REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

[JUDICIAL REVIEW DIVISION]

MISC. APPLICATION NO.186 OF 2015 (J.R)

IN THE MATTER OF ARTICLE 47 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF LABAN J MACHARIA MUIRURI

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY

FOR

ORDERS OF JUDICIAL REVIEW FOR AN ORDER OF CERTIORARI AND PROHIBITION PURSUANT TO ORDER LIII OF THE CIVIL PROCEDURE RULES 2010

BETWEEN

REPUBLIC….. …….....…….APPLICANT

AND

COUNTY GOVERNMENT OF KIAMBU ……...RESPONDENT

EXPARTE

LABAN J MACHARIA MUIRURI

JUDGEMENT

Introduction

1. By a Notice of Motion dated 24th June, 2015, the ex parte applicants herein, **Laban J Macharia Muiruri**, seeks the following orders:

1 THAT an order of certiorari be and is hereby issued to remove and bring into this court and quash the Planning Enforcement notice issued on 24th April 2015.

2 THAT an order of prohibition be and is hereby issued prohibiting the Respondent from stopping the *ex parte* Applicant's development of a Multi Dwelling Residential Unit (Flats) situated in NGOINGWA BLOCK 22/13 also known as THIKA MUNICIPALITY BLOCK 22/113 situate at Mangu in Kiambu County.

3 THAT costs be borne by the Respondent.

***Ex Parte* Applicant's Case**

2. According to the Applicant, he is the registered owner of parcel of land known as **NGOINGWA BLOCK 22/113,** also known as **THIKA MUNICIPALITY BLOCK 22/113** (hereinafter referred to as "the suit land") on which he was in the process of developing a multi dwelling residential unit (flats). As part of the regulatory and statutory requirements, he applied for development permissions from the County Government of Kiambu, the Respondent, which was granted on the 10th of February 2014 under the ***Physical Planning Act*** (hereinafter referred to as "the Act") consequent to an application No. [112389].

3. Acting on the approval, the applicant sourced for and engaged various consultants and a building contractor and commenced construction of the said flats and complied with all the conditions appearing on the approval. Further an official from the Respondent has been going to the site to supervise and ensure that the development was keeping up with the terms and conditions granted by the Respondent and approved the construction up to the stage it was.

4. To the applicant, the approval created a legitimate expectation that the Respondent would allow the construction to go on without interruption. Accordingly, the applicant mobilized enormous resources through loans from financial institutions to initiate the construction which was in jeopardy as a result of the issuance of a Planning Enforcement Notice by the Respondent on the ground that the construction was "construction without approval", despite having obtained the necessary approval prior to commencement of construction. It was the applicant's case that it was very strange for the County Government of Kiambu to have issued him with the requisite approval and development permission, and after starting the project and made tremendous progress thereon, purport that he was constructing without their necessary approval. It was therefore the applicant's contention that the Respondent's actions are illegal, unreasonable, in breach of the rules of natural justice and legitimate expectations and call for intervention of the court by way of judicial review by way of the payers sought herein since there is no reason for issuing the Approval and cancelling it whimsically. Based on legal counsel he contended that that the actions are also at variance with the law as they denied him an opportunity to present a defense to any allegations or purported breach.

5. It was further averred that there are commercial buildings in the same area where the suit property is situate that were constructed with the Respondents authority and that the Respondent did issue the requisite approval after receiving payment and stamped its approval on the architectural plans. To the applicant, lack of a title deed to the property does not bar one from applying for approval to develop, as he had already purchased the property, and all he was awaiting was the issuance of a title deed.

6. The applicant disclosed that he bought the land in the year 2012 from **David Njehiah Ngugi** and **Martha Muthoni Njihia** but before he could register the property in his favour, the vendors lost the title deed and applied for a new one to be issued. The issue of the lost title deed was gazetted in Gazette Notice no 15664, of 27th December 2013 and the title deed was later issued to the vendor and he registered the property in his favour though this did not stop him from lodging applications for development approvals.

7. It was averred that the PPA2 and notification of approval can only be issued by the Respondent who did not adduce any forensic evidence to sustain the forgery claims. Both the notification of approval and

the PPA2 forms bear the signatures of officers from the Respondent who has been monitoring and inspecting every stage of construction since it commenced and has been filling the inspection card annexed in my verifying affidavit.

8. Since the minutes of the meeting approving his plans are in the Respondents custody as the sole custodian, it was the applicant's case that the respondent should produce the said minutes in support of his assertions that the approval request was denied.

9. To the applicant as the Respondent has not given any plausible reasons as to why it would grant an approval and after construction has commenced, purport to withdraw such an approval, it was clearly evident that the respondent is unreasonably misusing his powers. The said breach is vague and the Respondent's refusal to disclose the exact reason of stoppage is oppressive and must invite judicial sanctions.

Respondent's Case

10. In response to the application, the Respondent filed a replying affidavit sworn by **David K. Gatimu**, its Chief Officer Lands, Housing and Planning on 31st July, 2015.

11. According to the Respondent, the suit property, according to their records and documents is located in area that is zoned as single dwelling property hence it is unlikely that any approval for a multi dwelling residential unit would be issued by the county government officers. In their view, in order for any person to be issued with a notification of development approval, that is a PPA 2 Form, the Applicant ought to attach as in their application property ownership documents. However, a look at the lease attached in the Applicant's affidavit shows that the lease was issued on 23rd April 2014 while the application for development approval was lodged on 25th April 2012 and the notification of approval (also known as Form PPA2) was issued on 10th February 2014. It was therefore their view that it is not possible for a notification of approval to be issued prior to issuance of ownership documents to the Applicant and more to that, 2 months prior to issuance of the lease to the Applicant. Accordingly the Respondent contended that the Form PPA2, notification of approval, annexed by the Applicant is a forgery and/or a fraudulent document as it is in accurate and full of inconsistencies.

12. It was averred that the first inconsistency is the fact that the application for approval was done 2 full years prior to the Applicant being the registered owner of the aforementioned property, further that the approval took 2 years to be processed and further the approval was issued 2 months before the Applicant was issued with the lease showing that he is the registered owner of the property. The document, according to the Respondent is a forgery on the ground that it does not provide details of when the meeting approving the Applicants application was done, neither does it disclose the date of the minutes that approved the application as is norm with all notification of approvals.

13. It was their position that the failure to produce the afore mentioned documents and the inconsistencies referred to above prompted their officers to issue the enforcement notice and compel the Applicant to regularize his rerecords and or provide the authenticate documentation if any existed.

14. To them, the Applicant has come to this honourable court with unclean hands, more specifically by misguiding the court that the properties in question belong to him and is therefore not deserving of the court's equitable remedies.

15. It was further contended that the Applicant has failed to follow the laid down procedure espoused in Section 38 the Act, that provides an appeal on the issuance of an enforcement notice shall first lie in the Liaison Committee hence the matter is prematurely before this honourable court as there lies other venues of redress which the Applicant has failed, neglected and or refused to follow. It was further contended that the application is frivolous, vexatious and amounts to abuse of the court process.

Determinations

16. I have considered the foregoing.

17. On the issue that the Applicant had no title to the suit plot, it is not true that for judicial review orders to be granted the Applicant must have legal title to the property. What is required is legal interest. From the case as presented by the Applicant he no doubt had beneficial interest in the suit plot even if legal title had not passed over to him.

18. 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.***

19. Therefore the *ex parte* applicant was a person contemplated under Article 47 of the Constitution aforesaid. As I held in **Republic vs. City Council of Nairobi ex parte North Lake Limited High Court Miscellaneous Application No. 84 of 2011 (JR)** "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 the mere fact that the applicant is not the person in whose name the title is registered or the one who applied for the approval does not necessarily bar him from being accorded the rights conferred under Article 47 of the Constitution as long as he was a person adversely affected by the decision of the Respondent.

20. In this case the applicant's case is that he did apply for development permission from the Respondent and his application was duly approved. He has exhibited a document which *prima facie* confirms his contention that this was the position. The same is executed by the Municipal Planner. The said planner has not sworn an affidavit that what appears thereon as his signature is in fact not his. The Respondent on the other hand contends that what prompted them to take the action under challenge was the realisation that there were inconsistencies in the documentation issued to the applicant which evinced fraud.

21. The Respondent has not contended that before issuing the enforcement notice they afforded the applicant a hearing. 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. All these constitutional edicts were ignored by the Respondent.

22. 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."**

23. 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. As was held by the Court of Appeal in **Onyango Oloo vs. Attorney General [1986-1989] EA 456** the Court of Appeal expressed itself as follows:

"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.*"

24. To contend that the applicant could appeal the decision of the Respondent is to miss the point by a wide margin. 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 hence the option would not have been efficacious in the circumstances of this case where what is alleged is a breach of the right to be heard.

25. 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."

26. With respect to the issue of fraud in obtaining the approval, such allegation does not permit the Respondent to act unconstitutionally and illegally. Article 47 of the Constitution required the Respondent to act fairly in the matter and one if not the cardinal rule of fairness is the requirement that persons who are likely to be adversely affected by an administrative action are afforded an opportunity of being heard. There is no evidence at all that the Applicant given an opportunity to be heard before the Respondent acted in the manner it did.

Order

27. Consequently, I find merit in the Notice of Motion dated 24th June, 2015 and in the result:

1. An order of certiorari is hereby issued bringing into this Court for the purposes of being quashed, the decision of the Respondent made vide the Planning Enforcement notice issued on 24th April 2015 and the same is hereby quashed.

2. Having quashed the decision an order of prohibition is nolonger necessary and in any case an order of prohibition in the manner sought would have the effect of permanently barring the Respondent from undertaking its statutory obligations. Such an order cannot be granted. However if the Respondent deems it fit to issue the enforcement notice it will have to follow the laid down constitutional and statutory procedure.

3. The costs of this application are awarded to the Applicant.

Dated at Nairobi this day 1st day of December, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ranja for the Respondent

Cc Muriuki