



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISCELLANEOUS CIVIL APPLICATION J.R. 475 OF 2009**

**IN THE MATTER OF AN APPLICATION BY PERGOLLA LIMITED FOR JUDICIAL  
REVIEW ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS**

**AND**

**IN THE MATTER OF LOCAL GOVERNMENT ACT, CHAPTER 265 OF THE LAWS OF  
KENYA.**

**AND**

**IN THE MATTER OF PHYSICAL PLANNING ACT CHAPTER 286 OF THE LAWS OF  
KENYA**

**AND**

**IN THE MATTER OF THE REGISTRATION OF TITLES ACT CHAPTER 281 OF THE LAWS  
OF KENYA**

**AND**

**IN THE MATTER OF THE CIVIL PROCEDURE RULES ORDER 53**

**THE REPUBLIC .....APPLICANT**

**VERSUS**

**THE CITY COUNCIL OF NAIROBI.....1<sup>ST</sup> RESPONDENT**

**THE MINISTER OF LOCAL GOVERNMENT.....2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL .....3<sup>RD</sup> RESPONDENT**

**Ex-parte PERGOLLA LIMITED.....APPLICANT**

**JUDGEMENT**

**INTRODUCTION**

1. By a Notice of Motion dated 10<sup>th</sup> August, 2009, the *ex parte* applicant herein, **Pergolla Limited**, seeks the following orders:

1. **The Honourable Court be pleased to allow the Applicant the following Orders for Judicial Review against the Respondents.**
2. **An order of certiorari removing to this Honourable Court for the purpose of the same being quashed the letters dated 27<sup>th</sup> March 2009, 18<sup>th</sup> June 2009 and 27<sup>th</sup> July 2009 written by P.T Odongo all addressing the development on L.R. No.12495/13 Karen belonging to Pergolla Limited together with the Enforcement Notice serial No.5439 and served on 17<sup>th</sup> February 2009 and any other Enforcement Notice that may or may not have been issued and not served on Pergolla Limited.**
3. **An order of prohibition to prohibit the 1<sup>st</sup> Respondent or any of its agents or any other party acting for and on behalf of the 1<sup>st</sup> Respondent from issuing any Enforcement Notices or Letters to any party whatsoever that are aimed at interfering with the development being carried out on the Applicant's property situated on L.R No.12495/13 Karen.**
4. **An order of prohibition to prohibit the 1<sup>st</sup> Respondent or any other party acting for or behalf of the 1<sup>st</sup> Respondent from interfering with any development on L.R No.12495/13 Karen pending the hearing and determination of Milimani HCCC No.308 of 2009 Mary Wairimu Kubai & Another v Morjaria & 15 Others.**
5. **An order of mandamus do issue compelling the Minister of Local Government to either appoint any public officer or direct the Town Clerk to investigate and inquire into the conduct of the officers in the Department of City Planning and in particular the conduct of P.T Odongo for issuing illegal enforcement notices and letters that directly interfere with the development of L.R No.12495/13 Karen, ignoring the sub-judice rule and purporting to act in excess of their powers by purporting to determine the validity of the applicant's right of ownership over its property L.R NO.12495/13 Karen when the dispute is pending the High court.**
6. **Costs be in the cause.**

#### **EX PARTE APPLICANT'S CASE**

2. The application is supported by a verifying affidavit sworn by **Edwin Induli**, a director of the applicant sworn on 7<sup>th</sup> August, 2009. I must respectfully point out that the terms of the said affidavit are couched on terms which are rather incoherent and difficult to follow.
3. According to the deponent, there is a suit pending in Milimani HCCC No.308 of 2009 **Mary W. Kubai & Ano. V Vijay Morjaria & 15 Others** (hereinafter referred to as the said suit) in which the plaintiffs sued all 16 Defendants primarily seeking to nullify the Certificate of Title in respect of L.R 12495/13 Karen, which belongs to the said 16<sup>th</sup> Defendant. However, the plaintiff did not obtain any ex-parte orders when the injunction was filed.
4. On 7<sup>th</sup> August 2009, in the said suit, the presiding Judge of the Milimani Commercial Court directed that the pending applications for security for costs filed by all save the 15<sup>th</sup> Defendants in the said suit be heard on 29<sup>th</sup> September 2009. However, dispute regarding the applicant's property L.R No.12495/13 Karen is pending in court and the matter is therefore *sub-judice*.
5. Although the 1<sup>st</sup> respondent granted to the Applicant and its contractor development permission one of the conditions was that the suit premises were not part of any disputed public utility land/allocation. This, according to him was confirmed by the applicant's advocates and that the said property is lawfully registered in the name of the applicant.
6. Despite this the Plaintiffs' in the said suit have unsuccessfully attempted to stall the construction work on the suit premises by lodging complaints with the commissioner of Lands and the National Environmental Management Authority (NEMA) in spite of the fact that the City Council of

- Nairobi and the Commissioner of Lands have confirmed in writing by letter dated 8<sup>th</sup> May and 12<sup>th</sup> May 2009 that the suit premises user is residential and not agricultural as falsely alleged by the Plaintiffs in the said suit.
7. According to the deponent, 1<sup>st</sup> Respondent, at the instigation of the Plaintiffs in the said suit has embarked on a personal crusade to frustrate the applicant, its shareholders and various financial institutions from carrying out the development of town houses on the Applicant's suit property. To this end, the 1<sup>st</sup> respondent issued an enforcement notice on 17<sup>th</sup> February 2009 which talked of the construction of 10 town houses and while cancelling the words 'without approved plans' ordered that the construction should be stopped immediately. No reasons however were given for the said action.
  8. By a further letter dated 27<sup>th</sup> March 2009, P.T Odongo, made allegations to the Commissioner of Lands that documents had been falsified and that following investigations on the authenticity of the ownership documents of the suit premises, the change of user approval had been cancelled. It was contended that the applicant's shareholders have already begun construction of the town houses and most of its shareholders have obtained mortgages from various financial institutions.
  9. Despite the applicant's advocates complaints regarding the need to comply to the rules of natural justice the said Mr Odongo insisted that based on reports of 'fraud/forgery' of ownership documents which led to the transfer of the suit premises to the Applicant, all development approvals had been cancelled and ordered an immediate halt to all development work on the suit property owned by the Applicant.
  10. Despite being informed of the pendency of the said suit, On or about 5<sup>th</sup> August 2009, the city council *askaris* together with the police, visited the suit premises and attempted to arrest the casual workers.
  11. It was contended by the deponent that the said P T Odongo's actions amount to contempt of court and that the 1<sup>st</sup> respondent had no jurisdiction and power to make findings of fact and law on matters affecting the Applicant's ownership of land. In the applicant's view, the construction work has reached a critical stage and cannot be stopped by the 1<sup>st</sup> Respondent as it is been used by the machinations of the Plaintiffs in the said suit and that the applicant and its shareholders stand to suffer immense financial loss if the project is not completed in time.

### **RESPNDENT'S CASE.**

12. In response to the application, the respondents filed a replying affidavit sworn by **Karisa Isa** the 1<sup>st</sup> respondent's Director of legal affairs on 6<sup>th</sup> October, 2009. According to him, it was true that the 1<sup>st</sup> respondent did issue an enforcement asking the applicant to cease further developments upon discovering that the applicant had fraudulently applied for and obtained development permission from the applicant. In the said application for development, it was indicated, contrary to the applicant's contention herein, that the owners and developer of the property were **Ms Eva Likimani** and one **Lois Likimani** and that the application for change of user was similarly made in the names of the said persons.
13. According to the deponent the said **Eva Likimani** informed him that she used to own the said property but relinquished ownership thereof in 1987 upon selling the same to **Julius Kaigoya** and **Mary Wairimu Kubai**. The deponent states that he has seen a letter from the Commissioner of land and forensic report from Criminal Investigations Department of the police to the effect that there was fraud on the part of the applicant and its predecessor in tile. Apart from that NEMA has denied issuing Environmental Impact Assessment Licence hence all the developments on the suit property are illegal. To him a developer must prove unqualified ownership of the property to be developed and the information tendered should be correct and accurate for one to be entitled to a grant of development plan hence the applicant's application for change of user and development are void *ab initio* and the 1<sup>st</sup> respondent is entitled to top further developments.
14. It was contended that upon issuance of enforcement notices, the developer ought to have appealed to the National Liaison Committee and or the High Court which avenue the applicant has ignored. It is therefore contended that the applicant was given a fair hearing by being stopped from further developments and in event of being aggrieved he was enjoined to follow the procedure under the **Physical Planning Act** which procedure the applicant has not followed. It was therefore

contended that the 1<sup>st</sup> respondent did not act without jurisdiction hence the application ought to be dismissed.

### **INTERESTED PARTY'S CASE.**

15. On behalf of the interested party an affidavit sworn by the said interested party, **Vijay Morjaria**, on 10<sup>th</sup> November, 2009 was filed on the same day.
16. According to him, the suit instituted against him as outlined by the Applicant, primarily on the admission of the Plaintiffs therein is based on fraud and to date there is no injunction that has been granted as sought by the Plaintiffs therein as against himself over the suit property or the now registered proprietor and the said matter as clearly indicated by the Applicant's counsel is presently "*sub Judice*". According to him, he has been subsequently absolved of any allegation of forgery and/or fraud by both a private document examiner and the Criminal Investigations Department who upon a through scrutiny of the original documents submitted by him, have come to the proper finding that the same are genuine and true in their present form. To him, any claim based on fraud or at all alleged by the Plaintiffs in their suit being HCCC No 308 2009 are not genuine or true and are therefore not worth more than the paper the same have been presented on.
17. In his view, after having been victimised in a more or less similar fashion he has every reason to believe the deponent where he states that the Plaintiffs have been instigating Authorities and/or parties with influence that are real and/or imagined in an effort of making them unwitting accomplice in their schemes to frustrate Law abiding citizens in enjoying the fruits of their investments.

### **DETERMINATIONS**

18. Having considered the foregoing, it is my view that the applicant's complaints are twofold: firstly, that it was never given a hearing before the enforcement notice was issued and, secondly, that the 1<sup>st</sup> respondent had no powers to cancel development approval.
19. In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** it was held that:

**“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”**

20. In **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See *Halsbury's Laws of England 4<sup>th</sup> Edition Vol (1)(1) Para 60*.
21. Judicial review is, therefore, concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose 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*.
22. The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorised

- by law to decide for itself a conclusion which is correct in the eyes of the court. See Chief Constable of the North Wales Police vs. Evans (1982) I WLR 1155.
23. Before going into the merit of the matter I must comment on the manner in which documents were exhibited to the verifying affidavit. In my view, affidavit contains the evidence in support of a judicial review application. Such an affidavit ought to refer to the documents exhibited thereto. To simply attach copies of documents to an affidavit without specific reference thereto in the affidavit is a most unusual way of adducing evidence in a judicial review. Parties ought not to simply throw documents at the Court and expect the Court to sieve through and decide for itself which documents are relevant and in respect of what as was done in this case. The deponent of an affidavit in support of an application ought to show in the body of the affidavit the relevance of the documents exhibited thereto.
24. By a letter dated 18<sup>th</sup> June 2009, the 1<sup>st</sup> Respondent informed the applicant that the 1<sup>st</sup> Respondent had cancelled all development approvals granted based on forgeries which had been unearthed.
25. The applicant contends that the said decision was arrived at without it being afforded a hearing. The Respondent does not dispute this but only contends that the applicant had the liberty to appeal the said decision. Article 47 of the Constitution provides as follows:

***(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.***

26. 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.
27. 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.”**

28. Therefore the 1<sup>st</sup> 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*."

29. To contend that the applicant could appeal the decision of the 1<sup>st</sup> 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.
30. Therefore the first and a crucial issue to be determined is whether the *ex parte* applicant was a person contemplated under Article 47 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 who applied for the approval does not necessarily bar it 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 1<sup>st</sup> Respondent.
31. In these proceedings the Court is not concerned about the merits of the decision and whether or not the 1<sup>st</sup> respondent could have arrived at the same decision had it afforded the applicant a hearing is neither here nor there. Similarly, this Court is not concerned with the manner in which the suit property was obtained by the applicant. That is an issue which will be determined in the said suit. The mere fact that a party has not obtained an injunction in a suit or even that no proceedings have been instituted does not take away the party's rights to be heard before an adverse decision is made.
32. With respect to whether the 1<sup>st</sup> 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.*

33.From the record there is no evidence that these provisions were complied with by the 1<sup>st</sup> respondent.

34.Having considered the application herein, I find that the 1<sup>st</sup> respondent acted un-procedurally hence its decision was tainted by procedural impropriety and the same cannot stand.

### **ORDER**

35.In the result the order which commends itself to me and which I hereby grant is that an order of certiorari is hereby issued bringing into this court for the purposes of being quashed the 1<sup>st</sup> respondent's decision expressed in the letters dated 27<sup>th</sup> March 2009, 18<sup>th</sup> June 2009 and 27<sup>th</sup> July 2009 written by P.T Odongo all addressing the development on L.R. No.12495/13 Karen belonging to **Pergolla Limited** together with the Enforcement Notice serial No.5439 and served on 17<sup>th</sup> February 2009 and the same are hereby quashed. I however find no merit in the other substantive prayers and decline to grant the same.

36.Taking into account what I have stated with respect to the manner in which the affidavit was drawn and the annexures thereto exhibited, I decline to make any order as to costs.

**Dated at Nairobi this day 14<sup>th</sup> day of February, 2014**

**G V ODUNGA**

**JUDGE**

***Delivered in the absence of the parties.***