REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

IN THE CONSTITUTIONAL LAW AND JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION JUDICIAL REVIEW NO. 321 OF 2012

IN THE MATTER OF ORDER 53 RULE 1 OF THE CIVIL PROCEDURE ACT CAP 21

AND

THE LAW REFORM ACT CAP 26

AND

IN THE MATTER OF THE PHYSICAL PLANNING ACT CAP 286

AND

IN THE MATTER OF THE ENVIRONMENTAL MANAGEMENT COORDINATION ACT 1999

AND

AND IN THE MATTER OF THE CITY COUNCIL OF NAIROBI ZONING ORDINANCE

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

REPUBLIC…….APPLICANT

VERSUS

THE CITY COUNCIL OF NAIROBI…….…… RESPONDENT

EX-PARTE

JEREMY ASHWORTH

JANE ROSE

VERIT KARMAR NDISI

GIOVANNI SARDELLI

MARY OWUOR

JUDGEMENT

Introduction

1. By a Notice of Motion dated 13th November, 2012 filed in this Court on 19th November, 2012, the ex parte applicants herein, **Jeremy Ashworth, Jane Rose, Verit Karmar Ndisi, Giovanni Sardelli and Mary Owuor** seek the following orders:

1. **An order of certiorari to remove into the High Court for the purpose of its being quashed the decision of the City Council of Nairobi to grant a change of user and planning permission to the owners/developers of plots L.R. 3734/41 and L.R.3734/45 to erect multi-dwelling housing units in a zone not eligible for multi-dwelling housing units.**

2. **An order of mandamus directed to the City Council of Nairobi to compel the said council to hear and determine according to law the objections of the applicants and residents of Lavington/Bernard Estate before granting the change of user and planning permission to the owners/developers of L.R.3734/41 and L.R. 3734/45.**

3. **A declaration that L.R. 3734/41 and L.R 3734/45 are situated in Lavington Estate and in Zone 5 of the City Council of Nairobi Development Zoning Ordinance.**

4. **The costs of this application.**

5. **Any further relief deemed expedient in the circumstances.**

2. The application is based on the Statement filed on 10th August 2012 in which the following grounds are stated:

i. **The respondent has flouted the laws regarding zoning and granted planning permission for the erection of multi-dwelling housing units where the zone is designated for low density residential one family houses.**

ii. **The respondent has flouted the provisions of laws regarding permitted Ground Coverage (GC) and Plot Ratio (PR) applicable in Zone 5 of the Nairobi City Development Ordinance.**

iii. **The respondent has failed to hear or take into account the applicants objection to the proposed developments on the said parcels.**

Ex Parte Applicant's Case

3. The application is supported by the supporting affidavit sworn by **Jeremy Ashworth**, who described himself as a resident of L.R. 3734/42 situated along Muthangari Close at Lavington Estate Nairobi on 4th July 2012.

4. According to him, he is a resident of L. R. 3734/42 situated along Muthangari Close at Lavington Estate Nairobi. Sometime in the month of January 2011 the deponent and other residents of his neighbourhood became aware of a notice of proposed change of user from singe to multi-dwelling units with respect to plots L.R. 3434/41 and L.R. 3734/45 which notice boards were at best hidden behind the hedges of the perimeter fences surrounding the said properties. Upon inquiry from the neighbours and some workers at the site he was informed that the owners of the parcels intended to put up apartments in each of the plots.

5. It was deposed that as a resident of the adjoining plot he and several of his neighbours were concerned as they were aware that the area is located at Lavington Estate and thus falling in Zone 5 of the Councils own zoning map where only low density one family houses were allowed. To the deponent, the plots in question together with the entire neighbourhood are not served by a

sewer and already being severely congested he was apprehensive that allowing such development of many apartments would cause unbearable strain on the already existing facilities. Accordingly, he and a few residents decided to put our objections to the Town Clerk and wrote letters to that effect which letters were delivered to the Town Clerks Offices on 24th January, 2011. Apart from that they also got Messrs Rombo & Company to write to the City Council stating their objection to the said proposed developments.

6. According to the deponent, by a letter dated 8th March 2011 written by the Director of City Planning **Mr. Odongo** in response to the said queries the deponent was surprised to note his claims that the property in question fell in the inter-phase between zones 4 and 5 in the Kileleshwa area and that apartments were allowed in zone 4 which he claimed was in the Kileleshwa area a position which the deponent disputed and through his advocate wrote back to the Director of City Planning and reiterated that the plots in question were not located at Kileleshwa but were in fact situated at Lavington which is clearly in zone 5 and requesting to be given an opportunity to be heard in my objection.

7. However no further communication was received from the council and the deponent became wary when he noticed movements at the premises mainly at night and very alarmed and instructed his advocates to inquire as to the status of the said objections and what the position was regarding issuance of the change of user. In January 2012 he was informed by his advocates Messrs Rombo & Company that they obtained schedules showing that planning permission appeared to have been granted by the council as per a schedule he obtained from the council showing that the applications had been submitted on 11th August, 2011 and 6th June, 2011 for L.R. 3434/41 and 3734/45 respectively and it was unclear when the said permissions were granted as there was no information indicating where the deliberations were held or if people with objections were given an opportunity to be heard.

8. It was averred that in the said schedules it was confirmed that the applicants **Saffron Apartments Limited** and **Pravin Kumar Madhavaji Kana** intend to construct 30 apartments each on the parcels making a total of 60 together with 6 penthouses in LR 3434/41 and further that in the said schedules both applications were designated as being located in the Kileleshwa area which is not true as the said parcels are Lavington estate.

9. According to the deponent, the respondent council deliberately flouted its own zoning laws in granting the planning permissions and it was not surprising that it was done quietly notwithstanding the objections raised by the deponent and his several neighbours. The deponent insisted that not only are the parcels in question located at Lavington Estate which is zone 5 but they are not located on the sewer line a fact that he confirmed with a report from an engineer **Mr. P. Gakobo** who also explained that the lower gradient of the parcels with respect to the sewer line which is higher means that gravity will militate against the said parcels being connected to the nearest sewer. In his view, the proposed developments of apartments will erode the character and nature of the neighbourhood and lead to congestion more so in the absence of connection to sewer.

10. Apart from that the proposed developments flout the permitted Ground Coverage and Plot Ratios of the Permissible Developments with respect to Zone 5 where the parcels are located as they are more 400% and 800% the coverage permitted and up to eight times the ratios permitted. Though he was given a chance to air his objections, he deposed that they appear not to have been considered and he was apprehensive that the Respondent council deliberately and fraudulently kept under wraps its decision to grant the change of user and planning permissions and totally ignored their objections.

11. Although he was unable to obtain the minutes of the councils meeting where the planning permissions were granted in the case of FB 193 it appeared the application was submitted on 11th August, 2011 and permission approved on 8th September, 2011 barely a month after.

12. It was contended that the purported designation of the parcels as being located in Kileleshwa in Zone 4 was a ploy to unlawfully circumvent the stringent provisions of the permitted development rules of Lavington Estate which is in Zone 5 hence his declaration from the Court that that the location of the parcels in question is in fact Lavington Estate and not Kileleshwa so as to put a stop to the mischief and abuse of authority by the council.

13. There was also a supplementary affidavit sworn by **Giovani Sardelli**, the 4th applicant on 17th February, 2014.

14. According to him, he was architect by profession and duly registered member of the Board of Registration of Architects & Quantity Surveyors of Kenya and also a member of the Architectural Association of Kenya since 1971 and also a resident of an adjoining plot being L.R. 3734/46 situated along Muthangari Close and neighbouring the plots that are the subject matter this application. He deposed that indeed the Certificate of Title exhibited showed that size of the plot LR 3734/45 on Muthangari Close is 0.830 of an acre which is equivalent to 0.33589 Ha yet according to the Town Planning Committee Policy, the minimum plot size for development of flats for Zone 4 is indicated as being 0.4 Ha.

15. He added that the plots in question are not served by a sewer and that this was confirmed by **Mustapha Primohamed** in his affidavit where it was stated that that they sought and obtained approval of the City Council of Nairobi for the construction of Bio Water treatment and further the said approval appears to have been given with certain conditions among approval from NEMA and the WRMA which approvals they had have no evidence were obtained.

16. According to him, the application for change of user was submitted on 16th February 2011 and approved barely a week later on the date indicated of 22nd February 2011 even as they were being asked to lodge objections the change of user was in fact already issued without any reference to their objections. In any case the said approval was with the condition that it was to comply with the zoning policy which is this case was not complied with since the plot falls in zone 5. Further, whereas the NEMA approval appears to have been granted 16th August 2011, the Change of User approval was granted earlier on 16th February, 2011 yet under the Physical Planning Act the EIA is supposed to have been made and approved before a change of user could be considered.

17. It was contended that as per the conditions set in the NEMA approval mandatory condition 2.2 clearly stipulated that there was to be strict adherence to the planning provisions and that the unit observes a minimum of 034 Ha yet this plot in question is smaller than that at 0.33589 Ha. Further, as per the schedule of applications for approval from the Council No. 898 labelled as FB 102 for proposed developments of 30 apartments annexed in the affidavit of the 1st applicant Jeremy Ashworth as it is indicated that the plot size is 0.3354 Ha.

18. The deponent asserted the residents of the neighbouring plots did raise objections with NEMA and that looking at the latest approval of building plants dated 12th September 2013 it is now indicated that the approval is for 35 apartments and not 30 as earlier indicated in FB 102. Further this approval has been given even as the case has been pending in court and the council not even bothering to enter into these proceedings despite being served. He reiterated that Muthangari Close where the plot is situated is in Lavington Estate and not Kileleshwa and the purported Zoning Map attached is hazy and vague but shows clearly that Lavington Estate where the plot LR 3734/45 situated is in Zone 5.In any event the description of Zone 4 as being “all land East of Muthangari Gardens and South of Kirichwa Ndogo River” is incomplete with regard to boundary position of Muthangari CLoe along Plot 3734/41. According to him, the boundary may pass down Muthangari Close along the plot 3734/41, along the boundary of 3734/42 to the boundary of 3734/350 and from there runs north along the plot to Kirichwa Ndogo which would still locate the plot 3734/45 in Zone 5 and even if it were to be taken that the said plot is in Zone 4 as claimed by the 2nd Interested Party according to the Town Planning Policy Committee Policy the minimum plot size for development of multi-dwelling flats/apartments is 0.4 Ha yet the said plot 3734/45 is

less than that as previously shown being 0.33589 Ha. The deponent further noted that it was admitted that there is no sewer to the said plot when it was alluded that connection is possible "using a small wattage pump system". To him, according to the City Council regulations multi-dwelling units are not allowed where there is no sewer and the approvals should not have been allowed as things stand. He was however a stranger to the contention that the Total Water Management System proposed by the 2nd Interested Party is eco-friendly or that it has been installed and used in other sites in Kenya as alluded and it doesn't sanitise the illegality of the exercise.

19. The deponent's view was that it was no excuse that other sites nearby may have been given approvals by the council in a similarly unlawful and illegal manner and it only goes to show the level of illegality and impunity that the council is engaged in and unless this honourable court intervenes the council will continue to violate the law and its own regulations. The deponent denied that the proposed developments will not erode character of the neighbourhood as clearly with 35 apartments there will be a severe strain on the water and sewer system not to mention congestion with buildings overlooking theirs with no privacy.

20. It was further averred that the ground coverage for the area is 35% and has not been exceeded and that the plot ration (PR) required is 1.0 but four apartments on four floors in two blocks gives a plot ratio of greater than 2 which more than double that which is allowed in Zone 4D. In his opinion the approvals given by the City Council of Nairobi were irregular, unlawful and against the councils own regulations and zoning laws and the applicants were not ever notified of the latest building plan approvals and there was no way they would have been able to lodge an appeal under the provisions of the ***Physical Planning Act*** and some of the approvals appear to have been made when this case was already pending in court.

Respondent's Case

21. In response to the application, the Respondent filed a replying affidavit sworn by **Nimrod Masaka**, the assistant director planning, implementation section for the time being of the Respondent's City Planning Department.

22. According to him, the Respondent admitted the averments so far as change of user is concerned but had no knowledge and did not admit the allegation of the hidden notice. According to him the property in question forms the interphase between zone 4 and 5 of the City Council of Nairobi planning zones and the development is situated at Kileleshwa where apartment's developments are allowed. He deposed that the developer got approval of the Nairobi City Water and Sewerage Company to install a waste water treatment plant.

23. He therefore asserted that the allegations by the Applicants are malicious and unfounded because the Council acted within the law and reiterated that the approval emanated from the City County.

24. It was averred that the Applicant's application is bad in law and ought to be dismissed on the grounds that the Respondent has duly discharged its statutory mandate according to the ***Physical Planning Act***; that the area is well mapped by the City County of Nairobi in its planning responsibilities; that the Applicant has not approached the Court with clean hands.

1st Interested Party's Case

25. On behalf of the 1st interested party a replying affidavit sworn by **Vasant Devji Sanghani**, one of its directors sworn on 19th December2013 was filed on 19th December, 2013.

26. According to the deponent, 1st Interested Party was once the registered Proprietor of all that parcel of Land known as L.R. No. 3734/41, Nairobi. Vide a Transfer dated 21st November, 2012 between the 1st Interested Party as Transferor of the one part transferred the said parcel of land to one Zen

Holdings Limited as Transferee of the other part which Transfer was duly registered on the 14th day of December, 2012 in favour of the said Zen Holdings Limited.

27. According to the deponent, as at the date the Application herein was lodged in Court on 19th November, 2013, the 1st Interested Party had already entered into Agreement for Sale of the Subject Property to the said Zen Holdings Limited hence it is non-suited in this matter and should therefore be substituted and/or removed from proceedings herein.

2nd Interested Party's Case

28. On the part of the 2nd interested party a replying affidavit was filed sworn by **Mustafa A. Primohamed,** a director of the 2nd interested party on 5th December, 2013.

29. According to the deponent, 2nd Interested Party was incorporated on the 7th day of April 2011 whereupon a Certificate of Incorporation was issued by the Registrar of Companies being Serial No. OPR/2011/45065.

30. It was deposed that the 2ndInterested Party acquired the property known as Land Reference Number 3734/45 situate on Muthangari Close, off Muthangari Drive and a transfer in its favour registered by the Registrar of Titles on 4th July, 2011. It further sought and obtained the approval of the City Council of Nairobi for the Construction of Bio Water treatment plant on 24thJanuary, 2011 and in furtherance of its objective and upon application to the then City Council of Nairobi, the 2ndInterested Party applied and was issued with an approval for change of user of the Plot from a single dwelling to a multiple dwelling residential plot. The National Environmental Management Authority (NEMA) approval on the other hand was granted to the 2nd Applicant on the 16thAugust, 2013 being approval Number 3885. It is worth noting that no objection was ever filed by the ex-parte applicant or any one at all upon the publication of the ex-parte Applicant's application for NEMA's approval and Environmental Impact Assessment Report and as such it was contended that the ex-parte Applicants are estopped from raising issue with the said approval by NEMA.

31. It was further deposed that the building plan for the 35 proposed apartments on L.R Number 3734/45 were approved by the City Council of Nairobi on the 12th September, 2013 upon the 2nd Interested Party's application and to augment the supply of water to the property, a plan for the construction of a borehole was approved upon the 2ndInterested Party's Application under reference number 13191/9/7 by way of a letter dated the 11th day of October, 2013.

32. It was therefore the deponent's view that the 2nd Interested Party acted overboard, obtained all the relevant approvals and has kept fidelity to the relevant laws and by-laws of the Country and the local government and as such there is no breach of the law or regulations in its conduct.

Determinations

33. I have considered the application herein, the various affidavits filed, the submissions and authorities relied upon by the parties.

34. Before delving into the merits of the application, it is important to recap the scope of the judicial review jurisdiction.

35. 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."

36. 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 4th Edition Vol (1)(1) Para 60.***

37. 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.

38. 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 a decision 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.

39. A look at the prayers sought in the instant application shows that amongst the prayers is a declaration that L.R. 3734/41 and L.R 3734/45 are situated in Lavington Estate and in Zone 5 of the City Council of Nairobi Development Zoning Ordinance.

40. Judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal and the ***Civil Procedure Act*** does not apply. It is governed by sections 8 and 9 of the ***Law Reform Act*** being the substantive law and Order 53 of the ***Civil Procedure Rules*** being the procedural law.

41. As was held in **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354**:

"Section 8 of the Law Reform Act specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, mandamus, *certiorari* and prohibition. A declaration does not fall under the purview of judicial review for the simple reason that the court would require *viva voce evidence* to be adduced for the determination of the case on the merits before declaring who that owner of the land is. Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application…...…Whereas it is true that the underlying dispute herein is ownership of the land, Judicial Review proceedings is not a forum where such a dispute can be adjudicated and determined as there would be a need for *viva voce* evidence to be adduced on how the land was acquired and came to be registered in the names of the applicant; whether the title is genuine or not. In cases where the subject matter or the question to be determined involves ownership of land, and the rights to occupy land namely occupation, and disposition, there would be need to allow *viva voce evidence* and cross-examination of the witnesses which is not available in judicial review proceedings. Even if the respondents had filed documents, they would be copies that would not be sufficient to establish authenticity of the title. The original documents would need to

be produced at a full hearing where oral evidence would be adduced…….It may indeed be true that the notice that is impugned is irregular or unlawful and an order of *certiorari* would be deserved, but it is not in every case that the court will grant an order of judicial review even though it is deserved. Judicial review being discretionary remedy will only issue if it will serve some purpose. *Certiorari* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the Court being a judicial one must be exercised on the basis of evidence and sound legal principles…..So that in this case, even though this application were properly before this Court and the application had merit, the court may not have granted an order of *certiorari* because it would not be the most efficacious remedy in the circumstances. Even if the notice under challenge is quashed, the issue over the ownership of the land still stands and it will require determination by way of filing pleadings and *viva voce evidence* at another forum preferably the Civil Courts."

42. The prayer for a declaration sought herein is therefore with due respect misplaced in these types of proceedings and the same is incompetent and must fail.

43. It was also contended that the applicants' claim is time barred since it was not brought within six months. Sections 9(2) and (3) of the ***Law Reform Act*** provides as follows:

(2) Subject to the provisions of subsection (3), rules made under subsection (1) may prescribe that applications for an order of mandamus, prohibition or certiorari shall, in specified proceedings, be made within six months, or such shorter period as may be prescribed, after the act or omission to which the application for leave relates.

(3) In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

44. In **R. vs. The Judicial Inquiry Into The Goldernberg Affair Ex Parte Hon Mwalulu & Others HCMA No. 1279 of 2004 [2004] eKLR** as well as **Republic vs. The Commissioner of Lands Ex Parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998,** it was held that the 6 months limitation period set out in Order 53 rules 2 & 7 only applies to the specific formal orders mentioned in Order 53 rules 2 and 7 and to nothing else and a decision to alienate or to allocate land, it was held, is not formal because the commissioner may in most cases issue titles without necessarily identifying the decision.

45. In **Republic vs. Kajiado Lands Disputes Tribunal & Others Ex Parte Joyce Wambui & Another Nairobi HCMA. No. 689 of 2001 [2006] 1 EA 318,** the Court found that despite the irregularities the Court cannot countenance nullities under any guise since the High Court has a supervisory role to play over inferior tribunals and courts and it would not be fit to abdicate its supervisory role hence it had powers to strike out nullities.

46. The phrase "or other proceedings" for the purposes of judicial review has been considered by the Tanzania Court of Appeal in **Mobrama Gold Corporation Ltd vs. Minister for Water, Energy and Minerals & Others Dar-Es-Salaam Civil Appeal No. 31 of 1999 [1995-1998] 1 EA 199,** in which case the said Court held that the phrase "or other proceedings" has to be construed *ejusdem generis* with judgement, order or decree, and conviction as having reference to a judicial or quasi-judicial proceedings as distinct from acts and omissions for which *certiorari* may be applied for.

47. However, even if the six months' time bar was applicable, it is clear that where the remedy sought is not just limited to an order of certiorari, the whole application cannot be said to be incompetent by that mere fact. The 6 months limitation only applies to application for certiorari for the simple reason that in cases where an order for prohibition is sought it means that the action sought to be prohibited is still continuing while mandamus applies to situations where a public authority has declined to carry out a duty imposed on it. In the premises it is my view that the six months limitation period may not be invoked to bar the applicants from bringing the present proceedings.

48. However, it must be noted that the nature of judicial review requires parties to approach the Court expeditiously. Expedition in my view is the hallmark of judicial review proceedings and where the Court finds that an applicant has approached the Court after an inordinate delay the Court would still be entitled to decline to grant the orders sought time bar or otherwise notwithstanding. The rational for this is that judicial review deals with administrative actions and such actions ought not to be placed in a status of uncertainty as to whether they would be subject of challenge. I associate myself with the decision in **Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs. Attorney General & 5 Others [2006] 1 KLR 443** where it was held:

"As stated herein it is a requirement of the rule of law that law must be certain and predictable…Thus the advantages of upsetting these ingredients at the altar of individual claims no matter how meritorious are heavily outweighed by the advantages of certainty predictability and stability…I believe one of the pillars of the rule of law which the Court should always uphold is the predictability of law so that individuals and other juristic persons can plan their lives and affairs on the basis of certainty of the applicable law. On this ground also I would not exercise my discretion to grant the relief sought even if it was properly sought and properly grounded because the delay even by the known judicial review standards is inordinate. Limitation in judicial review actions is that of a reasonable time (except as regards *certiorari* orders and proceedings set out in order 53 rule 2, which is six months). Reasonable time will in my view vary depending on the reasons for the delay. Where the decision being impugned has been implemented and third parties have come onto the scene the Court should not intervene because speed and promptness are the hallmarks of judicial review. Hardship to third parties should keep the Court away."

49. As already stated judicial review does not deal with the merits of the challenged decision but only deals with the decision making process: 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. Once these are complied with an aggrieved person ought to invoke the appellate procedure if an appeal is available but ought not to use judicial review as an avenue of an appeal. It is therefore my view that the challenge taken with repect to the Respondent's zoning policy are matters which properly speaking ought to be the subject of a merit investigation rather than a process investigation.

50. Having considered the affidavits and the submissions it is my view that the only issue that falls for determination within the purview of judicial review is whether the law relating to objections under the ***Physical Planning Act*** was adhered to. Section 41(3), (4) and (5) of the said Act provides:

> ***(3) Where in the opinion of a local authority an application in respect of development, change of user or subdivision has important impact on contiguous land or does not conform to any conditions registered against the title deed of property, the local authority shall, at the expense of the applicant, publish the notice of the application in the Gazette or in such other manner as it deems expedient, and shall serve copies of the application on every owner or occupier of the property adjacent to the land to which the application relates and to such other persons as the local authority may deem fit.***
>
> ***(4) If the local authority receives any objection to, or representation in connection with, an application made under subsection (1) the local authority shall notify the applicant***

of such objections or representations and shall before the application is determined by it afford the applicant an opportunity to make representations in response to such objections or representations.

(5) A local authority may approve with or without such modifications and subject to such conditions as it may deem fit, or refuse to approve, an application made under subsection (1).

(6) Any person aggrieved by a decision of the local authority under subsection (5) may appeal against such decision to the respective liaison committee:

Provided that if such person is aggrieved by a decision of the liaison committee he may appeal against such decision to the National Liaison Committee in writing stating the grounds of his appeal: Provided further that the appeal against a decision of the National Liaison Committee may be made to the High Court in accordance with the rules of procedure for the time being applicable to the High Court.

51. It is clear that there is a statutory obligation placed on the local authority not only to publish a notice for change of user in the Gazette but also to notify owners or occupiers of adjacent land of the intention to change the user.

52. It is therefore clear that the power to form an opinion that an application in respect of development, change of user or subdivision has important impact on contiguous land and the opinion whether or not the development does not conform to any conditions registered against the title deed of property is given by statute to the local authority. What then is the meaning of "in the opinion"? That phrase in my view falls in the same category as "if it appears" or 'if satisfied". In **Employment Secretary vs. ASLEF [1972] 2 QB 455 at 492-3**, **Lord Denning** expressed himself as follows:

"'If it appears to the Secretary of State'? This, in my opinion, does not mean that the Minister's decision is put beyond challenge. The scope available to the challenger depends very much on the subject-matter with which the Minister is dealing. In this case I would think that, if the Minister does not act in good faith, or if he acts on extraneous considerations which ought not to influence him, or if he plainly misdirects himself in fact or in law, it may well be that a court would interfere; but when he honestly takes a view of the facts or the law which could reasonably be entertained, then his decision is not to be set aside simply because thereafter someone thinks that his view was wrong."

53. In **Congreve vs. Home Office [1976] QB 629**, the same Judge expressed himself *inter alia* as follows:

"But now the question comes: can the Minister revoke the overlapping licence which was issued so lawfully? He claims that he can revoke it by virtue of the discretion given to him by section 1(4) of the Act. But I think not. The licensee has paid £12 for the 12 months. 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 which was dishonoured, or if he had broken the conditions of the licence – the Minister could revoke it. But when the licensee had 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 cause. If he should revoke it without giving reasons, or for no good reason, the courts can set aside his revocation and restore the licence. It would be a misuse of 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 the Minister or his department, no matter how much they resent it or warn us of the consequences if we do. *Padfield vs. Minister of Agriculture, Fisheries and Food [1968] AC 997* is proof of what I say. It shows that when a Minister is given a discretion – and exercises it for reasons which are

bad in law – the courts can interfere so as to get him back on to the right road."

54. It is now clear that even in the exercise of what may appear to be prima facie absolute discretion conferred on the executive the Court may interfere. The Court can only intervene in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See the decision of **Nyamu, J** (as he then was) in **Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323.**

55. The next issue for determination is whether the Respondent complied with the law. Section 41(2) required the Respondent**,** *"at the expense of the applicant, publish the notice of the application in the Gazette or in such other manner as it deems expedient, and shall serve copies of the application on every owner or occupier of the property adjacent to the land to which the application relates and to such other persons as the local authority may deem fit."* Prima facie, the only discretion given to the Respondent was with respect to the mode of the publication whether in the Gazette or in any other manner deemed expedient and secondly, and with respect to "such other persons" excluding owners or occupiers of adjacent lands to which the application relates. With respect to the latter the provisions on the face of it is in mandatory terms. In my view the provisions of section 41(2) of the Act are meant to reinforce the constitutional requirement under Article 47 thereof that a person likely to be adversely affected by an administrative decision ought to be heard before the decision is made. Matters dealing with developments and change of users more often than not affect the environment and those who are likely to be directly affected thereby ought to be heard before such developments are approved. To emphasise the importance which the Constitution attach to environment, the preamble to the Constitution provides that the people of Kenya are "***RESPECTFUL*** *of the environment, which is our heritage, and determined to sustain it for the benefit of future generations*" while Article 42 expressly provides that every person has the right to a clean and healthy environment, which includes the right to have the environment protected for the benefit of present and future generations through legislative and other measures.

56. It is therefore my view that the requirement that persons who own or occupy property adjacent to the land to which the application relates be served is mandatory and not merely directory and failure to serve them would ordinarily justify the Court in interfering with the decision by a local authority approving change of user.

57. However once the said people have been afforded an opportunity of being heard and a decision made either way, the only option available to a party aggrieved by the decision is to invoke the appellate route unless in the course of arriving at the decision further grounds warranting judicial review remedies are disclosed. As was held by **Ochieng, J** in **John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003**, for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort; the applicant however will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the orders granted to appeal against the same where there is a right of appeal would be less convenient or otherwise less appropriate, the adversely affected party ought to appeal against the said order rather than to challenge a decision in respect of which an application has been made and dismissed by the Tribunal by way of judicial review proceedings.

58. In this case the applicants contend that their objections were never considered and if I understand them correctly, their objections were merited. It is not for this court to decide whether or not the said objections were merited. In the letter dated 8th March, 2011, the Respondent responded to the

letter dated 26th January, 2011 and was of the view that the intended developments were to be carried out in an area where apartments are allowed and that the developer intended to install water treatment plant. The applicants' position is that this view is erroneous and that the intended developments do not comply with the Respondent's zoning policy. Whereas the applicants' contention may well be correct, it is not for this Court sitting as a judicial review court to plunge itself into an inquiry as to the exact location of the said developments and whether the zoning policy was complied with. That was a matter that was best suited for specialised bodies which are statutorily established to deal with such matters at the appellate level. The courts will only interfere with the decision of a public authority if it is outside the band of reasonableness. It was well put by **Professor Wade** in a passage in his treatise on ***Administrative Law***, 5th Edition at page 362 and approved by in the case of the **Boundary Commission [1983] 2 WLR 458, 475**:

"The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too lightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended."

59. I am also mindful of the decision of this Court in **Constitutional Petition Number 359 of 2013 Diana Kethi Kilonzo vs. IEBC and 2 Others** in which it was held that:

"**We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities."**

60. Once an objector is afforded an opportunity to raise his objection in whatever appropriate form and a decision is made and communicated to him, it is upon him to move to the nest rung in the ladder. As was held in **Onyango Oloo vs. Attorney General [1986-1989] EA 456**:

"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"

61. It must always be remembered that an opportunity to be heard must not necessarily be by way of oral hearing as is usually the position when one is charged before a court of law, though where witnesses are to be called, the applicant ought to be afforded an opportunity to cross examine the said witnesses. I agree with Michael Fordham in ***Judicial Review Handbook*** that:

"procedural fairness is a flexi-principle. Natural justice has always been an entirely contextual principle. There are no rigid or universal rules as to what is needed in order to be procedurally fair. The content of the duty depends on the particular function and circumstances of the individual case".

62. In **Kenya Revenue Authority vs. Menginya Salim Murgani Civil Appeal No. 108 of 2009,** the Court of appeal delivered itself as follows:

"In the court's view, the fairness of a hearing is not determined solely by its oral nature. It may be conducted through an exchange of letters as happened in the present case. The hearing does not necessarily have to be an oral hearing in all cases. There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing. Whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made."

63. In **R vs. Aga Khan Education Services *ex parte* Ali Sele & 20 Others High Court Misc. Application No. 12 of 2002**, it was held *inter alia* as follows:

"On the allegation that there was breach of the rules of natural justice, it is not in every situation that the other side must be heard. There are situations where a hearing would be unnecessary and even in some cases obstructive. Each case must be put on the scales by the court and there cannot be general requirement for hearing in all situations. There will be for example situations when the need for expedition in decision making far outweighs the need to hear the other side and in such situations, the court has to strike a balance."

64. I also associate myself with Emukule, J in Patrick Mungai & 22 Others vs. Nairobi City Council Planning and Architecture Department [2006] eKLR where he expressed himself as follows:

"The second and final part of Applicants' case was that the Applicants were not heard, by the Planning Committee of the Respondents, and that the decision of the Respondents Planning Committee was not consonant with the provisions of the Physical Planning Act 1996 (*No. 6 of 1996*). On the question of the right to be heard, I am of the view that the Applicants were accorded a hearing. The Applicants had no right of hearing before the Town Planning Committee, no member of the public usually has that privilege. If allowed to attend its sittings as either members of the press or interested public, the right is merely to be present and to hear, and not to be heard. The reason is this. When the Town Planning Committee of the Respondents sits, it does not hold a public inquiry to which it solicits views from those in the gallery. It is deliberating the business of the City of Nairobi as elected representatives of the City. It assumes that the City officers, the public servants have done what the law requires of them before they seek the final imprimatur from the Committee to a particular course of action. On the subject of change of user, the applicable law is the Physical Planning Act (*Chapter 286, laws of Kenya*) which came into force on 29-10-1998. Part V of the said Act devotes twelve sections to the question of Control of Development. Having regard to sections 32 (3) (b) (regard to health, amenities and convenience, Section 33 (3) (a) (being bound by any relevant regional or local physical development plan approved by the Minister) and Section 36 (Environmental impact assessment to which I have already referred to above), I am satisfied that the Respondent did consider all these matters before making recommendations to the Town Planning Committee for approval. In addition to compliance with the Physical Planning Act, the Respondents did also comply with the requirements of the consultation with the public who are likely to be adversely affected by the Change f User. The Respondents caused an advertisement to be placed in the local daily newspaper in the East African Standard of 11.03.1999 pursuant to which the 1st Applicant on behalf of the other Applicants wrote his objections on 24-02-2001, and earlier by the Applicants Advocates per their letter of 22-03-1999. The Applicants were thus expressly given an opportunity to raise their objections, and the objections did reach the Respondent. There is no provision in the Physical Planning Act aforesaid, or the Local Government Act that a decision would only be valid if such or other objections raised are accepted. The purpose of the public notification is to sound public opinion, consider objections in

accordance with established criteria in accordance with the applicable law, in this case, the Physical Planning Act, and where those criteria are met, the decision of the Town Planning Committee or other arm of a local authority, or the authority is concerned, is valid and legally binding upon the parties concerned, including those who objected to the application for permission for change of user being granted. The Applicants were clearly heard per their own, and their Advocates written objections, and cannot be heard to say that they were denied a hearing. It is to be understood that their objections were evaluated against the Applicant's grounds and were rejected. I also reject the Applicant's contention that they were not heard."

65. Similarly, in this case the applicants did object to the change of user and received a response thereto. The mere fact that their objections were not favourably considered does not elevate their case to the standards of judicial review. In other words whereas the applicants may well have intended to each a certain destination and embarked on a voyage to do so which voyage they may well have been justified in embarking on, regrettably the route they decided to follow could not lead them to that destination.

66. Having considered the forgoing it is my view that the applicants have not established that their application for judicial review is merited.

Order

67. Consequently, the Notice of Motion Notice of Motion dated 13th November, 2012 filed in this Court on 19th November, 2012 fails and is dismissed with costs.

Dated at Nairobi this day 9th day of October, 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Rombo for the Applicant

Mr Ogola for the Respondent

Mr Omondi for the 1st Interested Party

Miss Mwamunye for Mr Mutubwa for 2nd interested party