv. A declaration that the Respondent's purported suspension of the Petitioner's approved development plan is unconstitutional, null and void.

v. A declaration that the certificate of title issued to the Petitioner in respect to the suit property is conclusive evidence of ownership and the Petitioner is the absolute and infeasible owner of the suit property.

vi. Costs of and incidental to this suit.

2. The said Application was supported on the grounds on its face as well as on the Supporting Affidavit of the Petitioner/Applicant sworn on the 23rd October, 2019.

3. The said application was opposed by the Respondents through their grounds of opposition dated the 22nd November 2019 to the effect that the Petitioner's Notice of motion was premature before the Court for which they should await the Respondent's final verdict on the status of the approved but suspended development permission on the suit premises.

4. Subsequently the Court directed that the Notice of Motion be disposed of by way of written submissions.
5. Despite the Court having issued the above directions, the Respondents filed no written submissions. Nonetheless, I need to be satisfied that the orders sought are justiciable to grant before I can allow the application.
6. The Petitioner/Applicant herein contends that the Respondents have no known the land disputes between themselves and the Petitioners regarding the Petitioner's plot No. Nyeri/ Municipality/Block 1/1404, and further that they have not been served with any details or facts as to what the dispute is all about.
7. That Article 47 of the Constitution is clear that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. That Article 50 of the Constitution on the other hand provided everybody with the right to a fair trial. That in the instant case, the issues that brought about the Petition came from nowhere.
8. That since the allotment of the plot on 1st July 1995 by the Commissioner of Lands, the plot that had been alienated by the Director of Physical Planning under Nyeri local development plan and nobody had ever claimed ownership until the 3rd of October 2019 when she received a letter from the 1st Respondent suspending her development plan that had been approved by his department on 30th May 2019 on the pretext that there had been another party claiming ownership of the same plot.
9. That the Respondent's actions of suspending the development plan was suspicious as it had no jurisdiction, mandate or power to act as it did keeping in mind that it had approved the said construction and the reasons given for suspending the development had nothing to do with the development plan.
10. That the Respondents had no statutory or Constitutional mandate to handle land ownership disputes and further that it had no jurisdiction to issue the impugned suspension of approved development plan on the pretext of unknown land ownership dispute to itself or a third party. That this action amounted to deprivation of property contrary to the provisions of Article 40 of the Constitution.
11. That the Petitioner held a valid certificate of title in respect to the suit land that could only be challenged in a Court of law and as far as she was concerned there was no suit pending that challenge the validity of the title. Reliance was placed on the decided case in **Kuria Green limited vs. Registrar of Titles & Another [2010] eKLR**.
12. That the Respondent had intentionally breached Articles 19, 22, 23, 24, 40, 47 and 50 of the Constitution and most importantly that they had disregarded the rules of natural justice in their action which had been compounded with the fact that they had opposed the Petitioner's application for conservatory orders, for which it had intended to minimize the damages, whilst claiming that the irreparable damage caused could be compensated in damages.
13. The Respondent's grounds of opposition to the Petitioner's application was based on the fact that the Petitioner had not exhausted the dispute mechanism envisaged under Section 33(3), (4) & (5) of the Physical Planning Act.
14. Further that the approval of the development permission on the suit land was subject to clearly outlined conditions inter alia; all condition prescribed on the approved building plans to be observed and the land not constituting public/government land. That the suspension of the development permission aforementioned was temporary as they had received representations questioning the authenticity of the ownership documents submitted by the Petitioner during the approval stage and further that the Notice of motion herein sought for final orders which could only be issued after a full hearing of the substantive Petition. That the Petition ought to have awaited the final verdict of the Respondents, on the status of the approved but suspended development permission on the suit premises.

Determination

15. It is not in dispute that after the Petitioner had commenced the development on the suit land, the 1st Respondent vide a letter dated 4th October, 2019 suspended the development approval earlier issued on the ground that there had been a dispute in relation to the ownership of the suit land herein.
16. The Petitioner has filed the present application seeking remedies of *certiorari* and *prohibition* to remove to the Court for purposes of quashing, the suspension of development approval of the suit land dated 4th October, 2019. The Petitioner has alleged that the Respondent's decision to suspend its approval was not only made in bad faith but contrary to the rules of natural justice.
17. Alongside the said prayers the Applicant has also sought for other orders that, and in agreement with the Respondent, amount to substantive orders that are a preserve of the trial Court.
18. At this interlocutory stage, the issue for determination by this Court is whether the Petitioner/Applicant has established a prima facie case to enable the Court grant the orders sought. In the case of **Mrao vs First American Bank of Kenya Limited & 2 Others (2003) KLR 125**, a prima facie case was described as follows:

“a prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

19. Looking at the facts of this case, the Court has been moved under a certificate of urgency, by the Petitioner/Applicant, to issue an order of *certiorari* to bring in this honorable Court for the purpose of being quashed the first Respondent's letter dated 3rd October 2019 purporting to

suspend the Petitioner's ongoing development project in all that parcel of land comprised in titles No. Nyeri/ Municipality/Block 1/1404.

20. The Petitioner also seeks an order of prohibition to issue prohibiting the Respondents by themselves servants, agents or whomsoever from interfering with the Petitioner's project based on irrelevant issues. She also seeks for a declaration that the Respondent's purported suspension of her (Petitioner's) approved development plan is unconstitutional, null and void.

21. I find that the application offends the provision of **Order 53 rules 1, 2 and 3 of the Civil Procedure Rules** which provides as follows;

(1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave thereof has been granted in accordance with this rule.

(2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the Applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.

(3) The judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit including cash deposit, bank guarantee or insurance bond from a reputable institution.

(4) The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise: Provided that where the circumstances so require, the judge may direct that the application be served for hearing inter partes before grant of leave. Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days.

22. From the above captioned provisions, it is my understanding that the Applicant/Petitioner herein ought to have sought leave of the Court to file a substantive application seeking orders for certiorari and prohibition. In failing to do so, the application herein offended the provisions of Order 53 Rule 1 of the Civil Procedure Rules. **The purpose of the Court is to ensure that the decision making process is done fairly and justly to all parties. That the law must be followed and it is not a choice, and the Courts must ensure that it is so followed. It is imperative that the procedure laid down in the relevant statute should be properly observed and** the Court will not shy away from its constitutional mandate of ensuring that the law is followed. The contravention of the Statute was not justified and in the circumstances this ground must fail.

23. I have also gained sight of the impugned letter dated the 4th October 2019, whose contents are as follows:

RE; TEMPORARY SUSPENSION OF DEVELOPMENT APPROVAL

The above subject refers,

We are in receipt of a complaint letter Ref: MTIHUD/HUD/ED/NYI/HG/28/143 dated the 28th September 2019 and the follow-up letter to Ref: MTIHUD/HUD/ED/NYI/HG/28/144 dated the 3rd October 2019 (copies attached) in relation to the ownership of the plot which we are developing (Nyeri/ Municipality/Block 1/1404)

We hereby temporarily suspend the approved development plan number 2019/282 until the issue of the plot ownership is determined.

These layers with the ministry of transport infrastructure housing and urban development official was to obtain clearance over the mater.

DR Kwai Wanjaria

County executive committee member

Lands, Housing and Physical Planning and Urbanization .

24. In my own analysis of the matter, and keeping in mind that the letter of temporary suspension of the development approval was issued to the Petitioner on the 4th October 2019 after the commencement of the Physical and Land Use Planning Act, and that the Petitioner was able to construe that the contents of the said letter amounted to a dispute that could have been filed in Court, I see no reason why she could not have referred the matter to the National Physical and Land Use Planning Liaison Committee first as provided for in the Physical and Land Use Planning Act. *Section 32(4) and (5)* of the said **Act** provides that;

(4) Any person dissatisfied with the decision of the Inter-County Physical and Land Use Planning Joint Committee may appeal to the National Physical and Land Use Planning Liaison Committee within fourteen days and the committee shall consider the application and make its determination within (60) days of the receipt of the application.

(5) Any person dissatisfied with the decision of the National Physical and Land Use Planning Liaison Committee may, within fourteen days of the decision, appeal to the Environment and Land Court.

25. The Petitioner, being dissatisfied with the decision of the County Executive Committee to temporarily suspend her development approval on the basis of an allegation of an *ownership dispute*, ought to have sought for remedies as per the established remedies before escalating the matter to Court. See **Republic vs. National Environmental Management Authority [2011] eKLR** where the Court held as follows:

“The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the Court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what in, the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it..”

26. The gist of the said decision is that, where there is an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether a matter is exceptional, it is necessary for the Court to examine carefully the suitability of the statutory tribunal in the context of the particular case and ask itself whether the statutory body had the powers to determine the issue at hand. It is common ground that the issue at hand in this matter was about physical planning and execution of a development plan. The issues were purely matters of land planning and development that are covered under the Physical and Land Use Planning Act. For the aforesaid reasons, I am persuaded that the Petitioner ought to have followed and exhausted the alternative mechanism provided by Parliament under the Physical and Land Use Planning Act before engaging the Court.

27. I also note that the Petitioner’s Notice of motion herein also sought for final orders which could only be issued after a full hearing of the substantive Petition. The Court, being aware that at this juncture it is not required to make any definitive or conclusive findings on the factual matters for that is the sole function of the trial Court, and coupled with the afore mentioned determination, finds no merit in the Petitioner’s Application dated the 23rd October, 2019 and proceed to dismiss the same.

28. Costs shall follow the event.

Dated and delivered at Nyeri this 30th day of September 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE