REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Application 208 of 2010

SAMUEL O.MANANI (FORMERLY JR 614/08)

ANDREW MOKAYA JUMA

JUSTIN OTUKE MANANI ....APPLICANTS

VERSUS

CITY COUNCIL OF NAIROBI ....RESPONDENT

J U D G M E N T

The Ex-parte applicants, **SAMUEL O. MANANI, ANDREW MOKAYA JUMA and JUSTIN OTUKE MANANI** have invoked this court's jurisdiction for Judicial Review. They are seeking the following orders;

"1. AN ORDER OF CERTIORARI to remove into the High Court the proceedings of the City Magistrate's Court cases in Nairobi City Council Criminal Case Numbers 307 of 2006 – City Council of Nairobi –Vs- Samuel O. Manani; 342 of 2006 City Council of Nairobi –Vs- Andrew Mokaya Juma and 699 of 2006 City Council of Nairobi –Vs- Justin Otuke Manani for purposes of quashing the same.

2. An order of PROHIBITION do issue prohibiting the Resident Magistrates from proceeding with the hearing and determination of the City Council Criminal Cases 307 of 2006 City Council of Nairobi –Vs- Samuel O. Manani, 342 of 2006 City Council of Nairobi –Vs- Andrew Mokaya Juma and 699 of 2006 City Council of Nairobi –Vs- Justin Otuke Manani.

3. The COSTS of this application be provided for."

The Ex-parte applicants are of the view that the City Council of Nairobi ought not to have preferred criminal charges against them. Their reason for that contention was that by having them charged, the City Council of Nairobi was contravening **Section 10(2) (a) of the Physical Planning Act.**

Why do the Ex-parte applicants so opine?

It is because the City Council of Nairobi approved the development of the proposed shops and rooms on Plots A and B at Shauri Moyo, Nairobi.

Thereafter, the Ex-parte applicants proceeded to carry out construction upto the 2nd floor of the structure they intended to put up.

The Ex-parte applicants say that the City Council of Nairobi (hereinafter cited as “the Council”) had duly approved the Structural and Architectural Plans for the development which they were constructing. Therefore, it was wrong of the Council to put a stop to the development in question.

It was contended that by preferring criminal charges against the Exparte Applicants, (who shall hereinafter be cited as “the Applicants”), the Council was effectively declaring the development of the structure null and void. By so doing, the Council was causing the applicants to suffer a lot of loss and damage, so it was said.

The Council was faulted for failing to issue a Notice to the applicants to remedy any defects, before the Council could institute criminal proceedings. The requirement for a Notice was said to be provided for by **Section 30 (4) (a) and (b) of the Physical Planning Act.**

The applicants also contend that the trial court was wrong to proceed with the case pursuant to the provisions of the Criminal Procedure Code, yet the said provisions had not been imported into the Physical Planning Act.

In any event, if it were to be assumed that the provisions of the Criminal Procedure Code had been imported into the Physical Planning Act, the applicants submitted that the charges were preferred prematurely. They asserted that no investigations were carried out prior to the charges being preferred. Indeed, they contend that the investigations were only being undertaken after they had been taken before the criminal court.

In the event, the applicants expressed the view that the City Council of Nairobi was malicious by charging them with the offence of erecting a building without approved plans when the Council had issued the said plans to the applicants.

In answer to the application, the Director of City Planning, Mr. Peter Kibinda, swore a Replying Affidavit. He said that officers from his Department do conduct routine inspections.

In the course of one such routine inspection, the officers are said to have found some construction going ahead. The officers demanded production of Structural and Architectural Drawings.

When the officers perused the plans which were provided to them by the applicants, they noted that the said plans were not authentic.

Further investigations by the said officers are said to have verified that the plans did not originate from the City Council of Nairobi.

The officers explained the process through which approvals are given. The said process starts with the presentation of the application for approval.

The said application is then placed before the Full Council, for deliberations. It is the Full Council which then determines whether to approve or to reject the application. Whatever decision is made by the Full Council is recorded in its minutes. Therefore, there would always be a proper record reflecting the fate of each and every application for approval which is lodged at the City Council of Nairobi.

In this instance, the Council says that there are absolutely no records of the applicants’ application. It therefore follows that there was no approval by the Council.

Furthermore, the Council had not issued any official receipt to the applicants for the payment of the requisite fees.

The Council also pointed out that the stamp affixed on the plans exhibited by the applicants was suspicious, as it had not been affixed on the appropriate position.

The applicants did formulate 4 issues for determination by this court. The said issues are as follows;

"1. Whether the applicants contravened the provisions of the Physical Planning Act Cap 286 Laws of Kenya.

2. If the applicants contravened the provisions of the Physical Planning Act, what is provided for in the said Act to remedy the situation?

3. Whether the investigations were completed before the Applicants were arraigned in court.

4. Whether the charge sheets are properly before the court in view of the admission that the Architectural and Structural plans were with the 1st Respondent."

The applicants have asserted, in their submissions that the Council has failed to respond to the provisions of the Physical Planning Act. In particular, the applicants argued that if they had violated any provisions of the Act, the Council should first have issued Notices to them, to remedy the situation.

If the applicants then failed to comply with the said Notices, the Council could have invoked the criminal jurisdiction of the court.

In any event, the Council is accused of starting the prosecution of the applicants before they had completed investigations. That contention arises from the fact that charges were preferred when the Council was still waiting for the police officers from Buru Buru Police Station to conclude investigations on the confiscated documents.

Finally, because the Council was holding the Structural and Architectural Plans, the applicants submitted that the charge sheets were not properly before the court. The Council is said to be keen to have the applicants convicted, after withholding evidence from the court about the plans.

Having given due consideration to the matters raised, I note that the issues proposed by the applicants do not lead to the determination as to whether or not the reliefs sought should be granted.

For instance, the question about whether or not the applicants had contravened the provisions of the Physical Planning Act, is the very same one which the trial court is obliged to determine after giving consideration to such evidence as will be presented before it.

I therefore do not understand why the High Court should be called upon, by the applicants, to short-circuit the proceedings through which evidence would be made available.

The applicants also assert that the Council is in possession of the Structural and Architectural Plans; that fact is said to have been admitted by the Council.

But the council has categorically denied being in possession of any **APPROVED PLANS**. They say that the plans which the applicants had, did not emanate from the Council.

In effect, the parties appear to be talking at cross-purposes. The applicant is simply alluding to plans, whilst the Council is talking about plans that had been approved by them.

By dint of the provisions of **Section 30 (1) of the Physical Planning Act;**

"No person shall carry out development within the area of a local authority without a development permission granted by the local authority under section 33"

By dint of the provisions of **Section 30 (2);**

"Any person who contravenes subsection (1) shall be guilty of an offence and shall be liable to a fine not exceeding one hundred thousand shillings or to an imprisonment not exceeding five years or to both."

In this instance, the applicants have disclosed that they have already reached the second floor of the building that they were developing. And the Council is saying that that development was put up without the approval of the Structural and Architectural Plans.

The applicants are, by law, presumed to be innocent until and unless the prosecution proves otherwise. It is therefore the obligation of the prosecution to prove that the applicants had contravened the provisions of the Physical Planning Act. The forum before which the evidence should be tendered is not this court, but the trial court.

If the investigations had been completed or not before charges were preferred against the applicants, is a matter of evidence. Again, this court is being called upon, prematurely, to determine that issue. The said issue would be resolved by the trial court, at the conclusion of the criminal case.

Indeed, if the trial court was persuaded that the investigations were incomplete, it would not even ask the applicants to put forward any defence.

In so finding, I am not oblivious to the assertion that the plans in issue were still in the hands of the police officers at Buru Buru Police Station. Even assuming that the plans were actually in the hands of the police, this court does not have full information regarding the reasons why the police have the said documents.

One possibility is that the police have been asked to help in verifying the Council's contention, that the alleged approvals were fake. If that be the position, then it would be arguable that the Council was still conducting further investigations.

But then, the Council has already stated categorically that the plans were never approved by them. That suggests that the Council did not need any further evidence to prove that the plans were fake. The Council has thrown the challenge at the applicants, to prove the authenticity of the plans.

The second possibility is that the Council has asked the police to try and ascertain the persons responsible for forging the documents. This possibility appears more probable, after the Council had ascertained that the alleged approval of the plans did not emanate from the Full Council.

If the persons who forged the alleged approvals are identified, they would be charged with offences such as forgery. Others may be charged with offences such as uttering false documents.

In other words, even if there be further investigations by the police, that would not, of itself, imply that the known facts did not already disclose the offence for which the applicants were charged.

The applicants called upon this court to quash the proceedings before the trial court. However, the said proceedings were not presented before this court. I am therefore unable to verify whether or not there are any shortcomings in the said proceedings. That is ground enough to disallow the application.

Secondly, as the facts upon which the claim is founded are disputed, this would be another ground for rejecting the application. I say so because the court would first have to establish the facts from the evidence yet to be tendered, then thereafter proceed to ask itself whether or not judicial review should issue.

Judicial Review, as is well established, does not delve into the correctness of a decision. That should be the function of an appellate body.

Judicial Review intervenes in the following circumstances;

(a)   Illegality or unlawfulness;

(b)   Irrationality or unreasonableness;

(c)   Procedural impropriety or unfairness.

Illegality may arise when the body either lacks jurisdiction or acts in excess of jurisdiction. It may also arise where there was an error of law or an error of fact.

Irrationality may arise when the decision is so outrageous in its defiance of logic or of standards, that no sensible person who applied his mind to the question decided could have arrived at. In such a situation, the decision-maker may have abused his power or may have taken into account irrelevant considerations when making the decision.

Procedural impropriety is the failure to observe procedural rules laid out in the legislative instrument. Such failure bespeaks lack of fairness.

In this case, the applicants appear to suggest that the Council was guilty of procedural impropriety. The reasoning is that before the Council could decide whether or not to prefer charges, the Council ought to have first given them a Notice to remedy the defect. That is what the applicants read from **section 30 (4) (a) of the Physical Planning Act**. That section stipulates as follows;

> "Notwithstanding the provisions of **subsection (2) –**

(a)   the local authority concerned shall require the developer to restore the land on which such development has taken place to its original condition within a period of not more than ninety days;

(b)   If on the expiry of the ninety days notice given to the developer such restoration has not been effected, the concerned local authority shall restore the site to its original condition and recover the cost incurred thereto from the developer."

To my mind, that subsection is not subordinate to **section 30 (2) of the Physical Planning Act.** The law does not say that before a person who has contravened the requirement for development permission cannot be charged before he is given a Notice to remedy the wrong.

The notice envisaged in **section 30 (4) (a)** is the one requiring the developer to restore the land to its original condition. Before the developer is given that notice, the local authority cannot move in to restore the land to its original condition. But after the notice is given, the local authority is entitled to restore the land to its original condition, if the developer failed to comply with the notice within the period not exceeding 90 days. In the event that the local authority moved in and restored the land, it would be entitled to claim from the developer the costs incurred in the restoration process, if they had given notice.

The requirement for the restoration exercise is not an alternative to the criminal process. It is in addition to the said process.

In conclusion, I find no merit in the application. It is therefore dismissed, with costs to the respondents.

Dated, Signed and Delivered at Nairobi, this 7TH day of November, 2012.

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FRED A. OCHIENG

JUDGE