



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW APPLICATION NO. 342 OF 2012**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE JUDICIAL REVIEW PROCEEDINGS AND THE CITY PLANNING ACT (CAP 386) LAWS OF KENYA & THE CITY COUNCIL BY-LAWS AND THE CONSTITUTION OF KENYA AND ENFORCEMENT NOTICE)**

**BETWEEN**

**MICHAEL THIONG'O KINYANJUI.....APPLICANT**

**VERSUS**

**THE TOWN CLERK, CITY COUNCIL OF NAIROBI..... RESPONDENT**

**JUDGEMENT**

**Introduction**

1. By a Notice of Motion dated 17<sup>th</sup> September, 2012 filed in this Court on 10<sup>th</sup> September, 2012, the applicant herein, **Michael Thiong'o Kinyanjui** seeks the following orders:
1. **THAT an order of Certiorari do issue to remove to the High Court and quash the enforcement Notice No. 11604 issued on 29<sup>th</sup> August, 2012 against the Applicant directing the removal of the boundary wall securing property known as Plot No. 33 Kangundo Road.**
2. **THAT an order of Prohibition directed to the Respondent prohibiting them from taking any further action in effecting Enforcement Notice No. 11604 issued on 29<sup>th</sup> August 2012 and further matters touching existing boundary wall on the said the boundary wall securing property known as plot No. 33 Kangundo Road.**
3. **THAT an order condemning the Respondent to pay cost of application for leave and the substantive application.**

**Ex Parte Applicant's Case**

2. The application is supported by an affidavit sworn by the applicant on 4<sup>th</sup> September, 2011.
3. According to the deponent, he is the registered allottee of property known as Plot No. 33 Kangundo Road situated at Kayole Estate on the junction at Kangundo Road Komarock junction allocate to him vide the Allotment Certificate No. 1130040 which property he has occupied since September 2008 while continuing to pay all the necessary rates and other payments as demanded by the City Council of Nairobi, the Respondent herein.
4. Sometimes in August, 2012, the applicant with an intention to develop his said plot sought the services of the Respondent's Department for Housing Development to prepare a plan for the

- boundary wall and prior to the drawing of the wall the officers of the said Respondent visited the suit premises with their records and did sketches in the applicant's presence which sketches were used to draw the plan for the perimeter wall which plan the applicant submitted to the Director of Housing Development Department. Pursuant thereto, the applicant paid a sum of Kshs. 16,000/= an all-inclusive amount for the plan and Approval and was given a letter to enable him collect the approved plan from the assistant director Technical Room T-85.
5. The applicant deposed that upon the approval of the plans on 16<sup>th</sup> August, 2012 for the perimeter wall it was an express authority for him to move and construct the boundary wall according to what was provided in the plans. Accordingly, after the approval was granted he immediately embarked on construction of the perimeter wall which he did finish. However, on 29<sup>th</sup> August, 2012 soon after completing the same officers from the physical planning department served him with an Enforcement Notice No. 11604 alleging that the said boundary wall encroached on the road reserve and he was required to remove the same by 5<sup>th</sup> September, 2012 a development which the applicant found strange since it is the Respondent who is the custodian of all documents and matters pertaining to his said parcel of land and who received payment for and approval plans for construction of the said boundary wall. Despite visiting several offices of the Respondent, and tendering all the evidence showing that the said enforcement notice was erroneously issued, the Respondent has insisted that the same should be complied with first. Similar attempts to get assistance of the Town Clerk have not yielded any fruits hence his decision to come to court. However, in his supplementary affidavit he deposed that he had been informed by the relevant department of the Respondent that what he has is sufficient approval and of the council.
  6. According to him the said enforcement Notice is as a result of malicious instigation by the Deputy Mayor, **William Kinyanyi** who is eyeing part of his said plot to turn it into a car wash. To him, the said **William Kinyanyi** has no power whatsoever to enter upon or cause other persons to enter into his legitimately allocated property and the said letter followed by the Enforcement Notice is a clear show of impunity and abuse of office by the Deputy Mayor at whose behest the Respondent is acting.
  7. According to the applicant the Respondent allotted the plot to him upon payment of the requisite fees and issued him with the clearance. Apart from that the Respondent even sent demand notices for payment of rates and other payments relating to ownership hence it is estopped from demanding other proof of ownership.
  8. In the applicant's submissions, the applicant reiterated the foregoing and contended that the issue of allotment and possession are not the subject of this application but rather it is the issue of a boundary wall that is in issue.

### **Respondent's Case**

9. In opposition to the application, the Respondent filed a replying affidavit sworn by **Rose K. Muema**, its Director of City Planning Department.
10. According to the deponent, payment of land rates is not an authority to erect any structure on the land without statutory approvals of the Respondent. In her view there is no authority to erect the wall as claimed by the Applicant and mere possession of a plan does not translate into an authority to erect the wall without seeking and obtaining a written authority to do so.
11. It was therefore deposed that the enforcement notice was correctly issued in view of the fact that the Applicant had no such approval. It was further contended that the Town Clerk is not responsible for City Planning and the Deputy Mayor is not authorised to determine what use or structures are to be erected on any piece of land within the Respondent's jurisdiction. To her the said matters fall within the City Planning Department which the applicant ought to have consulted.
12. To her the Applicant has not exhibited any proof of ownership as a letter of allotment is an offer which is either accepted or rejected and by itself does not confer ownership. Therefore in the absence of a lease the applicant's claim of ownership is vitiated hence he cannot pray to the court to assist him.
13. The Respondent however did not file any submissions.

### **Determinations**

14. I have considered the foregoing.
15. It is clear from Enforcement Notice dated 29<sup>th</sup> August 2012 issued by the Respondent to the Applicant that the said notice was given under section 30(1) of the ***Physical Planning Act***, Cap 286, which prohibits the development within an area of a local authority unless permission for the same is granted by the said authority.
16. The Applicant contends that such permission was duly granted to it by the Respondent while the Respondent disputes the existence thereof. In support of his case, the Applicant exhibited a copy of a letter dated 17<sup>th</sup> August 2012 in which it was indicated that his plans had been cleared awaiting ratification of the Housing Development Committee. He was therefore required to collect a copy of the same from the Assistant Director Technical Room T-85. He also exhibited the plan which he submitted for approval and on which it was endorsed that the same was valid for 24 months.
17. According to section 33(1)(a) of the said Act, an approval of a building plan is supposed to be in accordance with the Fifth Schedule to the said Act. It is clear that the document which the Applicant relied on as the approval is not exactly in that format. However section 72 of the ***Interpretation and General Provisions Act*** Cap 2 Laws of Kenya provides as follows:

***Save as is otherwise expressly provided, whenever a form is prescribed by a written law, an instrument or document which purports to be in that form shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument or document, or which is not calculated to mislead.***

18. The same provision was relied upon by the Court of Appeal in **Daniel Toroitich Arap Moi vs. John Harun Mwau Civil Application No. 131 of 1994 [2008] 2 KLR (EP).**
19. The Respondent has not contested that the said document was not the development permission which was granted to the Applicant. Therefore although the same was not in the format provided under the Act in the absence of any dispute with respect to the same and as there is no allegation that the same was meant to mislead, it is my view that the said document taken together with the building plan which was duly endorsed by the Respondent constitute evidence of approval of the said plan.
20. It has been contended that the Applicant has no title to the plot in question and only has an allotment letter for the same. In my view the issue herein is not an issue of ownership of the plot in question. In any case section 31 of the said Act empowers any person requiring a development permission to apply for the same. The said section does not state that only proprietors of land can apply for the same. In any case as was held by **Warsame, J** (as he then was) **Rukaya Ali Mohamed vs. David Gikonyo Nambacha & Another Kisumu HCCA No. 9 of 2004** once allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers absolute right of ownership or proprietorship unless it is challenged by the allotting authority or is acquired through fraud mistake or misrepresentation or that the allotment was out rightly illegal or it was against public interest. In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled.
21. It is therefore clear that the ground upon which the enforcement notice was based that the developments were illegal had no legal basis. The notice was therefore issued based on an erroneous state of affairs. I associate myself with the decision of **Nyamu, J** (as he then was) in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] 2 KLR 240** where he expressed himself as follow:

**To the extent that the respondent (KRA) acted outside the law or asked itself the wrong question it did so without jurisdiction and such exercise is a nullity see the cases of *Anisminic [1969] 2 AC 147 and Re Racal Communications Re [1981] AC 374* as per Lord Diplock all errors of law go to jurisdiction. In *Congreve vs. Home Office (1976) 1 QB 629* Lord Denning at 651 held: “If the licence is to be revoked and his money forfeited the Minister would have to give good reasons to justify it. Of course, if the licensee had done anything wrong – if he had given a cheque for 12 pounds which was dishonoured, or he had broken the conditions of the licence –the Minister could revoke it. But when the licensee has done nothing wrong at all, I do**

not think the Minister can lawfully revoke the licence, at any rate, not without offering him his money back and not even then except for good causes. If he should revoke it without giving reasons or for no good reason, the court can set aside the revocation and restore the licence. It would be a misuse of the power conferred on him by Parliament and these courts have the authority and I would add the duty – to correct a misuse of power by a Minister or his department, no matter how much he may resent it or warn us of the consequences if we do.’... Finally even assuming for the purpose of argument that the respondents have a discretion (and this is not accepted) to impose or alter the tariff without any restriction can this court intervene in the exercise of such an unqualified discretion. The court is of the view that it has such powers to intervene. (1) From the circumstances and the manner of imposition of the tariff it is selective, arbitrary and oppressive which in itself is indicative of bad faith by the respondents in the exercise of their discretion. (2) It is also clear that the discretion if any was exercised unreasonably and or for an improper purpose. Where there is no real or genuine exercise of discretion the courts must intervene...Finally this court is entitled to intervene on the ground that there is no evidence shown that the respondents in charging the tariffs acted on evidence of any change in the manufacturing or the chemistry of the manufacture of the relevant products. Thus lack of evidence for a decision is a ground for judicial review. Where a tribunal makes a finding of fact wholly unsupported by evidence or draws an inference wholly unsupported by any of the prevailing facts found by it, it may be held to have erred in point of law...The applicant having paid regularly, taxes based on the tariff allocated to it, it is unreasonable and abuse of power for the respondents to have purported to change the tariff and a breach on the part of the respondents to act fairly. Statutory power must be exercised fairly. Perhaps it is important to recall the observations made in the English case of *Reg vs. Secretary of State for the Home Department ex-parte Doody [1994] 1 AC 531* as follows: “The rule of law in its wider sense has procedural and substantive effect ... Unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law. And the rule of law enforces minimum standards of fairness, both substantive and procedural.”

22. It is therefore my view that the Respondent’s decision was based on an erroneous factual position. Having granted permission to the Applicant to construct the wall, it was unreasonable and irrational on the part of the Respondent to issue the Applicant with an Enforcement Notice based on the ground that the same was an illegal development. One of the grounds for granting of judicial review reliefs is irrationality which was defined in *Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300*, as “*such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision.*”
23. 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.”

## Order

24. In the result the orders which commend themselves to me which I hereby grant are as follows:

1. An order of certiorari is hereby issued removing into this Court for the purposes of being

- quashed, the enforcement Notice No. 11604 issued on 29<sup>th</sup> August, 2012 against the Applicant directing the removal of the boundary wall securing property known as Plot No. 33 Kangundo Road, which decision is hereby quashed.
2. An order prohibition directed to the Respondent prohibiting them from taking any further action in effecting Enforcement Notice No. 11604 issued on 29<sup>th</sup> August 2012 and further matters touching existing boundary wall on the said the boundary wall securing property known as plot No. 33 Kangundo Road.
  3. There will however be no order as to costs as the Application was not properly instituted. Applications for judicial review ought to be made in the name of the Republic rather than in the name of the ex parte applicant. See Farmers Bus Service & Others vs. Transport Licensing Appeal Tribunal [1959] EA 779 and Mohamed Ahmed vs. R [1957] EA 523.

Dated at Nairobi this day 12<sup>th</sup> day of June 2014

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Mrs Kamau for the Applicant***

***Cc Kevin***