



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL MISC. APPLICATION NO. 457 OF 2012

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE PROCEEDINGS IN
THE NATURE OF JUDICIAL REVIEW**

AND

**IN THE MATTER OF THE PURPORTED REPOSSESSION AND RE-ALLOCATION OF PLOT
NO. C1-303 KAYOLE SITE & SERVICE SCHEME**

BETWEEN

REPUBLIC.....APPLICANT

VS.

THE CITY COUNCIL OF NAIROBI.....RESPONDENT

AND

JOSHUA ODHIAMBO KASERA.....INTERESTED PARTY

EX PARTE

1 FRANCIS MWANGI TUTI

2 JOSEPH KAROBIA MUTURI

**3 JAMES WARUI WAMBUGU (Suing as the Registered
Officials of the Mutuota Family Welfare Society)**

JUDGEMENT

Introduction

1. By a Notice of Motion dated 31st December, 2012 filed on 4th January, 2013, the ex parte applicants herein, **Francis Mwangi Tuti, Joseph Karobia Muturi and James Warui Wambugu**, who are suing as

the Registered Officials of the Mutuota Family Welfare Society (hereinafter referred to as the Society), seek the following orders:

1. THAT an order of Certiorari to remove into this Honourable Court and quash the decision of the Respondent purporting to repossess and re-allocate plot No. C1-303 Kayole situated within the Kayole Site and Service Scheme as communicated vide a letter reference No. HDD/2/4/099 dated 1st November, 2012.

2. THAT an order of Certiorari to remove into this Honourable Court and quash the enforcement notice issued under Physical Planning Act (Cap. 286) and the City Council By Laws by the Respondent through its Housing Development Department on 21st December, 2012 directing the Applicants to demolish the fencing structures on plot No. C1-303 within forty eight (48) hours of the date of the notice failing which the Respondent would demolish or prosecute the Applicants without further notice.

3. THAT costs of and incidental to this application be provided for.

4. THAT such further and other relief that the Honourable Court may deem just and expedient to grant.

Ex Parte Applicant's Case

2. The application was supported by an affidavit sworn by **Joseph Karobia Muturi**, the Chairman of the Society on 28th December, 2012.

3. According to the deponent, in May 2006, the officials of the Society entered into negotiations for purchase of Plot No. C1-303 ("the Plot") situated within the Kayole Site and Service Scheme (hereinafter referred to as the Scheme) with the registered owners, **Joseph Mwangi Njoroge** and **Margaret Wangari Njoroge** (hereinafter referred to as the Vendors) which negotiations culminated in the signing of an agreement for the sale of the plot on 12th July, 2006 for a consideration of Shs. 250,000/= out of which the seller acknowledged receipt of Shs. 185,780/= with the balance being Shs. 64,220/= to be paid later.

4. By way of a search conducted on 7th June, 2006, the Community Development Officer, the Respondent's Officer, issued a certified copy of the letter of allotment issued by the Respondent to the Vendors on 10th March 1987 in confirmation of ownership of the plot. The Applicants also confirmed that the registered owners were up to date with the payment of rates and ground rent.

5. However, the Applicants did not immediately embark on the transfer procedures at the Respondent's offices as this would take some time and they intended to commence developments on the property immediately. They therefore requested the Vendors to apply for a beacon certificate at their cost and a Beacon Certificate was issued on 7th June, 2006.

6. On 8th June, 2006 the Applicants through the Vendors lodged a building plan for approval by the Respondent, paid the required fee for the acceptance of the plan and on the 20th June, 2006, the Respondent issued a provisional approval of the building plan. However the Applicants were unable to commence construction immediately due to financial challenges though they continued paying rates and ground rent to the Respondent.

7. On 24th September 2012 the Applicants employed a casual labourer to clear bushes from the plot to enable them commence developments. However the said labourer was summoned to the Kayole Police Station on 27th September 2012 to respond to the complaint lodged by **Joshua Odhiambo Kasera**, the interested party herein, as recorded in the Occurrence Book as OB No. 47/27 /7/2012 in which the interested party alleged that he was the owner of the Plot having been allocated the plot by the

Respondent on 15th December 2003.

8. Alarmed and unnerved at this development, the Applicants on 28th September wrote a letter to the Director, Housing Development Department of the Respondent seeking his assistance in sorting out the misunderstanding. They subsequently instructed their Advocates on record to write to the Respondent after their letter of 28th September elicited no response and their Advocates on record wrote on 29th October 2012 and subsequently on 2nd November 2012 seeking formal confirmation from the Respondent that the Vendors were indeed the registered owners of the plot.

9. In response thereto the Deputy Director, Housing Development Department wrote a letter dated 2nd November, 2012 which was received by the Applicants on 2nd November, 2012 indicating that the property had been repossessed and re-allocated to someone else.

10. The deponent averred that no notice of the intention to repossess or the reasons for such a decision was ever issued to the Applicants or the Vendors from whom they derive their interest in the plot. Neither did the Respondent give them an opportunity to show cause why the plot should not be repossessed and re-allocated and were, therefore, denied the right to be heard. To the Applicants the decision was, therefore, taken in a blatant disregard of the rules of natural justice. To them, the Respondent does not have the power to arbitrarily repossess and reallocate property issued to individuals hence the decision taken was illegal and that the decision to repossess and re-allocate plot No. C1-303 was made without adherence to the rules and procedures governing re-possession of Local Authorities Properties set out under the relevant laws.

11. On 24th December 2012 the Applicants received an enforcement notice that had been posted on the fence to the plot purporting to give them 48 hours to demolish the fence failing which the Respondent would “demolish/prosecute without further notice”. To Applicants contended that the said notice is malicious and issued in bad faith and amounts to an abuse of the Respondent’s powers. Further the decision is tainted with bias as the Respondent, in making the decision, clearly favoured the Interested Party’s claim to ownership of the plot which is not the first in time.

12. The Supporting affidavit was supplemented by another affidavit sworn by the same deponent on 26th March 2014 in which he reiterated the foregoing and deposed that the Respondent’s claim that its failure to notify the original allottees of repossession of the plot was an oversight cannot stand since they continued to receive payments from the original allottees. While it was not until vide a letter dated 1st November, 2012 that the Respondent’s decision was communicated to the Society, the reasons for the same were never given neither was the society, nor the original allottees of the plot given an opportunity to show why the plot should not be repossessed hence due process was not followed in repossessing the property and reasons for the repossession were never given.

13. According to him, the Respondent’s action was in bad faith and has caused the society great financial loss and if the orders sought are not granted, the society will be deprived of their land without compensation or due process being followed. In his view, the society has demonstrated sufficient interest in the suit to enable it institute the present Judicial Review Proceedings challenging wrongful exercise of the Respondent’s administrative power and that the Applicants also have mandate to institute these proceedings on behalf of Mutuola Family Welfare Society as the officials of the society and as such having mandate to conduct, manage and oversee all the affairs of the society, which includes mandate to institute legal proceedings so as to protect the interests of the society. Further the Respondent’s assertion that the society has not shown proprietary interest in the land is unfounded since the plot was duly allotted to the original and subsequently purchased by the society which has continued to make all necessary payments to the Respondent.

14. To him, despite the allottees fulfilling all the conditions of the Letter of Allotment and continuing to make necessary payments, the Respondent never issued any title document. However, the society also owns another parcel of land known as B3-140 Kayole in respect of which the Respondent has also not issued title document despite requests from the society to issue the same.

Respondent's Case

15. In response to the application, the Respondent filed the following grounds of opposition and preliminary objections which were heard together with the main Motion:

- 1. That the Petitioner's have no locus standing to commence or prosecute this petition therefore this petition is an abuse of the process of this Honourable Court and should be dismissed for the following reason that the Petitioners have no title to the subject property to warrant or invoke any rights including litigation as perpetrated by this petition.**
- 2. That This Petition by design seeks to perpetrate a fraud on the court and the Respondent.**
- 3. That the Enforcement Notice in issue was founded on Statute Laws, specifically the *Physical Planning Act*, Chapter 286 Laws of Kenya, (hereinafter referred to as the Act) Section 39(1) and (ii) and Building By-laws (By-Laws 256(1), 16(1) (Adoptive By Laws 1968) a fact not questioned or contested by the Petitioners.**
- 4. That the Enforcement Notice in issue was made in Plain language and addressed t the holder of the property, whereupon the holder ought to have complained or sought after waiver from the Respondent on application.**
- 5. THAT it is self evident that the nature of the complained of development amounted to illegal and unsafe construction specifically-**
 - (a) The Petitioners if at all the title holder never sought after any/appropriate building permits or approval from the Respondent. (Petitioner exhibit JKM 6 illustrates the building plans would be subject to approval by the Town Planning Committee, of which no evidence has been produced to demonstrate that such permission was ever granted by the said authority).**
 - (b) That the Petitioners if at all the tile holder, have by design neglected to inform the Honourable Court that the Enforcement Notice inn issue was in plain language and indicated that the Iron Sheet/Mabati, were illegally used as fencing material and as a result acquired a rustic appearance posing a health hazard to the public.**
- 6. That the fence's architectural and structural integrity was/and still is a violation of all basic standard of safe construction.**
- 7. That in addition to the contents of paragraph 4, 5 and 6 the material utilised (Rustic Mabati/iron sheets) are a public hazard to all residents especially minors (the property being located in a densely populated residential area).**
- 8. That an allotment letter does not qualify as a title to property.**
- 9. That if at all Joseph Mwangi Njoroge and Margaret W. Njoroge were the initial title holders of the subject property as suggested by the Petitioners then he alleged sale in the year 2006 was unlawful venture in clear breach of lease agreement (specifically not to transfer without approval of the Respondent).**
- 10. That if at all Joseph Mwangi Njoroge and Margaret W. Njoroge were the title holder as at the year 2006, then the same was voided by the blatant breach complained of in paragraph 6 above.**
- 11. That in addition to contents of paragraph 10 and 11 it is evident that the alleged transaction was not only illegal but also fraudulent.**

12. That the alleged transaction reported to the Police at Kayole (OB No. 47/27//7/2012) is strange and a matter outside the purview of the Respondent.

13. That the Respondents election not to pursue laid down procedures and processes in there purported purchase of the subject property was and still is an indication that fraud was being perpetrated.

14. That in addition to the contents of paragraph 13 above, the Petitioner cannot claim to derive a benefit from fruits of illegality.

15. That the Petitioners claim is unfounded unmerited and ought to be dismissed for the reasons aforesaid.

16. Apart from the foregoing the Respondent also filed a replying affidavit sworn by **Karisa Iha**, its Director of Legal Affairs on 12th February, 2014.

17. According to the deponent, the property known as C1-303 Kayole was repossessed by the Respondent in the Year 2003 from the Vendors and upon repossession the property was allotted to one **Joshua Odhiambo** in the same year 2003. However, due to an oversight **Margaret W. Njoroge** in the year 2006 was allowed to clear outstanding arrears which error was accidental and did not impute any inference of revival in her claim to the property.

18. According to him, the Applicants herein are strangers to the Respondent and have not title or lawful claim to the property in issue and have no locus to institute or prosecute this Petition. In the circumstances and based on the foregoing reasons, the orders sought in this Petition ought in the interests of justice and fairness to be dismissed with costs.

Applicants' Submissions

19. On behalf of the Applicants, it was submitted that the applicants being the registered officials of the society have mandate as officials to manage and oversee the affairs of the society including protecting its interests and assets. It was submitted that in judicial review proceedings a party can sustain a suit where they show that they have a sufficient interest in the suit. In this case it was submitted that the applicants have shown sufficient interest to institute the present proceedings. In support of this submission the Applicants relied on **Republic vs. Principal Immigration Officer Judicial Review No. 188 of 2012 [2012] eKLR** and submitted that even without the titles to the suit plot, the allottees had an equitable/beneficial interest in the land which the Respondent was well aware of and cannot now claim that there such interest did not exist.

20. The Applicants contended that neither the Respondent nor the interested party have produced any evidence showing that the interest party has title to the plot. Even if there was such allotment letter, it was submitted that it is trite law that where there are two equitable interests to the same property, the first in time prevails.

21. According to the Applicants the Respondent has failed to demonstrate that the said repossession was carried out with due regard to the rules of natural justice.

Respondent's Submissions

22. On behalf of the Respondent, it was submitted that there is no evidence that the Applicants have authority to prosecute this suit on behalf of the Society. Secondly the Applicants have not demonstrated title to the suit property or at least contractual relationship between the Applicant and the Respondent.

23. According to the Respondent the agreement relied on by the Applicants was between the Applicants and the Vendors for sale of allotment letter and not titled land and was both unregistered, unstamped and unapproved by the Respondent hence did not confer title.

24. Based on Wreck Motor Enterprises vs. Commissioner of Lands and Another Civil Appeal No. 71 of 1997, it was submitted that title to landed property normally comes into existence after issuance of a letter of allotment, meeting conditions stated in such a letter and actual issuance of title documents thereafter. According to the Respondent a letter of allotment is not a title. To the Respondent the Applicants and Respondent have no contractual relationship at all to evoke locus or any action. Further there is no evidence that the Vendors complied with the conditions.

25. It was further submitted based on Nairobi Permanent Society vs. Salim Enterprises & Others [1995-1998] 1 EA 232, it was submitted that in order for a right to property to be protected, a party alleging that right has been infringed upon must establish a proprietary interest in the property and secondly, the right must have been acquired through the existing legal framework.

26. On the notice, it was submitted that the same was statutory and was issued for breach on public safety laws and regulations and has not been enforced and was made in the interest of the general public. It was therefore submitted that the application should be dismissed with costs.

Determinations

27. I have considered the foregoing.

28. The first issue for determination is whether the Applicants herein have locus standi to bring this Application. According to the Respondent, they don't have locus because on one hand they have not shown that they have the authority to bring these proceedings on behalf of the Society while on the other hand there is no relationship between them and the Respondent, they have no title to the property and have not proved payment of the stamp duty and the transfer to them was never approved. Further it has not been proved that the Vendors who sold them the allotment letter complied with the conditions.

29. The issue of standing was recently dealt with by Nyamu, J (as he then was) in Mureithi & 2 Others (for Mbari ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443 as follows:

“The function of standing rules include: to restrict access to judicial review; to protect public bodies from vexatious litigants with no real interest in the outcome of the case but just a desire to make things difficult for the Government. Such litigants do not exist in real life – if they did the requirement for leave would take care of this; to prevent the conduct of Government business being unduly hampered and delayed by excessive litigation; to reduce the risk that civil servants will behave in over cautious and unhelpful ways in dealing with citizens for fear of being sued if things go wrong; to ration scarce judicial resources; to ensure that the argument on the merit is presented in the best possible way, by a person with a real interest in presenting it (but quality of presentation and personal interest do not always go together); to ensure that people do not meddle paternalistically in affairs of others..... Judicial review courts have generally adopted a very liberal approach on standing for the reason that judicial review is now regarded as an important pillar in vindicating the rule of law and constitutionalism. Thus a party who wants to challenge illegality, unreasonableness, arbitrariness, irrationality and abuse of power just to name a few interventions ought to be given a hearing by a court of law.....The other reason is that although initially it was feared that the relaxation of standing would open floodgates of litigation and overwhelm the Courts this has in fact not happened and statistics reveal or show that on the ground, there are very few busybodies in this area. In addition, the path by eminent jurists in many countries highlighting on the need for the courts being broadminded on the issue....Under the English Order 53 now replaced in that country since 1977 and which applies to us by virtue of the Law Reform Act Cap 26 the test of locus standi is that a person is aggrieved. After 1977 the test is whether the applicant has sufficient interest in the matter to which the application relates. The statutory phrase “person aggrieved” was treated as a question of fact – “grievances are not to be measured in pounds and pence”.....Although under statute our test is that of sufficient interest my view is that the horse has bolted and has left the stable – it

would be difficult to restrain the great achievements in this area, which achievements have been attained on a case to case basis. It will be equally difficult to restrain the public spirited citizen or well organised and well equipped pressure groups from articulating issues of public law in our courts. It is for this reason that I think Courts have a wide discretion on the issue of standing and should use it well in the circumstances of each case. The words person aggrieved are of wide import and should not be subjected to a restricted interpretation. They do not include, if course, a mere busybody who is interfering in things that do not concern him but this include a person who has a genuine grievance because an order has been made which prejudicially affects his interests and the rights of citizens to enter the lists for the benefit of the public or a section of the public, of which they themselves are members. A direct financial or legal interest is not required in the test of sufficient interest.....In my view the Courts must resist the temptation to try and contain judicial review in a straight jacket. Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them.....The applicants are members of a Kikuyu clan which contends that during the Mau Mau war (colonial emergency) in 1955 their clan land was unlawfully acquired because the then colonial Governor and subsequently the presidents of the Independent Kenya Nation did not have the power to alienate clan or trust land for private purpose or at all. In terms of Order 53 they are “persons directly affected”. I find no basis for giving those words a different meaning to that set out in the case law above. The Court has to adopt a purposive interpretation. I have no hesitation in finding that the clan members and their successors are sufficiently aggrieved since they claim an interest in the parcels of land which they allege was clan and trust land and which is now part of a vibrant Municipality. I find it in order that the applicants represent themselves as individuals and the wider clan and I unequivocally hold that they have the required standing to bring the matter to this Court. Moreover in this case I find a strong link between standing and at least one ground for intervention – the claim that the land belonged to the clan and finally there cannot be a better challenger than members of the affected clan.”

30. In **Republic vs. The Minister For Lands and Settlement Ex Parte Narankaik & Another [1988] KLR 693, Tunoi, J** (as he then was) held that Certiorari lies, on the application of a person aggrieved, to bring the proceedings of an inferior tribunal before the High Court for review so that the court can determine whether they should be quashed, or to quash such proceedings. It will issue to quash a determination for excess or lack of jurisdiction, error of law on the face of the record or breach of the rules of natural justice, or where the determination was procured by fraud, collusion or perjury. The phrase “a person aggrieved” was defined in **Yusuf vs. Nokrach [1971] EA 104**, as a person who has suffered legal grievance. In **Republic Ex Parte Chudasama vs. The Chief Magistrate’s Court, Nairobi And Another [2008] 2 EA 311, Rawal, J** (as she then was) expressed herself as follows:

“In Kenya, the functions and remedies of orders of *certiorari*, *mandamus* and prohibition by way of judicial review found roots in 1956 by the enactment of the Law Reform Act (Chapter 26 Laws of Kenya) and thereafter by the Constitution of Kenya itself. Simply stated, these remedies are in our judicial system to uphold and protect and defend the rule of law, that is, to supervise the acts of government powers and authorities which affect the right or duties or liberty of any person. 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 can be safely disregarded. The government is a government of laws and not of mess and will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right.”

31. The applicants herein describe themselves as registered officials of a welfare society registered with the Registrar of Societies hence the Society would be a Society registered under the ***Societies Act*** Cap 108 Laws of Kenya. It is averred that the Society is a transferee of the suit plot. In my view, the Applicant are aggrieved persons in terms of an application for judicial review as they have shown sufficient interests in the suit plot to enable them bring these proceedings.

32. On the issue of payment of stamp duty, the law as I understand it is that the mere failure to pay the stamp duty does not nullify the instrument in question. My position is supported by the decision in **Azad Kara vs. Mwangi Mutero Mombasa HCCC No. 222 of 1997** where it was held that whereas it is mandatory under section 19 of the ***Stamp Duty Act***, Cap 480 Laws of Kenya for an agreement to be stamped in order for it to be admissible in evidence however that does not make the document useless in evidence as the omission is curable under section 20 of the ***Stamp Duty Act***. Further as was held by Law, J (as he then was) in **Sunderji Nanji Limited vs. Mohamedali Kassam Bhaloo [1958] EA 762**, “before holding a document inadmissible in evidence on the sole ground of its not being properly stamped, the court ought to give an opportunity to the party producing it to pay the stamp duty and penalty. The appellant has never been given the opportunity of paying the requisite stamp duty and the prescribed penalty on the unstamped letter of guarantee on which he sought to rely in support of his claim against the second defendant/respondent, and he must be given that opportunity.” It is therefore my view that the mere fact that the transfer document may not have been stamped even if true would not necessarily render the same inadmissible. However, this issue was raised only in submissions hence has little if any evidential weight.

33. With respect to the issue of the failure to obtain approval of the Respondent, I do not think that even if that was a requirement, the same would justify the Respondent in acting unconstitutionally and illegally. Article 47 of the Constitution required the Respondent to act fairly in the matter and one of the cardinal rules 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 at least the Vendors were given an opportunity to be heard before the Respondent revoked the allotment letter.

34. The contention that the Vendors did not comply with the conditions does not in my view hold much weight in light of the admission by the Respondent that payment from the vendors was received in 2006 by oversight. The law as I understand it is that the mere fact that the same decision would have been reached even if the rules of natural justice were complied with does not sanitise a decision taken without compliance therewith. This position was made clear in **Onyango Oloo vs. Attorney General [1986-1989] EA 456** where it was held:

“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." [Emphasis mine].

35. It is therefore clear that it is not the perceived hopelessness of a person's case that determines whether or not he ought to be heard in a decision likely to adversely affect him since the right to be heard is a fundamental human right that is not given by the State as human rights are generally universal and inalienable rights of human beings only given recognition by the Constitution.

36. In my view, the Applicants who no doubt had an interest in the suit land were not afforded an opportunity of being heard either by themselves or through the allottees of the suit plot.

37. On the issue that the Applicants 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 they no doubt had beneficial interest in the suit plot. 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.

38. Apart from that 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.

(3) Unless an appeal has been lodged under subsection (4) an enforcement notice shall take effect after the expiration of such period as may be specified in the notice.

(4) If a person on whom an enforcement notice has been served under subsection (1) is aggrieved by the notice he may within the period specified in the notice appeal to the relevant liaison committee under section 13.

15. The Enforcement Notice which was given herein was for only 48 hours. Even if the Applicants wished to invoke the provisions of section 38(4) above 48 hours notice posted to a fence was in my view unreasonable. Accordingly, the Respondent's action was tainted with procedural irregularity and ought not to be allowed to stand.

16. Section 38(4) in my view also implicitly imports that a reasonable notice be given so as to enable a person appeal to the liaison committee if he chooses to. A notice which is worded on such terms as to take effect within such unrealistic period cannot therefore be said to be in compliance with the spirit of section

38(4) of the said Act.

17. 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.”

18. I therefore have no hesitation in finding that the Respondent’s action was both illegal, irrational and tainted with procedural impropriety, all which are grounds for granting judicial review orders. See **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300.**

19. I have also taken into account the fact that the interested party in whose name the Respondent purportedly revoked the allotment of the suit plot to the Vendors has decided for some reasons not to participate in these proceedings.

Order

20. Consequently, I find merit in the Notice of Motion dated 31st December, 2012 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 purporting to repossess and re-allocate plot No. C1-303 Kayole situated within the Kayole Site and Service Scheme as communicated vide a letter reference No. HDD/2/4/099 dated 1st November, 2012 and the same is hereby quashed.

2. An order of certiorari is hereby issued bringing into this Court for the purposes of being quashed, the enforcement notice issued under Physical Planning Act (Cap. 286) and the City Council By Laws by the Respondent through its Housing Development Department on 21st December, 2012 directing the Applicants to demolish the fencing structures on plot No. C1-303 within forty eight (48) hours of the date of the notice failing which the Respondent would demolish or prosecute the Applicants without further notice and the same is hereby quashed.

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

Dated at Nairobi this day 10th day of June, 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Kayugira for the Applicant

Mr Bose for the Respondent

Cc Kevin

