



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW 69 OF 2012

REPUBLIC.....APPLICANT

VERSUS

THE CITY COUNCIL OF NAIROBI.....RESPONDENT

AND

IVYLAND PART LTD.....1ST INTERESTED PARTY

WILL COMPANY LIMITED.....2ND INTERESTED PARTY

EX PARTE

1. **INDERPAL SINGH,**
2. **FRANCIS NNEBE AND**
3. **JAMES KISA (SUING ON BEHALF OF CONVENT
DRIVE SOUTH RESIDENTS' ASSOCIATION)**

R U L I N G

On 5th March 2012, the applicants herein Inderpal Singh, Francis Nnebe and James Kisa filed a chamber summons application of even date on behalf of Convent Drive South Residents Association seeking leave to apply for an order of Certiorari to remove into the High Court and to quash the approval given by the Respondent, the City Council of Nairobi on 6th September 2011 allowing construction of five (5) Town houses on LR.3734/299 in Lavington Nairobi.

The applicant's had a second prayer that in the event that leave is granted, the court orders that the said leave operates as stay to halt the contemplated construction till hearing and determination of the suit.

Leave was granted by this court on 6th March 2012 but on the issue of stay, the court directed that the application be served for that prayer to be canvassed interpartes before a final determination thereof was made by the court.

The applicant subsequently proceeded to file the substantive Notice of motion on 25th March 2012 in which they mainly sought an order of Certiorari to quash the Respondents decision to grant development

permission for construction of 5 town houses on L.R. No.3734/299 Lavington (*hereinafter referred to as the suit property*).

In opposition to the applicant's prayer for leave to operate as stay, the respondents filed grounds of opposition on 5th July 2012 while the Interested Party filed a notice of preliminary objection dated 8th June 2012 and a replying affidavit sworn by its director Mr. Zhang Xu Ling on 28th June 2012.

Briefly, it is the applicant's case that the court should grant stay in this case stopping construction of the 5 Town Houses in the suit property pending the hearing and determination of their substantive motion because if stay is not granted, their suit will be rendered nugatory.

The Respondent and the Interested Party opposed the prayer for leave to operate as stay on grounds that the Applicant's were not entitled to such orders as the suit was incompetent and prematurely filed.

M/s Matunda, learned counsel for the Respondent maintained that the development permission had been granted by the Respondent in accordance with the provisions of the Physical Planning Act (The Act) and that the Applicants had not demonstrated that the single dwelling houses being put up by the Interested Party were being constructed on less than 0.1 hectares which is what would be contrary to the Respondents zoning Policy.

M/s Matunda and Mr. Ochieng, learned counsel for the Interested Party also contended that stay should not be granted since the Applicants had failed to exhaust the statutory appeal process prescribed under the Act before instituting the judicial review proceedings.

Finally, Mr. Ochieng submitted that the entire suit was incompetent as it was filed contrary to Order 1 Rule 8 of the Civil Procedure Rules yet it is a representative suit in character.

Having considered the rival submissions made by the learned counsels appearing for the parties herein, I find that at this stage when the court is only considering whether or not leave granted should operate as stay pending determination of the applicant's main motion, it would not be appropriate to attempt to address the issues raised concerning the competence or otherwise of the Applicant's suit since these may prejudice the hearing of the substantive motion. I will therefore strive to limit myself to only those issues which are relevant to the application of stay.

However, I wish to comment briefly on the issue raised of lack of exhaustion of alternative remedies available to an applicant before commencement of judicial review proceedings which is also an issue that may arise at the substantive hearing because the Respondent and the Interested Party appeared to lay great emphasis on it in their submissions. I wish to just point out that it is now settled law that as a general rule, the existence of an alternative remedy is no bar to the commencement of judicial review proceedings or to the granting of judicial review remedies in appropriate cases. The Respondents and the Interested Party's argument that the applicants are not entitled to the orders sought simply because they chose to institute judicial review proceedings instead of first exhausting the statutory appeal process prescribed under Section 33 (3) & 4 of the Physical Planning Act cannot therefore be sustained.

Turning now to the issues at hand, the Applicants claim that if the stay orders are not granted, their Notice of Motion challenging the legal validity of the Respondent's decision to allow the aforesaid construction on the suit property will be rendered nugatory. The Interested Party on the other hand contends that stay should not be granted since the said construction is at an advanced stage and they have invested substantial amounts of money in the construction project.

I have perused the Applicant's Notice of Motion filed on 25th March 2012. The motion contains only one main prayer which challenges the legal validity of the Respondent's decision to permit the construction complained about in the suit property. The evidence availed to the court shows that the said construction has already began and that it is at an advanced stage.

The purpose of stay in judicial review proceedings is to suspend the validity and implementation of the

impugned decision to avoid the possibility of actions or decisions by public bodies which are suspected to be illegal or irregularly made being implemented to the detriment of parties affected by the said decisions before a final determination is made by the court on the legality or otherwise of the impugned decision after hearing all parties to the dispute in the substantive motion.

This is the reason why in considering applications such as the present one, the court should ensure that the Applicant's substantive motion is not rendered nugatory by the acts of the Respondent and other Interested parties during the pendency of the main application.

I wholly agree with the holding of J. Maraga in **Taib A Taib –Vs- Minister for Local Government and 3 Others [2006] eKLR** that where the court finds that an order of stay is efficacious, the court should not hesitate to use its discretion to grant it especially where there is a possibility that if stay orders are not granted, the applicants main application for judicial review may be rendered nugatory.

In this case, I am persuaded to find that the Applicants have made out a prima facie case which warrants grant of stay. It is clear to me that since the Interested Party has already began implementing the Respondents impugned decision by carrying out construction in the suit property which is now at an advanced stage, if the stay orders sought are not granted at this juncture, then the applicant's substantive motion will definitely be rendered nugatory.

It is therefore my finding that the interests of justice demand that in this case the Applicants application for leave granted herein to operate as stay be granted which I hereby do. The stay will operate to stop the Interested Party from carrying out further construction on the suit property till the substantive motion is heard and determined.

However, given that the Interested Party has invested heavily in the said construction relying on the decision subject matter of the challenge in these proceedings, it is important that hearing of the suit be expedited so that its outcome is known as quickly as possible in order to allow all the affected parties in the dispute to chart their way forward guided by the courts final verdict on the matter.

In the circumstances, I direct that this case be heard on a priority basis before any other judge in the Division. Case to be mentioned on **17th July, 2012** for directions.

Dated, Signed and Delivered by me at Nairobi this 13th day of July, 2012.

C. W. GITHUA
JUDGE

In the presence of:

Florence - Court Clerk

Mr. Karanja for Applicants

M/s Matunda for Respondent

Mr. Odhiambo Ochieng for Interested parties