



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**JR NO. 14 OF 2019**

**LASHAD MOHAMED MUBARAK (Suing through his appointed**

**attorney ABDILAH SALIM BADRI) .....APPLICANT**

**VERSUS**

**THE COUNTY GOVERNMENT OF MOMBASA....RESPONDENT**

**RULING**

(Suit being a judicial review application for prerogative orders directed at the respondent in relation to revocation of planning and development permission; preliminary objection that the suit ought to have been filed before the County Physical and Land Use Planning Liaison Committee under the Physical Planning and Land Use Act, 2019; argument of ex parte applicant that the court has jurisdiction as this is a suit for prerogative orders; Physical Planning and Land Use Act, 2019, providing a dispute resolution mechanism; the mechanism ought to be followed unless there are special circumstances; no reason given as to why the ex parte applicant did not pursue the mechanism provided by the Act; preliminary objection upheld and suit struck out; ex parte applicant advised to file his complaint before the Liaison Committee)

1. This ruling is in respect of a preliminary objection raised by the respondent. The objection is as follows :-

i. That this Honourable Court lacks jurisdiction to determine or make any orders thereof in regard to the suit against the Respondent for the reasons that :

a. The suit is premature and any attempt to entertain the present proceedings before this Honourable /court is unconstitutional for the reasons that there exists sufficient and adequate mechanisms to deal with the issues raised in the present suit and the jurisdiction of the court should not be involved until such mechanisms have been exhausted.

b. The suit arises from the decision making and communication on issuance and/or refusal and/or revocation of development permission under the Physical and Land Use Planning Act, No. 13 of 2019. Therefore, any claim in relation thereof should be dealt with pursuant to the provisions of the Physical and Land Use Planning Act, No. 13 of 2019, which requires all claims in relation to decision making and communication on issuance and/or refusal and/or revocation of a development permission to be lodged with the County Physical and Land Use Planning Liaison Committee.

ii. That this suit is incurable defective and repugnant to the provisions of the law, in particular the Physical and Land Use Planning Act, No. 13 of 2019 and the Constitution of Kenya, 2010.

2. To put matters into perspective, the ex parte applicant (Lashad Mohamed Mubarak) is the owner of the land identified as Plot No. 149 Section II Mainland North situated in Mtopanga, Kisauni Sub-County, within Mombasa County. He has donated a power of attorney to Abdilahi Salim Badri. The ex-parte applicant wished to develop the plot and on 2 April 2019, he applied for development permission to construct a building on the suit land from the respondent. On 8 May 2019, the ex-parte applicant received a notification of approval of the application from the respondent's Director of Planning. However, through a notice dated 27 August 2019, the Respondent's County Executive Committee member revoked the construction approval permit of 8 May 2019, on the allegation that the land lies on a road reserve.

3. Through an application dated 19 September 2010, the ex parte applicant sought leave to commence judicial review proceedings for the following orders (slightly paraphrased for brevity) :-

i. Certiorari to quash the decision of the Respondent's Chief Executive Committee Member for Lands as evidenced in the letter and notice dated 27<sup>th</sup> August 2019 issued to the ex-parte applicant.

ii. Mandamus directed at the respondent to restore the approval for development permission dated 8<sup>th</sup> May 2019 and allow the ex-parte applicant to proceed with construction based on the terms and conditions contained therein.

iii. Prohibition directed to the respondent prohibiting it from cancelling, rescinding, revoking, or recalling the Notification of Approval dated 8 May 2019 issued to the ex-parte applicant, or demolishing, or interfering with the ex-parte applicant's construction on Plot No. 149/II/MN on the basis of notices dated 27<sup>th</sup> August 2019.

4. The leave sought was granted but without prejudice to the discretion of the court to refer the matter for determination by the County Physical and Land Use Planning Liaison Committee under The Physical and Land Use Planning Act, 2019. It will be observed that the preliminary objection raises the same issue, that is, that the dispute ought to have been referred to the Liaison Committee.

5. I invited counsel to file written submissions to the preliminary objection which was done. I have taken note of these submissions. On his part, Mr. B.N. Otieno, learned counsel for the respondent, referred me to Section 61(3) of the Physical and Land Use Planning Act, No. 13 of 2019 which provides as follows :-

(3) An applicant or an interested party that is aggrieved by the decision of a county executive committee member regarding an application for development permission may appeal against that decision to the County Physical and Land Use Planning Liaison Committee within fourteen days of the decision by the county executive committee member and that committee shall hear and determine the appeal within fourteen days of the appeal being filed.

Counsel also referred me to the case of *Samson Chembe Vuko vs Nelson Kilumo & 2 Others (2016)eKLR* where it was inter alia held that where there is a clear procedure for redress of a particular grievance prescribed by an Act of Parliament, that procedure should be followed. He submitted that this court cannot oust the jurisdiction bestowed upon the Physical and Land Use Planning Liaison Committee by law.

6. On his part, Mr. Mutubia, learned counsel for the ex-parte applicant, inter alia submitted that the availability of an alternative remedy is no bar to proceedings by way of judicial review as judicial review does not concern itself with the merits of a decision but the process itself. He submitted that a statute may provide a mechanism for dealing with the merits of an impugned decision but Judicial Review is a remedy addressing the process. He referred me to the case of *R vs National Environmental Management Authority, Civil Appeal No. 84 of 2010 (2011)eKLR*; *Republic vs Senior Magistrate Mombasa Ex Parte HL & Another (2016)eKLR* and *Republic vs Commissioner of Customs Services Ex-Parte Unilever Kenya Limited, High Court Miscellaneous Application No. 181 of 2011*, as holding that the existence of an alternative remedy by itself is not a ground for declining judicial review relief, especially where the administrator's decision is ultra vires. He also referred me to Section 9(4) of the Fair Administrative Action Act, which stipulates as follows :-

“Notwithstanding subsection (3), the High Court or a Subordinate Court, may in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.”

7. He submitted that the court may exempt a party from exhausting an alternative remedy. He further submitted that one of the orders sought in this suit is a stay of the decision which the Liaison Committee could not grant. He submitted that this court has jurisdiction.

8. I have taken note of the above submissions and I take the following view of the matter.

9. The Physical and Land Use Planning Act, Act No. 13 of 2019, is the principal statute that makes provision for the planning, use, regulation and development of land. The objectives of the Act are set out in Section 3 which provides as follows :-

### 3. Objects of the Act

The objects of this Act are to provide—

- (a) the principles, procedures and standards for the preparation and implementation of physical and land use development plans at the national, county, urban, rural and cities level;
- (b) the administration and management of physical and land use planning in Kenya;
- (c) the procedures and standards for development control and the regulation of physical planning and land use;
- (d) a framework for the co-ordination of physical and land use planning by county governments;
- (e) a mechanism for dispute resolution with respect to physical and land use planning;
- (f) a framework for equitable and sustainable use, planning and management of land;
- (g) the functions of and the relationship between planning authorities;
- (h) a robust, comprehensive and responsive system of physical and land use planning and regulation; and
- (i) a framework to ensure that investments in property benefit local communities and their economies.

10. It will be seen from the above, that apart from providing the framework for development control, the statute also provides a mechanism for dispute resolution with respect to physical and land use planning. Under Section 57 (1) a person shall not carry out development within a county without a development permission granted by the respective county executive committee member. One therefore needs to make an application to the County Executive Committee member of the particular county in charge of planning before embarking on a development.

11. Apart from the power to grant development permission, The County Executive Committee member has further been granted by the Act, power to revoke a development permission and power to modify the conditions imposed on a development permission. These are provided for in Section 57 (5) and (6) which are drawn as follows :-

(5) A county executive committee member may revoke development permission if the applicant has contravened any provision of this Act or conditions imposed on the development permission for any justifiable cause.

(6) A county executive committee member may modify the conditions imposed on development permission where circumstances require it or for any justifiable cause.

12. The Act has a dispute resolution mechanism which is contained in Section 61 (3) and (4) which provide as follows :-

(3) An applicant or an interested party that is aggrieved by the decision of a county executive committee member regarding an application for development permission may appeal against that decision to the County Physical and Land Use Planning Liaison Committee within fourteen days of the decision by the county executive committee member and that committee shall hear and determine the appeal within fourteen days of the appeal being filed.

(4) An applicant or an interested party who files an appeal under sub-section (3) and who is aggrieved by the decision of the committee may appeal against that decision to the Environment and Land Court.

13. It will be seen from the above, that a person who is aggrieved by a decision of the County Executive Member over a planning application, has liberty to appeal to the County Physical and Land Use Planning Liaison Committee. I believe that this right of appeal is not only on the grant or refusal to grant a development permission in the first instance, but also a decision to revoke or modify a planning permission. There is therefore a right of appeal that has been granted by statute. This right of appeal would encompass all matters that a person feels aggrieved against, whether it is procedural or on merits.

14. In his submissions, Mr. Mutubia, learned counsel for the ex-parte applicant, of course pressed the point that this court still has jurisdiction to hear a judicial review application, to interrogate the procedural integrity of the decision making process. I agree. I in fact do not think that this is a situation where it can be said that the court does not have jurisdiction. However, the fact that this court has jurisdiction to entertain a judicial review application, and that would include the jurisdiction to oversee the manner in which the county executive member performs his duties, does not mean that it must invoke its powers every time it is moved. Where the parent statute has provided a mechanism for resolving disputes, the court ought to be slow to invoke its inherent jurisdiction, and unless there are special circumstances, for example, that the body that is meant to hear the dispute has not been constituted, then the court ought ordinarily to defer jurisdiction to the specific dispute mechanism body that has been provided for in the statute.

15. In the case at hand, no reason has been given as to why the ex-parte applicant did not pursue the dispute settlement mechanism that is provided for in statute. I have not been told why the ex-parte applicant did not file an appeal to the County Physical and Land Use Planning Liaison Committee. Given that position, I am of the view that it is best that the ex-parte applicant first exhausts the dispute resolution mechanism in the Act before invoking the jurisdiction of this court.

16. For the above reasons, I strike out this suit. I am aware that the time for filing the appeal to the County Physical and Land Use Planning Liaison Committee has lapsed for an appeal is supposed to be filed within 14 days of the decision. In my discretion, and so that the ex-parte applicant is not shut out of the appeal mechanism, I enlarge the time to file the appeal by a further 14 days from the date hereof.

17. On the costs of this suit, in my discretion, each party to bear his/her own costs.

18. Orders accordingly.

**DATED AND DELIVERED THIS 17TH DAY OF SEPTEMBER 2020**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT MOMBASA**