



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW 338 OF 2011

IN THE MATTER OF: AN APPLICATION BY SPRING VALLEY RESIDENTS COMPANY LIMITED FOR A JUDICIAL REVIEW ORDER OF CERTIORARI

AND

IN THE MATTER OF: THE LOCAL GOVERNMENT (ADOPTIVE BY LAW BUILDING) ORDER 1968

AND

IN THE MATTER OF: THE CITY OF NAIROBI (BUILDING) BY LAW 1948

AND

IN THE MATTER OF: THE PHYSICAL PLANNING ACT

BETWEEN

REPUBLIC.....APPLICANT

-VERSUS-

THE CITY COUNCIL OF NAIROBI.....RESPONDENT

EX-PARTE

SPRING VALLEY RESIDENTS COMPANY LTD

JUDGMENT

The Exparte Applicant herein Spring Valley Residents Company Limited (*hereinafter referred to simply as the Applicant*) moved this Court by way of a Notice of Motion dated 30th January 2012 filed in

court on even date seeking orders of Certiorari to remove into the High Court and quash the decision made by the City Council of Nairobi, the Respondent herein on 1st July 2011 approving the proposed development plan (**Plan Reg. No.FB 503**) in respect of the proposed development of an office park and hotel on land known as L.R. No.7158/76 Nairobi.

The Applicant also prays for costs of the suit.

The application was filed pursuant to leave granted on 11th January 2012 and is supported by the verifying affidavit sworn on 28th December 2011 by Rajesh Shah, the supplementary affidavit sworn by Davidson Mwaisaka on 30th April 2012, annexures thereto and the statutory statement dated 30th January 2012.

The statutory statement contains *inter alia* the grounds upon which the application is premised which are expressed as follows: -

1. ILLEGALITY, UNREASONABLENESS AND IRRATIONALITY

1.1. THAT notwithstanding that the City Council of Nairobi found that the subject property fell under Zone 5, it nevertheless went ahead and gave approval for a proposed development plan that exceeds and contravenes the restrictions set out under the said Zone 5.

1.2. THAT the decision made was further predicated on a contravention of Section 30(6) of the Physical Planning Act, which defines Commercial Development as including offices and hotels.

The application is opposed by both the Respondent and the Interested Party. The Interested Party is Dazzler Properties Ltd which is the registered proprietor of Land LR.No.7158/76 on which the proposed development was to be erected .

The Respondent opposed the motion through a replying affidavit sworn on 23rd March 2012 by its Director of City Planning, Mr. Patrick Tom Odongo.

The Interested Party opposed the motion through two affidavits sworn by its Director, Mr. Peter Muraya. These are the Replying Affidavits sworn on 28th March 2012 and the supplementary affidavit sworn on 12th April 2012.

Briefly, the background against which the instant Judicial Review proceedings were commenced as can be discerned from the pleadings filed herein and the documentation/material placed before the court is that the Interested Party purchased all that piece of land comprised in LR.7158/76 measuring approximately 2.2. acres (the suit property) when its use was designated as Residential. Thereafter, the Interested Party made an application to the Respondent being the Local Authority in whose jurisdiction the suit property is situated seeking a change of user of the property from residential to office park and Hotel.

It is not disputed that the application was advertised in the print media inviting members of the public generally and other interested persons to make representations regarding the proposed change of user of the suit property before the Respondent could make a decision on the application.

From the evidence tendered before the court, it is clear that objections to the proposed change of user were made to the Respondent by residents and property owners in the affected area either in their individual capacities or in their Resident Associations for example **Lake View Estate Resident Association** which authored objections in letter dated 18th May 2011.

It is also evident that the Respondent convened two stakeholder consultative meetings on 29th April 2011 and 4th May 2011 to further discuss the objections raised to the proposed change of user by the various

Resident Associations in the neighbourhood.

After however evaluating and considering the said objections, the Respondent approved the application for change of user of the suit property from Residential to Office Park and Hotel in its Town Planning Committee meeting held on 5th May 2011. This decision by the Respondent was communicated to the Interested Party through two letters namely the letter dated 11th May 2011 which is annexed to the Interested Party's replying affidavit and **marked exhibit PM – 5** and the letter dated 15th June 2011 annexed to the Respondent's replying affidavit **marked "PTO1"** which by its own wording superseded the permission granted in letter dated 11th May 2011. The letters show that the approval of change of user was made subject to several conditions which I will discuss later in this judgment.

After the change of user was approved, the Interested Party proceeded to prepare architectural drawings for its proposed development on the suit property in line with its permitted use of Office Park and Hotel. A sample of the said drawings are attached to the exhibits by the Interested Party at pages 166 – 202. The proposed development plan was then submitted to the Respondent for the purpose of obtaining development permission in accordance with the provisions of the Physical Planning Act, Cap.286 of the Laws of Kenya (*hereinafter referred to as the Act*).

From the documentation exhibited by the Interested Party, it is apparent that an Environmental Impact Assessment on the proposed development was done and a public hearing which was advertised in the print media was held at the suit property to further address stakeholder concerns and all aspects of the proposed development.

Subsequently, by letter dated 1st July 2011, the Respondent announced its decision to approve the proposed development. It is this decision which basically permitted the implementation of the proposed development as shown in the building plan registered by the Respondent as No. FB 505 which triggered the commencement of the instant proceedings. The applicant now urges this court to quash that decision by an order of Certiorari on grounds that it was made illegally, irrationally, unreasonably and in breach of the rules of Natural Justice.

The corpus of the Applicant's complaints is that the proposed development was commercial in nature and that the Respondent acted irrationally or unreasonably in approving such a development in a residential area contrary to its zoning policy. The Applicant further contends that the said decision was illegal as the Respondent failed to take into account the factors enumerated under S33(2) (b) of the Physical Planning Act which all Local Authorities are statutorily obligated to consider when deciding whether or not to grant development permission. The applicant further claims that the Respondent violated the rules of Natural Justice by not responding to objections made by members of the Applicant in letters dated 21st June 2012 before making its decision.

In answer to the Applicant's motion, the Interested Party supported the Respondent's position that the Applicant's motion was unmerited and that it ought to be dismissed with costs.

The Respondent and the Interested Party maintained the position that the impugned decision was made in the exercise of the Respondent's mandate as a Local Authority after following all the procedures laid down in the Act and after taking into account all relevant factors and objections raised by the Applicant's members. The deponents to the affidavits filed on behalf of the Respondent and the Interested Party denied that in granting the development permission, the Respondent violated its own Planning/Zoning policy. They averred that the proposed development complies with the density; skyline, character and amenity of the area the suit property is located and that it was in compliance with condition (V1) subject to which the change of user was granted. Mr. Tom Odongo deponed that the proposed development will be situated near other Commercial developments already established in the area (Office blocks of UNDP Somalia, Medicines San Frontiers Holland among others) which were in line with the development requirements of that area and that therefore the development proposed by the Interested Party was not peculiar.

It was also their case that the applicant was not entitled to the remedy of Judicial Review having failed to utilize the alternative remedy of the statutory appeal process provided for under Section 33(3) and (4) of the Act.

The Interested Party also questioned the Applicant's legal standing in this matter claiming that the Applicant had no property in the neighbourhood, had not objected to the development permission as it was incorporated after the permission had been granted and that it had no legitimate grievance against issuance of the development approval.

To further advance their respective positions, the parties herein filed written submissions which their counsel highlighted before me on 29th and 30th of May 2012.

Having carefully evaluated and considered the submission's made by Counsel for the respective parties, the pleadings herein and the authorities cited, I find that the main issues that arise for this court's determination are as follows:

- (1) Whether the applicants failure to utilize the alternative remedy provided for under the Act is a bar to the granting of the relief sought for in this case.
- (2) Whether the Respondent acted illegally, irrationally and unreasonably in making the impugned decision.
- (3) Whether the Applicant is entitled to the relief sought.
- (4) What order should be made on costs?

Having identified what in my view are the issues for determination by the court in this case, I now proceed to consider the first two issues with a view to determining whether the Applicant is entitled to the relief sought in this case so that it will not be necessary to consider the third issue separately.

Turning to the first issue, Mr. Ngatia learned counsel for the Interested Party submitted that the Applicant is not entitled to the order of Certiorari to quash the decision of the Respondent to grant the Interested Party approval to carry out the proposed development on the suit property since the Applicant did not utilize or exhaust the alternative remedy available to it in the form of the statutory appeal process prescribed under Section 33 (3) and (4) of the Physical Planning Act before applying for the remedy of Judicial Review. He further submitted that as the Applicant did not plead any exceptional circumstances that would have justified commencement of judicial review proceedings in preference to the statutory appeal process, the Applicant was not entitled to the relief sought.

Mr. Amoko learned counsel for the Applicant in response to Mr. Ngatia's submissions submitted that the existence of an alternative remedy is no bar to the commencement of judicial review proceedings and that in any case, Section 33 (3) of the Act only applies to persons aggrieved by the refusal of development permission. In the Applicant's case, it was aggrieved by the decision granting the said development permission not its refusal and therefore the alternative remedy under the Act was not available to it. In order to fully appreciate the rival submissions made by the parties on this point, I think it is important to reproduce S33(b) of the Act which states as follows;

“Any person who is aggrieved by the decision of the local authority refusing his application for development permission may appeal against such decision to the relevant liaison committee under section 13”.

The appeal process prescribed under S33 of the Act is to the liaison committee, the national liaison committee and eventually to the High Court.

In my attempt to resolve this issue, i will begin by stating from the outset the law on the issue of whether or not the existence of alternative remedies is a bar to the remedy of Judicial Review.

It is now settled law that the existence of an alternative remedy is not a bar to the commencement of Judicial Review proceedings or to the granting of Judicial Review remedies. However, the law requires that a party seeking the remedy of Judicial Review in preference to other alternative remedies must disclose the existence of such alternative remedies at the leave's stage of the proceedings and demonstrate to the satisfaction of the court that exceptional circumstances exist which justifies the applicant's preference of the remedy of judicial review to the alternative remedy. The applicant must demonstrate that judicial Review is more convenient and most effective when compared to the alternative remedy.

The Court of Appeal had opportunity to pronounce the law on this point in the case of R –Vs- National Environment Management Authority C/Appeal No.84/2010 when it was considering an appeal lodged against the decision made by Wendoh, J in R –Vs -National Environment Management Authority Exparte SoundEquipment Ltd Misc Civil Appn No. 7 of 2009. The court expressed itself in the following terms:

“The principle running through these cases is that where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to determine and whether the statutory appeal procedure was suitable to determine it”.

In this case, a reading of Section 33 (3) of the Act clearly shows that the provision for appeal therein was limited to a person who had lodged an application to the Respondent for development permission and that application had been denied/refused. It is therefore clear that the statutory appeal process prescribed under Section 33 (3) & (4) of the Act was not available to the Applicant in this case since the Applicant was not the person who had lodged the application for the development permission subject matter of this case and in any event the application had been granted. The appeal process only applied to situations where the application for development permission had been refused. In the circumstances, the submission by Mr. Ngatia that the Applicant was not entitled to the relief sought as it had failed to exhaust the statutory appeal process under the Act before seeking the remedy of judicial review cannot be sustained.

On the second issue concerning whether the Respondent in making the impugned decision acted illegally, irrationally or unreasonably or whether it violated the rules of natural justice, I find that it is common ground that the Respondent, being the local authority having jurisdiction over the area in which the suit property is located had the statutory mandate to consider all applications for development permission in the area and to grant or refuse the grant of development permission. This mandate is found in Section 29(c) and Section 33(1) (a) & (b) of the Act.

Section 29 is in the following terms

“Subject to the provisions of the Act, each local authority shall have the power –

- (a) to prohibit or control the use and development of land and buildings in the interests of proper and orderly development of its area;
- (b) to control or prohibit the subdivision of land or existing plots into smaller areas;
- (c) to consider and approve all development applications and grant all development permissions;

Section 33(1) (a) & (b) of the Act specifically and expressly confers on local authorities the discretion to either grant or refuse to grant development permission with or without conditions but where permission is refused, grounds for such refusal must be given.

Given the foregoing, I have no doubt in my mind that the Respondent herein had jurisdiction to consider

the Interested Party's application for development permission and to grant the said permission with or without conditions.

In this case the Respondent granted the interested party development permission with several conditions as can be seen from the letter of approval annexed to the Applicant's verifying affidavit marked RS—6.

The Applicant complains that unlike the change of user, the development permission was not made conditional to compliance with the Respondents zoning policy.

It is not disputed that under the guidelines to Nairobi's City Development Ordinances and Zones commonly referred to by the Applicant as the Respondent's zoning policy (*see annexure to verifying affidavit marked R5 – 2*) the suit property is situated in Zone 5 where developments are allowed for low density residential family units except for Lavington where mansionettes are allowed on sewerred areas.

It is also not in dispute that the proposed development related to proposed construction of five office blocks and a four star residential hotel all storeyed complete with parking lots. It is therefore obvious that the proposed development was commercial in nature.

The applicant contends that in approving such a commercial development in a residential area, the Respondent acted contrary to the provisions of Section 32(3) (b) of the Act which required Local Authorities to have regard to the health, amenities and convenience of the community generally and to the proper planning and density of development and land use when considering applications for development permission. It was also submitted on behalf of the Applicant that in so far as the grant of development approval was not conditional to the zoning policy, it violated the conditions subject to which the change of user had been permitted and was to that extent illegal.

As stated earlier, the change of user of the suit property had been granted by the Respondent subject to certain conditions. The decision approving the change of user was communicated to the Interested Party in two letters one dated 11th May 2011 and another one dated 15th June 2011. The notification of approval of development permission dated 11th May 2011 annexed to the Interested Party's replying affidavit is the one which was relied upon by the Applicant in its submission that the Respondents in making the impugned decision did not consider among others its zoning policy on land use in the area which was one of the conditions subject to which the change of user had been granted. This condition was listed as No.6 (VI) which made the change of user subject to approved Zoning Policy (Density, Skyline, Character and Amenity of the area). This letter was however countermanded by the later letter dated 15th June 2012 (*annexed to the Respondent's replying affidavit*) which apart from introducing one more condition to the grant of approval for change of user changed condition No.6 in the previous letter and in its place had the change of user subjected to **“compliance with the approved zoning and planning policy for investment in Hotels and related developments and to observe residential character and amenity of the area”**.

This letter superseded the letter dated 11th May 2011 and was therefore the basis upon which the development permission impugned in this case was issued. The letter shows that besides the guidelines on zoning policy, the development permission had to comply with approved planning policy on hotels and related support services. The letter dated 14th June 2012 addressed to Lakeview Estate Residents Association one of the Applicant's subscribers which is annexed to the Respondent's replying affidavit alleged that the said policy was approved by the Town Planning Committee of the Respondent in April 2008 and that it did not limit such commercial developments to specific sites but permitted their location for example in the Central Business District, Residential and other areas on a rational criteria basis.

This in effect means that the Respondent had an approved planning policy on investment in Hotels and related developments quite apart from the zoning policy exhibited by the Applicant. The Respondent has maintained that it followed its planning policies, all the procedures and requirements prescribed under the Act in considering and granting the development permission. Although the applicant had alleged that the Respondent had failed to take into account the requirements of Section 32(3) (b) of the

Act, it failed to tender any evidence to prove that contention.

It is apparent from the material placed before the court that the Respondent considered the factors enumerated under Section 32 (3)(b) of the Act such as the amenities and convenience of the community living in the area and that must be why in my opinion, it included the provision of extension of a 350mm sewer to serve the property and other neighbouring properties as a planning gain as well as requiring the surrender of a 5 metres wide strip of the Interested Party's land along Lower Kabete road for purposes of road widening obviously in a bid to mitigate against traffic congestion in view of the proposed development. The Applicant's submission that the Respondent failed to consider the mandatory requirements prescribed under Section 32(3)(b) of the Act in making the impugned decision is therefore factually incorrect.

Though this court appreciates that the Respondent did not avail to the court the said approved policy on investments in hotels and related support services, it is significant to note that the Applicant upon being served with the Respondent's replying affidavit did not swear a further affidavit to deny that such a policy existed. It is also worth noting that the Respondents claim that it had followed that policy in making its decision was not challenged by the applicant. What is not denied is in law deemed to be admitted and therefore the court is entitled to presume or even accept that such a policy does in fact exist. If the Respondent made its decision on the basis of that policy which allowed investment on hotels and other related developments in residential areas among others, then it would have acted within its mandate following its regulations despite the fact that the affected area had been zoned off as residential. The claim that the impugned decision was illegal as it was not subjected to the Respondent's zoning policy cannot stand since the Respondent was allowed by the law to grant development permission with or without conditions. In view of the foregoing, it is my finding that the applicant has not demonstrated that the Respondent acted illegally in making the impugned decision.

Turning now to the other ground relied upon by the Applicant, namely that the Respondent's decision should be quashed for having been made irrationally and unreasonably, I wish to begin by stating that from the evidence placed on record in this case, the Applicant has failed to sufficiently demonstrate that the Respondent acted irrationally or unreasonably within the meaning of *Wednesbury's* unreasonableness as defined in the case of Associated Provincial Picture House Ltd –Vs- Wednesbury Corporation [1947] 2 All ER 680.

I make this finding because it is common ground that as from 15th June 2011 when the Respondent granted the Interested Party approval for change of user, of course subject to some conditions, the authorized use of the suit property became Office Park and Hotel.

Though some members of the Applicant had made objections to the proposed change of user which objections were considered and overruled by the Respondent, when the change of user was eventually approved, the evidence on record confirms that no appeal was filed by the objectors against the decision either through the statutory appeal process under the Act or through the court process.

This in effect means that by the time the Respondent was considering and granting the development permission, the approval for the change of user was still in place and it had not been challenged through any legal process.

It is instructive to note that the proposed development was for the construction of five office blocks and a four star Hotel which was in line with the development proposed by the Interested Party when it applied for the change of user of the suit property from residential to Office Park and Hotel. In my understanding, it is because of that proposed use of the suit property that the respondent had approved the change of user. The Applicant has not alleged or tendered evidence to show that permission for the proposed development was for a project that was not in conformity with the change of user or that it was of such size, density and magnitude that it could not possibly have been envisaged in the application and approval of the aforesaid change of user.

Since the proposed development was for construction of office blocks and a Hotel, I see nothing irrational

or unreasonable in the Respondent's decision to grant the impugned development permission since this was the only way it could have effected or facilitated the newly authorized use of the suit property. In fact, given that the approval of change of user had not been challenged in any way, the Respondent would have acted irrationally and unreasonably had it refused to grant the development permission since it would have rendered the approval it had given for change of user of the suit property meaningless and useless. Refusing to grant the development permission would in my view have been tantamount to reversing its decision granting change of user.

Secondly, it was alleged by the Interested Party and the Respondent and this was not contravened by the Respondent that there are other office blocks and buildings which are commercial in character near the site of the proposed development. If this were so given that the proposed development was approved in line with the Respondent's approved planning policies as maintained by the Respondent, then in my opinion there was nothing irrational or unreasonable about the Respondent's decision especially if the residential properties of the members of the Applicant were far from the suit property. It is noteworthy that the persons represented by the Applicant did not indicate in their pleadings how far their properties were located from the site of the proposed development in terms of distance. This courts task in resolving this issue would have been made much easier if the applicant had shown in its pleadings where the properties of its members were located *visa vis* the proposed development and where possible approximate the distance between the two in order to assist the court determine the reasonableness or otherwise of the Respondent's impugned decision. To demonstrate this point, I would for example find it unreasonable if it was established that the Respondent had permitted the development of highrise office blocks and a Hotel say in between two residential housing units.

It would however be different if the proposed development was permitted near other highrise office blocks which were in an isolated part of the affected residential area. The desirability of disclosing the distance between the suit property and the properties of members of the applicant was even more necessary when one considers that Zone 5 where the suit property is located covers a very wide area as shown in the guide to the City of Nairobi's Development Ordinances and Zones – *see annexure R5 – 2*. According to this guide, Zone 5 covered upper Spring Valley, Kyuna, Loresho and Lavington.

In view of the foregoing, I am not persuaded to find that the Respondent's impugned decision was either irrational or unreasonable according to the Wednesbury principles of unreasonableness. It was not in the least outrageous that no other reasonable Local Authority would have arrived at the same decision given similar circumstances.

I now wish to turn to the Applicant's claim that in making the impugned decision, the Respondent violated the rules of natural justice. The twin rules of natural justice namely that no man shall be condemned unheard (*audi alteram partem*) and that no man shall be a judge in his own *cause* (*nemo judex in causa sua*) are cardinal principles in our justice system. They denote the concept of fairness and the duty imposed on all public/statutory bodies and tribunals to act fairly in their interactions with citizens.

In this case the Applicant alleges that its members wrote letters to the Respondent on 21st June 2011 objecting to approval of the Interested Party's proposed development on the suit property and the Respondent without having first responded to the said objections proceeded to grant approval for the proposed development.

This action by the respondent in the Applicant's view violated the rules of natural justice. It should however be noted that the Applicant does not deny that following advertisements in the print media caused by the Respondent inviting objections from members of the public to the application for change of user, its members lodged objections to the proposed change of user which were considered and overruled. The Respondent wrote to the said objectors a letter dated 14th June 2011 notifying them that it had carefully evaluated and considered their objections and found them unmerited. It also stated in the same letter the reasons why it had granted permission for change of user which precipitated the approval of the development permission.

Though it is evident that the objections in the letters dated 21st June 2011 were not responded to by the Respondent before 1st July 2011 when it granted approval for the proposed development, I have noted that the said objections were similar to those made by the members of the Lake View Estate Resident Association dated 18th May 2011 which were fully addressed by the Respondent at the stage of granting permission for change of user. The complaints and concerns raised in the said objections appear to have been taken into account in the crafting of the conditions subject to which the change of user was permitted. In the circumstances, having heard the Applicant's members and considered their objections at the change of user stage, it was not in my view necessary for the Respondent to hear and/or respond to the same objections again when considering whether or not to permit the development on the basis of which it had allowed a change of user. In this context, it is my decision that the Respondent properly exercised its duty to act fairly. It gave the Applicant's members and all interested members of the public for that matter an opportunity to be heard on their objections and concerns with regard to the proposed development. The Respondent in a bid to accommodate the objector's complaints and concerns gave approval for the change of user subject to compliance with certain conditions meant to safeguard the resident's welfare. The proposed development being a consequence of that change of user was supposed to be in line with the said conditions in the premises, it is my finding that in this case, there is no evidence to suggest that the Respondent subjected the applicant or its members to unfair treatment.

In my view, the elaborate process of inviting objections from members of the public, holding consultative meetings with stakeholders, considering the objections received and notifying the objectors of reasons for its decision had all the hallmarks of compliance with the rules of natural justice. It is therefore my finding that in making the impugned decision, the Respondent complied with the rules of natural justice.

Last but not least, I must record my finding that even if the Applicant had succeeded in proving that the Respondent's impugned decision was wrong for having approved a proposed commercial development in a residential area, the Applicant would still not have succeeded in its case. I say so because from the pleadings, it is clear that the Applicant's Notice of Motion was by and large a challenge on the merits of the Respondent's decision and not a challenge on the process by which that decision was made. However, judicial review is not concerned with the merits of the decision being challenged but with the decision making process.

In this regard, I wish to borrow the words of my brother Hon. J. Emukule in the case **of Republic –Vs- National Environment Management Authority & Another (2006) eKLR** when he made the following statement regarding the jurisdiction of a Judicial Review Court when he was considering the issue of existence of alternative remedies Visa-vis the remedy of judicial review. He said

“Regarding the availability of an alternative remedy such as an appeal whereas there are occasion when the Court will require exhaustion of other remedies..... The reason for this as explained in the foregoing paragraphs is to be found in the nature of judicial review. This court concerns itself with the review of the decision making process.....an applicant's right to apply for judicial review of such public body's decision-making process is neither closed nor limited by the existence of a tribunal or an appellate mechanism.....,,

Similar sentiments were also echoed by the Court of Appeal in the case of **Commissioner of Lands –Vs- Kuntse Hotel Ltd, Civil Appeal No.234 of 1995** when the Court of Appeal stated:

“But it must be remembered that judicial review is concerned not with private rights or the merits of the decisions 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.....,,

As stated earlier, the Respondent had complied with all the procedures laid down in the Physical Planning Act with regard to the making of applications and approval for change of user and development permission. Its decision making process was not flawed in any way. There was no procedural impropriety. In the circumstances, this court in the exercise of its Judicial Review jurisdiction cannot seek to establish whether the Respondents decision was right or wrong and proceed to quash it if it finds

that it was wrong. This is because a judicial Review court does not function as an appellate court.

The respondent had discretion bestowed on it by statute to grant or refuse to grant development permission. The courts intervention can only be invoked if it was established that the Respondent either acted in excess of or outside its jurisdiction or had abused its discretion by exercising it arbitrarily or unreasonably. In this case, the Respondent has proved that it exercised its discretion reasonably and within the confines of the law.

In conclusion, the Applicant in this case seeks the remedy of certiorari to quash the Respondents decision to approve the interested party's proposed development on the suit property. The question then to pose at this juncture is – In what circumstances would a court issue orders of certiorari?

In Halsbury's Laws of England, 4th Edition Vo.1 at page 202 it is stated that:

“Certiorari will issue to quash a determination for excess or lack of jurisdiction, error of law on the face of the record, breach of the rules of natural justice or where the determination was procured by fraud, collusion or perjury”.

As demonstrated earlier, the applicant has not proved that any of

the above grounds existed in respect of the impugned decision to justify the issuance of an order of certiorari .It is therefore very clear to me that the applicant is not entitled to the relief sought in this case.

For all the foregoing reasons and findings, it is my conclusion and decision that the Applicant's Notice of Motion dated 30th January 2012 lacks merit and it is hereby dismissed with costs to the Respondent and the Interested Party.

Dated, Signed andDeliveredby me at Nairobi this 6th day of July, 2012.

C. W. GITHUA
JUDGE

In the presence of:

Florence - Court Clerk

Mr. Mbaluto holding brief for Amollo for Applicant

N/Afor Respondent

Mr.Ngatia for Interested Parties