REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Miscellaneous Application 84 of 2011

REPUBLIC .....APPLICANT

VERSUS

CITY COUNCIL OF NAIROBI.....RESPONDENT

AND

NORTH LAKE LIMITED.....INTERESTED PARTY

JUDGEMENT

1. By a Notice of Motion dated 28th April, 2011 filed on 4th May 2011, the *ex parte* applicant herein, **Transallied Limited,** seeks the following orders:

a. That this Honourable Court be pleased to issue an order of Certiorari to remove into this High Court for quashing, the Respondent's decision contained in a letter of cancellation dated 15th December 2010 cancelling the change of User for the property known as Plot No. 330/351 & 330/377 on Kingara Road/Mbaazi Avenue in Thomson Estate.

b. That this Honourable Court be pleased to issue an Order of Prohibition, Prohibiting the Respondent from interfering, harassing, demolishing or in any way interfering with the *ex parte* Applicant's business on Plot No. 330/351 & 33o/377 on Kingara Road/Mbaazi Avenue in Thomson Estate.

c. That costs be provided for.

***EX PARTE* APPLICANT'S CASE**

2. The application is based on the Statutory Statement filed on 24th December, 2010 and a verifying affidavit sworn on 24th December 2010 by **Dickson Mwangi Muraya**, a director of the applicant Company. According to the deponent on 10th June 2009, the *ex parte* Applicant herein entered into a tenancy agreement with the owners of the properties known as Plot No. 330/351 & 330/377 on King'ara road/Mbaazi Avenue in Thomson estate and applied to the City Council of Nairobi for approval to build temporary structures on Plot No. 330/351 & 330/377 thereon in Thomson estate. The *ex parte* Applicant's

Landlord applied for a "Change of User" from residential to commercial use and the fact of use of the property as a business premises was known to the Respondent herein. It also deposed that the *ex parte* Applicant renovated and painted the existing structures which were dilapidated and run down. The *ex parte* Applicant also cleared the bushes, gravelled the yard and did landscaping on the property. The *ex parte* Applicant sublet part of the premises [L.R. No. 330/331] to Maggie Macnieven T/A the Garden of Eden Restaurant and Geco Carwash Limited.

3. However sometime in October 2010 the Interested Party began to interfere with the *ex parte* Applicant's sub tenants and demanded for an increase in rent in contravention to the aforementioned tenancy agreement which action prompted one of the subtenants (Maggie Macnieven) to move the Business premises Rent Tribunal where she obtained temporary restraining orders pending the hearing of the application scheduled on the 25th January 2011. The Interested party had instructed auctioneers to distress her company for rent which had not accrued. There was no privity of contract between the interested Party and the *ex parte* Applicants sub tenants since the *ex parte* Applicant herein is the tenant and it was not in breach of any term of the tenancy agreement. The Applicant instructed its advocate to write to the interested party seeking to stop them from breaching the tenancy agreement. However, on 15th December 2010 at around 10.00 am, a bulldozer belonging to the respondent brought down the perimeter fence and forcibly entered the premises and proceeded to demolish all the improvements and the renovated buildings indiscriminately. The said demolition was carried out on the premises without due process and/or any regard of the law and without any notice whatsoever. On the advice gathered from the *ex parte* Applicant's advocates on record, the acts of the Respondent are unreasonable and are not based on any law and such actions not being backed by any laws are *ulra vires* and attract prohibition from this court. According to the applicant it was shocked to learn that the same bulldozer was sent to cause further demolition on 20th December 2010 at 9.00 am and later on 21st December 2010 at 1.30 am thereby demolishing the premises on both plots and causing loss in excess of Kenya Shillings Twenty Million (Kshs 20,000,000/-). The said bulldozer was accompanied by a gang of about 50 youths who raided the restaurant looted and broke the furniture windows and poured the stock after chasing away the security guards and the effort to seek police assistance proved futile as they did not heed the calls for help from the neighbours and security guards. Upon several visits and enquiries at City Hall specifically the department of City planning the deponent established that the approval for extension of user was purportedly cancelled on 15th December 2010. To the utter disbelief and dismay of the deponent the demolition was done the same day that the approvals were purportedly cancelled and it is therefore clear that no notice was issued under the laid down procedure in Physical Planning Act No 9 of 1996 hence the notice is malicious, unreasonable, capricious, manifestly oppressive and illegal since it is not permissible to serve a notice and demolish the *ex parte* Applicant's premises and property on the same day hence the same invites the relief of certiorari and prohibition. It is deposed that the Applicant came to learn about the said cancellation through its efforts and investigations on 22nd December 2010 which purported cancellation was in reaction to the Applicant's complaints to various bodies and extensive media coverage of the Respondents illegal demolition. In the deponent's view, the demolition was carried out by the Respondent in collusion with the interested party with intent to constructively evict the *ex parte* Applicant from the premises and after demolition was carried out the Interested party posted its security at the premises who chased away the *ex parte* Applicants employees and guards. The *ex parte* Applicant then moved the Business premises rent Tribunal (the Tribunal) seeking to restrain the Interested party from interfering with its tenancy.

4. It is therefore contended that since the Respondent has never made any demand for compliance of any by-laws or legislation to the *ex parte* Applicant the actions of the respondent are ipso facto malicious, illegal, manifestly crude, barbaric and *ultra vires* since. In spite of being a municipal body, it still has to follow any laws that the *ex parte* applicant is legitimately expected to have notice of hence the orders sought ought to be granted. It contended that the Interested Party has been demanding for rent for the premises which the Applicant duly paid in spite of the fact that it is not carrying out business as the Applicant's tenant aforementioned has threatened to terminate the sub lease on grounds of frustration thereby compounding the loss accruing to the Applicant. According to legal advice received from the *ex parte* Applicant's advocates on record, the respondent ought to have given the *ex parte* Applicant notice of any breach of law and/or its bylaws. In the applicant's view it is evident from the actions of the respondent that they are only inclined to shut down the x parte Applicants yet the *ex parte* Applicant is

not in breach of any law and the actions of the respondent should be prohibited as having no basis in law and for being unreasonable, illegal and *ultra vires.* Since the Respondent has not issued any notice or decision the *ex parte* Applicant does not have any other remedy.

5. According to the *ex parte* applicant, it is evident that the illegal actions of the respondent and the interested party were malicious, vexatious and have caused the *ex parte* Applicant heavy loss and if no restrained the *ex parte* Applicant stands to suffer irreparable loss and damage. It is however conceded that the *ex parte* Applicant had previously filed MISC. JR No 378 of 2010 and had been granted leave which was then vacated because of a mistake of counsel. Therefore, in this case, the *ex parte* applicant also seeks for orders of Certiorari seeking to quash the purported cancellation of an approval for "Change of User" issued in the name of the *ex parte* Applicant which was not given to the *ex parte* Applicant as it was purportedly issued on the same day the demolitions started. To the *ex parte* applicant the actions of the respondent invite judicial sanctions by way of Judicial Review.

RESPONDENT'S CASE

6. In opposition to the application, the Respondent on 3st October 2012 filed a replying affidavit sworn by **Rose Muema** on 30th October 2012.

7. According to the said deponent, the Applicant was granted authority to repair drainage system, fix tiles and paint Plot L.R. 330/377 & 351 Mbaazi Road Thomson Estate, subject to the Landlord's approval and the same was granted for only three (3) months from 10th July 2009. The interested party herein did apply for change of user and temporary orders were issued on 26/10/10, but the same was denied and communicated to them vide a letter dated 12th November, 2011. The Respondent is, however, a stranger to the allegation made and contained in paragraphs 6, 7 & 8 of the Affidavit as the same refer to action made by the interested party. According to the deponent, the said application for change of user was denied on 12/11/2010 and not 15th December, 2011.

8. In her view, it was callous of the Applicant herein to have erected illegal structure upon property that was having problem with the Landlord as the Respondent cannot be held liable for communication break down between them hence the results of the dispute between the Applicant and the interested party should not be visited upon the Respondent as the Respondent did follow procedures laid down in their By Law and served all document upon the interested party. In response to paragraph 21 of the Affidavit the respondent states that the same has been overtaken by events as the said illegal structures have been demolished, the Applicant is also no longer in occupation of the suit premise hence the Orders brought before this court if granted would be rendered nugatory. In her view, the respondent was not obligated to serve the Applicant with any notice as the said application made and contained in paragraph 22, 23 were not made by interested party herein and the Respondent is not a party to the issues between the Applicant and interested party and further contends that the Applicant's aggrieved situation has been created by the acrimony between themselves and the interested party and not the Respondent. It is further reiterated that the Respondent's obligation are towards the interested party, whom under the Respondent by Law is the Party the respondent is obligated to deal with as they are the actual owner of the property herein. Further the temporary change of user granted was also subject to the neighbour's rights object to its existence and the Applicant herein was aware that the temporary change of user being subject to other parties would be terminated without reference to them. According to the *ex parte* applicant, it is possessed of information that the said Applicant has ceased being a tenant of interested party and hence the Order sought herein have been overtaken by events.

APPLICANT'S SUBMISSIONS

9. On behalf of the *ex parte* applicant it was submitted that the Respondent did not afford the *ex parte* applicant an opportunity of being heard. Since the demolitions occurred on the same day that the notice was issued, it was not humanely possible to challenge the decision as provided for by the appellate procedure envisaged in the Physical Planning Act No. 6 of 1996. It is, however, submitted that the applicant's rights to apply for judicial review of such a public body's decision making process is neither closed nor limited by the existence of a tribunal or an appellate mechanism. The fact that the letter

purporting to cancel the approvals was issued on the same date of demolition and received after the demolition is an injustice that ought to invite judicial review of certiorari as it was issued illegally and unfairly. It is therefore contended that the actions of the Respondent are arbitrary, unreasonable, capricious, impulsive and ultra vires and call for intervention of the court and for the judicial review orders sought. It is further contended that the same actions are the height of impunity and an abuse of power and not backed by any law yet the *ex parte* applicant would legitimately expect to have notice of the law that it is supposed to have breached and accorded an opportunity to either remedy it or appeal against it as provided for in the Physical Planning Act.

DETERMINATION

10. I have considered the foregoing. The purview of judicial review was clearly set by **Lord Diplock** in the case of **Council for Civil Service Unions vs. Minister for Civil Service [1985] A.C. 374, at 401D** when he stated that:-

"Judicial review has I think developed to a stage today when.....one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'.....By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it .....By 'irrationality' I mean what can now be succinctly referred to as "Wednesbury unreasonableness'.....it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it .....I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision."

11. 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.

12. That the cancellation of the approval 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 require 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.

13. It has not been contended that the *ex parte* applicant herein was ever afforded an opportunity to be heard. In fact, it is the Respondent's case that it was not under any duty to notify the *ex parte* applicant of its intended action since the approval was given to the interested party who was duly notified.

14. Therefore the first and a crucial issue to be determined is whether the *ex parte* applicant was a person contemplated under Article 47 aforesaid. From the documents on record, it is clear that the application for change of user was made by **North Lake**, the interested party herein. The letter notifying the change of user was on the other hand addressed to one **David N. Gichohi**, who the *ex parte* applicant concedes is the interested party. However, vide a letter dated 15th December 2010, the Respondent notified both the *ex parte* applicant and the interested party of the cancellation of the temporary change of user. The only explanation for this notification must have been that whereas the approval was not granted on an application made by the *ex parte* applicant, the *ex parte* applicant was a person likely to be affected by the cancellation of the approval. A person likely to be affected by an administrative action, in my view, is not necessarily a party to the subject of the transaction.

15. The *ex parte* applicant's case is that the said letter was dated the same date that the demolition took place and that by the time of the said demolition the *ex parte* applicant had not received the said letter. In paragraph 9 of the replying affidavit the only person who is expressly mentioned to have been served with the documents is the interested party. There is no evidence at all that the *ex parte* applicant was similarly notified. The question that one asks is; what was the reason for addressing the notification to the *ex parte* applicant if the letter was not meant to be sent to him and if in the Respondent's view, the *ex parte* applicant was not entitled to the same? The only reasonable conclusion one can make is that the Respondent did appreciate that the *ex parte* applicant even if was not the person to whom the approval was granted was a beneficiary thereto and therefore a person likely to be affected by the said cancellation. Under Article 47 aforesaid it was not only entitled to written reasons for the said action but to hearing as well.

16. 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 it would be afforded an opportunity of presenting his case and challenging the said decision. The commencement of the demolition on the same date of the cancellation was meant to ensure that the Respondent's action was not challenged and was hence undertaken in bad faith. 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. The mere fact that the Respondent inserted in the letter of the approval that the permit would be cancelled without reference, in my view, does not take away a persons Constitutional rights guaranteed under the Constitution. Public officers must be reminded that under Article 129 of the Constitution executive authority derives from the people of Kenya and is to be exercised in accordance with the Constitution in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit.

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

18. The *ex parte* applicant seeks an order of Certiorari to remove into this High Court for quashing, the Respondent's decision contained in a letter of cancellation dated 15th December 2010 cancelling the change of User for the property known as Plot No. 330/351 & 330/377 on Kingara Road/Mbaazi Avenue in Thomson Estate. That the decision whether or not to grant the remedy of judicial review is discretionary is now well settled. In **Republic vs. Judicial Service Commission *ex parte* Pareno [2004] 1 KLR 203-209** it was held that judicial review orders are discretionary and are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. Further the court exercises a discretionary jurisdiction in granting prerogative orders and can withhold the gravity of the order where among other reasons there has been delay, where a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised. See **Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 Of 2000.**

19. In this case the letter granting temporary change of use from residential to commercial was dated 26th October 2010. The said approval was for a period of two years. It is therefore clear that the said approval was to come to an end by 25th October 2012 which is now past. The application before me does not seek an order for mandamus assuming the same would have been capable of being granted in the circumstances. Accordingly, to grant the order of certiorari sought would simply be an academic exercise and would not be efficacious in the circumstances.

20. The *ex parte* applicant also seeks an Order of Prohibition, Prohibiting the Respondent from interfering, harassing, demolishing or in any way interfering with the *ex parte* Applicant's business on

Plot No. 330/351 & 330/377 on Kingara Road/Mbaazi Avenue in Thomson Estate. In **Kenya National Examinations Council vs. Republic *Ex parte* Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 eKLR** the Court of Appeal held *inter alia* as follows:

"Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision…Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings.....an order of prohibition.....cannot quash what has already been done…Only an order of *certiorari* can quash a decision already made."

21. In the present application, the demolition has already taken place and the period of the approval as already stated hereinabove has lapsed. To grant the prohibitory orders sought without likewise quashing the same would similarly not be efficacious. As was held by the Court of Appeal in **Republic vs. University of Nairobi Civil Application No. Nai. 73 of 2001 [2002] 2 EA 572**, as a matter of common-sense the judicial order of prohibition must be pre-emptive in nature, that is, it must be directed at preventing what has not been done.

22. In the foregoing circumstances, whereas I find that the actions taken by the Respondent were clearly unlawful, illegal and tainted with procedural impropriety, I am, regrettably, unable to grant the orders sought in the Motion dated 28th April 2011.

23. Accordingly the said Motion is disallowed but with costs to the *ex parte* applicant.

Dated at Nairobi this 12th day of April 2013
G V ODUNGA
JUDGE

Delivered in the presence of Mr Kitonga Mureithi for ex parte applicant.