



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**(MILIMANI LAW COURTS)**  
**CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION**  
**MISC-CIVIL CASE NO. JR 143 OF 2014**

**REPUBLIC.....APPLICANT**

**-VERSUS-**

**NAIROBI CITY COUNTY.....RESPONDENT**

**EX-PARTE: ELMA LIMITED.....EX-PARTE**

**JUDGEMENT**

**Introduction**

1. By a Notice of Motion dated 17<sup>th</sup> April, 2014, the ex parte applicant herein, **Elma Limited** seeks the following orders:

1. **THAT an order of Certiorari do issue for purposes of bringing into this court and quashing the decision by the Respondent contained in its letter dated 24<sup>th</sup> March, 2014 declaring the suit property being Land Reference Number 9363/93 a public utility plot and therefore disapproving Plan Reg. No. CPF. ADD 922 earlier issued by the Respondent itself.**
2. **THAT the Respondent by itself or any of its servants or anybody claiming its authority be prohibited from interfering with the Ex-parte Applicant’s quiet possession of the suit property or user, development or activities thereon allowed by law or for which there has been granted appropriate approval or license by any relevant statutory body or authority.**
3. **THAT costs of the application be borne by the Respondent.**

**Ex Parte Applicant’s Case**

2. The application was supported by the affidavits sworn by **Amritpal Singh Suri**, a director of the applicant on 9<sup>th</sup> April, 2014 and 29<sup>th</sup> May, 2014.

3. According to the deponent, the Applicant is the registered proprietor of all that piece or parcel of land known as Land Reference Number **9363/93** situate at Ruai, off the Eastern Bypass, Nairobi (hereinafter referred to as the suit land) which the applicant bought from one **Chris Nguru Gitimu** in May, 2011 in the sum of Kshs 28,200,000/-after a comprehensive due diligence resulting in the Registrar of Titles authenticating the title and issuing an Official Search of the Title of the property.

4. It was deposed that prior to the transfer, it emerged that the ownership details shown at the Respondent's offices were different from those at the Lands Registry but later, the Respondent confirmed that its record had been falsified and the Chief Valuer issued a memo certifying the correct rateable owner as **Chris Nguru Gitimu**, the previous owner. To facilitate Transfer of the property to the Applicant, the Respondent demanded and accepted **Kshs. 681,524/=** as accrued rates and demanded and accepted subsequent annual rates paid up to date.

5. It was deposed that the Applicant purchased the property to build a high end shopping mall and housing estate to serve the Eastern by-pass region and as the user of the property was initially residential, the Applicant sought and obtained from the Respondent a change of user to Commercial cum residential.

6. Subsequently, the Applicant submitted to the Respondent, as required by law, building plans for the construction of the shopping mall and Seventy Seven (77) Town Houses which plans were duly approved and a certificate being Plan Reg. No. **CPF – AD922** duly issued by the Respondent paving way for the commencement of the works. Thereafter, the applicant obtained funds, fenced off the property and mobilized its resources and employed over three hundred employees who have been working on the construction site in which more than Kshs. 100,000,000/= has been invested in the initial stages of planning and laying of foundation for the works.

7. However, it was contended that on or about 17<sup>th</sup> March, 2014, the Respondent's representatives from the City Planning Department invaded the property and stopped workers from doing their designated jobs claiming the construction was illegal and left an Enforcement Notice, directing the Applicant to stop the construction works forthwith and demolish and remove all structures that had been erected on the suit property. On seeking from the City Planning Department the circumstances under which the said action was taken, it was confirmed that the said officers acted in error and apologized and verbally retracted the enforcement notice.

8. However, on or about 31<sup>st</sup> March, 2014, the Applicant received a letter from the City Planning Department conveying a decision of the Respondent revoking the approval number CPF –AD 922 for the works alleging that the Applicant's title was a disputed land allocation a decision which meant that the works could not go on and the Applicant's huge investment and the fate of the many employees was at stake and the Applicant immediately sought to know from the Respondents the basis of the said decision but in vain.

9. It was the applicant's position that the Respondent's decision is utmost illogical, bizarre, perverse, and completely absurd as the Respondent has no legal authority to declare any property to be in dispute as that jurisdiction is constitutionally the mandate of the National Land Commission yet neither the Registrar of Titles nor the National Land Commission has not communicated to the Applicant any decision that affects the Applicant's proprietary rights in the property and the Respondent has clearly acted out of jurisdiction.

10. To the applicant, the suit land is private land owned by the Applicant and the Respondent having charged and obtained land rates and approval fees from the Applicant for the change of user of the property and the building plans is obliged in law to act fairly and seek the Applicant's input, which it did not, before making decisions that affect use of the property.

11. It was therefore contended that the Respondent has abused its authority in clear breach of the law and unless the disapproval is stayed and subsequently quashed the Applicant is bound to suffer irreparably.

### **Respondent's Case**

12. In response to the application the Respondent filed a replying affidavit sworn by **Stephen G. Mwangi**, the Chief Officer in the Department of Land Survey in the Respondent on 30<sup>th</sup> April, 2014.

13. According to the deponent, the Respondent was opposed to the reliefs sought in the instant application to the extent that it relates to the ownership of LR. No. 9363/93 situate at Ruai and the subsequent approval of the building plan registration No. CPF-AD 922. To the deponent, land parcel of

land known as LR. No. 93634/93 situate in Ruai is a public utility designated for a primary school and not a private property belonging to the Applicant as alleged. According to him, public utilities within the Nairobi City County are purely meant to benefit the public and not subject to allocation to private parties for their own use.

14. It was deposed that the covering letter by **Mr. H.F.K. Wambua** the licenced Land Surveyor from Director of Surveys Kenya who issued Deed Plan No. 205872 dated 21<sup>st</sup> October, 1996 shows that Parcel No. 9363/93 is a public utility for the primary school and copies of the said letter forwarded to the Commissioner of Lands and the Respondent for noting. According to him, Land Parcel No. 9363/93 situate in Ruai falls within Block 9363 owned by the Respondent and there is no gazettelement nor any County resolution passed at all for the authorization of change of user from public utility to private use. In his view, in order for the commissioner of Lands Ministry to issue a grant/title for L.R. No. 9363/93 a deed plan ought to have been issued by the Director of surveys Kenya followed by a lease from the Nairobi City County respectively containing particulars of the land in question and the Applicant's ownership status which process was never followed at all.

15. He averred that the Applicant has not demonstrated the process it followed to secure Title purportedly lost which conferred ownership of the suit public primary school utility to it without seeking for the Respondent's authority for allocation and subsequent change of user. Further, the Applicant did not disclose material facts within its knowledge pertaining to the ownership of the subject property to the architect it contracted to make architectural drawings and submitting them to the Respondent hence the issuance of the approval of the building plan registration No. CPF-AD 922 which has since been cancelled.

16. It was asserted that the acquisition of the title over the suit property from the Commissioner of Lands by the Applicant is irregular since no lease was ever prepared by the Respondent to confirm the status of the property and ownership thereof which is the procedure and the said title is therefore a forgery. However, the Applicant misled the Respondent to believe that the title presented was genuine thereby occasioning the acceptance of payments allegedly made in favour of the suit property and the payment receipts held should be treated as cancelled. After the approval of the proposed development was granted, it emerged that the Respondent had actually encroached on a public utility plot following the internal investigations commenced to ascertain complaints of alleged grabbing of a Public Utility by the Residents hence the Respondent cancelled the Applicant's approval on the strength of condition No. (q) of the approval issued on 15<sup>th</sup> August, 2013 which provides that the application for development of the property shall be approved subject to the same not constituting part of any disputed private or public utility allocations.

17. It was averred that upon the Respondent being satisfied that the property is indeed a public utility proceeded to issue an enforcement notice to stop the development as provided by the County regulations and according notified the Applicant of the cancellation of the approval earlier given. In his view the Respondent's actions were timely in order to safeguard the interests of the public intercepting the well Applicant's fraudulent actions and that this applicant is bad in law and an abuse of the court process.

### **Determinations**

18. I have considered the application, the affidavits filed in support of and in opposition to the application and the submissions filed on behalf of the applicant herein.

19. Article 47 of the Constitution provides:

***(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***

***(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.***

20. That the cancellation of the approval letter for the applicant's building plans was an administrative action by the Respondent is not in dispute. The Respondent was therefore under a duty to ensure that its action was expeditious, efficient, lawful, reasonable and procedurally fair. Procedural fairness necessarily requires that persons who are likely to be affected by the decision be afforded an opportunity of being heard before the decision is taken. Further, it is a Constitutional requirement that that person be given written reasons for the action.

21. It has not been contended that the *ex parte* applicant herein was ever afforded an opportunity to be heard. To the contrary, the Respondent has contented itself with challenging the legality of the applicant's title. This Court in these proceedings is not being called upon to determine the legality or otherwise of the title to the suit property. What this Court is being called upon to determine is whether the process followed by the Respondent in cancelling the development plan issued to the applicant was lawful and procedurally fair.

22. With respect to procedural fairness, it was held in Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300 that procedural impropriety is one of the grounds upon which a Court would be entitled to grant judicial review orders and according to the court:

**“Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”**

23. Therefore the Respondent was obliged to afford the applicant a hearing before it made its decision which decision, undoubtedly, affected the interest of the applicant by depriving it of its rights to the enjoyment of a property to which it lay claim by developing the same. As was held by the Court of Appeal in Onyango Oloo vs. Attorney General [1986-1989] EA 456:

**“The 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*.”**

24. In these proceedings the Court is not concerned about the merits of the decision and whether or not the respondent could have arrived at the same decision had it afforded the applicant a hearing is neither here nor there. Similarly, this Court is not concerned with the manner in which the suit property was obtained by the applicant. That is an issue which can only be determined in a suit instituted for the determination of ownership of the suit property.

25. With respect to whether the Respondent had the power to revoke the permission, section 38 of the **Physical Planning Act**, Cap 286 Laws of Kenya provided as follows:

***(1) When it comes to the notice of a local authority that the development of land has been or is being carried out after the commencement of this Act without the required development permission having been obtained, or that any of the conditions of a development permission granted under this Act has not been complied with, the local authority may serve an enforcement notice on the owner, occupier or developer of the land.***

***(2) An enforcement notice shall specify the development alleged to have been carried out without development permission, or the conditions of the development permission alleged to have been contravened and such measures as may be required to be taken within the period specified in the notice to restore the land to its original condition before the development took place, or for securing compliance with those conditions, as the case may be, and in particular such enforcement notice may require the demolition or alteration of any building or works or the discontinuance of any use of land or the construction of any building or the carrying out of any other activities.***

26. From the record there is no evidence that these provisions were complied with by the Respondent. Therefore before the Respondent can determine whether a person to whom an approval has been granted has failed to adhere to the conditions specified in the approval, it is my view and I so hold that in order that the action be deemed to be fair such a person ought to be afforded an opportunity of being heard thereon.

27. The applicant has contended that once the approval is given the Respondent has no power to revoke the same by issuance of enforcement notice. That the Respondent has power to issue enforcement notice in appropriate case is not in doubt. Accordingly I am unable to hold that the Respondent had no power to put into a motion a process through which the approval could be rescinded.

28. It is therefore my view and I so hold that the action by the Respondent of cancelling the said approval was contrary to the rules of natural justice was hence tainted with procedural impropriety and fell foul of the provisions of Article 47 of the Constitution. It is my view and I so hold that the decision taken by the Respondent was contrary to the *ex parte* applicant's legitimate expectations that before any adverse action was taken he would be afforded an opportunity of presenting his case and challenging the said decision. It is settled law that a benefit cannot be withdrawn until the reason for withdrawal has been given and the person concerned has been given an opportunity to comment on the reason. As was held in **Republic vs. Kenya National Examinations Council ex parte Geoffrey Gathenji and 9 Others Civil Appeal No. 266 of 1996:**

**“the remedies of certiorari and prohibition are tools that this court uses to supervise public bodies and inferior tribunals to ensure that they do not make decisions or undertake activities which are ultra vires their statutory mandate or which are irrational or otherwise illegal. They are meant to keep public authorities in check to prevent them from abusing their statutory powers or subjecting citizens to unfair treatment.”**

29. It is therefore clear that the Respondent's action was clearly unlawful hence a candidate for challenge by way of judicial review.

30. In these proceedings, I must however reiterate that the Court is not concerned about the merits of the decision and whether or not the applicant legally obtained the title to the suit land. Accordingly this

decision ought not to be construed as sanitising the title to the suit property. The Court's concern in this case is whether the correct process was followed. Whether or not the applicant's title was properly obtained is a matter which ought to be litigated in a proper forum. Once the Court finds that the proper procedure was not followed the Court's duty is to simply nullify the process or the decision and leave the parties to take proper steps.

31. Consequently, I find merit in the Notice of Motion Notice of Motion dated 17<sup>th</sup> April, 2014, and grant the following orders:

1. **An order of Certiorari bringing into this court for the purposes of being quashed the decision by the Respondent contained in its letter dated 24<sup>th</sup> March, 2014 disapproving Plan Reg. No. CPF. ADD 922 earlier issued by the Respondent itself.**
2. **An order of prohibition prohibiting the Respondent by itself or any of its servants or anybody claiming its authority from interfering with the Ex-parte Applicant's quiet possession of the suit property or user, development or activities thereon unless the due process of the law is followed.**
3. **The applicant will have the costs of this application.**

**Dated at Nairobi this day 8<sup>th</sup> day of October, 2014**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Mr Nyawara for the Applicant***

***Cc Patricia***