REPUBLIC OF KENYA

IN THE ENVRONMENT AND LAND COURT AT NAIROBI

MISCELLANEOUS CIVIL CAUSE NO. 134 OF 2018

IN THE MATTER OF: AN APPLICATION BY SCORPION PROPERTIES LIMITED

FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI

AND PROHIBITION AGAINST THE DIRECTOR OF PLANNING COMPLIANCE

& ENFORCEMENT NAIROBI CITY COUNTY AND NAIROBI CITY COUNTY.

AND

IN THE MATTER OF: THE CONSITITUTION OF KENYA, 2010

AND

IN THE MATTER OF: THE ENVIRONMENT AND LAND COURT ACT, NO. 19 OF 2011

AND

IN THE MATTER OF: THE LAND REGISTRATION ACT, NO. 3 OF 2012

AND

IN THE MATTER OF: PHYSICAL PLANNING ACT (CAP. 286 LAWS OF KENYA)

AND

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN

SCORPION PROPERTIES LIMITED...APPLICANT

AND

DIRECTOR OF PLANNING, COMPLIANCE &

ENFORCEMENT NAIROBI CITY COUNTY.................1ST RESPONDENT

NAIROBI CITY COUNTY...2ND RESPONDENT

RULING

What is before the court is a Chamber Summons application dated 15th August, 2018 by Scorpion Properties Limited (“the applicant”) seeking the following orders;

1. That the applicant be granted leave to apply for;

a. An order of CERTIORARI to call into the Honourable Court for quashing the Enforcement Notice dated 9th August, 2018 issued by the 1st respondent to the applicant purporting that the structures on the parcel of land known as Nairobi/Block 91/56 are illegally constructed and that the change of use in respect of the said piece of land is also illegal.

b. An order of PROHIBITION prohibiting the respondents by themselves, their agents, employees and or anybody deriving authority from the respondents from demolishing the structures erected on all that parcel of land known as Nairobi/Block 91/56.

c. A DECLARATION that the applicant's fundamental right to fair administrative action and right to property was infringed and/or violated by the respondents in the Enforcement Notice dated 9th August, 2018 contrary to the provisions of Article 27, 40 and 47 of the Constitution of Kenya.

d. A DECLARATION that the respondents are constitutionally obligated to act lawfully, fairly and reasonably in the exercise of their constitutional mandate, which principles were violated in the Enforcement Notice dated 9th August, 2018 against the applicant herein.

2. That the leave sought do act as a stay to restrain the respondents by themselves, their agents, employees and or anybody deriving authority from the respondents from demolishing the structures erected on all that parcel of land known as Nairobi/Block 91/56 as contemplated under the Enforcement Notice dated 9th August, 2018 issued by the 2nd Respondent as against the Applicant.

3. That the respondents be ordered to pay to the applicant the costs of the application.

4. Any such further orders as this Honourable court shall deem just and fit to grant.

The application was brought on the grounds set out on the statutory statement and verifying affidavit of Rahim Chatur both dated 15th August, 2018. The applicant has sought leave to challenge by way of judicial review the Enforcement Notice dated 9th August, 2018 that was served upon the applicant by the respondents. In the notice, the respondents claimed that the applicant had carried out illegal development on all that parcel of land known as Nairobi/Block 91/56 ("the suit property") that was reserved for a fire station and had also procured illegally a change of user in respect of the property. The respondents claimed that the applicant had constructed a car bazaar and offices on the suit property. The respondents demanded that the applicant removes the structures on the suit property within 7 days' failure to which the same would be removed by the respondents. The applicant's application was brought on the following main grounds;

1. That Article 47 of the Constitution guarantees each and every person a right to an administrative action that is fair, efficient, lawful, reasonable, expeditious and procedurally fair.

2. That section 4 of the Fair Administrative Action Act provides that where an administrative action is likely to affect the rights or fundamental freedoms of a person adversely, the administrator must give the person likely to be affected adequate notice of the nature and reasons for any proposed administrative action and an opportunity to be heard.

3. That neither the applicants nor their tenants on the suit property were afforded a fair administrative action before a decision was made to issue the notice being challenged.

4. That neither the applicant nor its tenants on the suit property were given a hearing before a decision to issue the notice was made.

5. That the suit property was private land and that the applicant was the registered owner thereof.

6. That the applicant sought and obtained all requisite approvals from the respondent as provided for under section 30(1) of the Physical Planning Act before putting up the structures standing thereon.

7. That it was not clear on what basis the respondents reached the decision contained in their Enforcement Notice dated 9th August, 2018 and, that despite the applicant forwarding all the approved plans and certificate of change of user, there had been no communication from the respondents.

8. That the respondents were acting maliciously in that having issued the permits for the construction of the structures on the suit property, they could not turn around and claim that the said structures were illegal.

9. That the applicant had received several notices from its tenants seeking to vacate the suit property as they were apprehensive of losing their properties following the said Enforcement Notice from the respondents.

10. That if the court did not intervene and declare the decision by the respondents unconstitutional, the applicant would suffer irreparable harm.

When the applicant's application came up for directions ex-parte on 4th September, 2018, the court directed that it be served for hearing inter-partes. The application was opposed by the respondents through a replying affidavit sworn by Jasper Ndeke on 24th January, 2019. In the affidavit, the respondents averred that the ownership of the suit property was in dispute and that the property was mentioned in the Report of the Commission of Inquiry into Illegal /Irregular Allocation of Public Land ("the Ndungu Report") as one of the parcels of land that had been illegally allocated to private individuals. The respondents averred that the suit property was originally set aside for a fire station and that

whether the suit property was private or public land was pending determination in Nairobi High Court Civil Suit No. 2156 of 2007. The respondents averred further that their investigations revealed several irregularities from the time the property was allocated up to the time it ended up with the applicant. The respondents averred that the applicant was aware as early as 2007 that the ownership of the suit property was disputed. The respondents averred that the applicant borrowed money on the security of the suit property knowing well that the title was in dispute. The respondents averred that the applicant had not established a prima facie case to warrant the grant of the orders sought. The respondents averred that the permission that it had granted for the establishment of a car bazaar on the suit property was for a renewable period of one year and that there was a prohibition against the construction of permanent structures on the suit property. The respondents averred that the permission to operate a car bazaar on the suit property was not renewed and was instead revoked by the respondents through a letter to the applicant dated 15th April, 2009. The respondents averred that the evidence placed before the court showed that the applicant had put up permanent structures on the suit property contrary to the conditions that the respondents had given to the applicant while allowing it to operate a car bazaar on the suit property.

The respondents averred that by their letter dated 15th April, 2009 referred to above, they had asked the applicant to clear the area. The respondents averred that the decision that was being enforced through the Enforcement Notice being challenged by the applicant was made over 10 years ago and as such was not reviewable through an order of certiorari. The respondents averred that the approvals that were given to the applicant in respect of its building plans were given subject to the suit property not being part of a disputed private or public utility land. The respondents averred that it was clear from the Ndungu Report that, the suit property constituted disputed public land. The respondents averred that on account of that fact, the approval that had been granted to the applicant were void *ab initio*. The respondents averred that the applicant's application had no basis and urged the court to dismiss the same.

Submissions.

The applicant's application was heard by way of written submissions. The applicant filed its submissions on 19th February, 2019 and further submissions on 3rd April, 2019. The applicant framed three main issues which it submitted on at length. The applicant submitted that it was deserving the leave sought and a stay of the enforcement of the notice that had been served upon it by the respondents pending the hearing and determination of the judicial review application. The applicant submitted that it had established a prima facie case against the respondents and had also demonstrated that unless the stay was granted, the judicial review application would be rendered nugatory or an academic exercise. The applicant relied on among others the Supreme Court case of Gatirau Peter Munya *v* Dickson Mwenda Kithinji & 2 Others [2014] eKLR in which the court laid down the principles that should be followed in applications for conservatory orders. The applicant also relied on the cases of Mirugi Kariuki *v* Attorney General [1992] eKLR, Pravin Galot *v* Chief Magistrates Court at Milimani Law Courts [2017] eKLR and John Kipkoech Rotich and 29 others *v* Eldama Ravine Sub-County Alcoholic Drinks Regulation Committee [2019] eKLR on the principles applied by the court on applications for leave to apply for judicial review. The applicant submitted that the availability of an alternative remedy of an appeal under the Physical Planning Act, Chapter 286 Laws of Kenya (now repealed) was not a bar to an order of judicial review in respect of which leave has been sought. The applicant urged the court to grant the leave sought, the stay of execution of the Enforcement Notice dated 9th August, 2018 and the cost of the application.

The respondents filed their submissions on 13th March, 2019. The respondents also framed several issues that they submitted on. The respondents submitted that the Enforcement Notice that was served upon the applicant by the respondents was not a decision capable of being reviewed by the court. The respondents submitted that an Enforcement Notice was a creature of section 38(1) of the Physical Panning Act, Chapter 286 Laws of Kenya (now repealed) and that the same comes after a decision has already been made. The respondents submitted that its decision to have the illegal structures cleared from the suit property was made and communicated to the applicant on 15th April, 2009; some 9 years and 3 months before the present application was filed. The respondents submitted that an attempt by the applicant to review that decision in these proceedings is barred under section 9(3) of the Law Reform Act, Chapter 26 Laws of Kenya which limits the period within which an application for leave to bring an application for certiorari to 6 months from the date of the proceedings sought to be quashed. The respondents submitted that the delay in bringing the application herein was not explained and as such cannot be excused by the court.

The respondents submitted that if the court holds that the Enforcement Notice aforesaid was a decision capable of being challenged through judicial review then the applicant was given an amble opportunity to be heard. The respondents submitted that an Enforcement Notice cannot take effect until the person served has exhausted the mechanism for appeal that is provided for under the Physical Planning Act, Chapter 286 Laws of Kenya (now repealed). The respondents submitted that the applicant had a right to appeal against the issuance of that notice to the Liaison Committee and subsequently to the High Court. The respondents submitted that the applicant had an opportunity to be heard through the a foresaid appeal process that it did not make use of.

The respondents submitted further that section 9(2) of the Fair Administrative Action Act, 2015 bars this court from reviewing an administrative action under the Act before all available mechanisms for appeal or review and all other remedies under any other law is first exhausted by the applicant. The respondents submitted that the Physical Planning Act, Chapter 286(now repealed) had an inbuilt dispute resolution mechanism which the applicant should have exhausted before coming to this court for judicial review. In support of this submission, the respondents cited Mutanga Tea & Coffee Company Ltd. *v* Shikara Limited & Another [2015] eKLR, in which the Court of Appeal restated that where there is a clear procedure for redress of any particular grievances prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. The respondents averred that since the applicant had not exhausted the dispute resolution mechanism provided for under the Physical Planning Act, Chapter 286 Laws of Kenya (now repealed), it was not entitled to the leave sought.

On whether the applicant was entitled to an order for stay of the enforcement of the Enforcement Notice pending the hearing and determination of the judicial review application, the respondents submitted that the applicant had not demonstrated that it had a prima facie case against the respondents and that it stood to suffer irreparable damage unless the stay was granted. The respondents submitted that in the circumstances, a case had not been made out by the applicant for the stay sought.

On the issue of costs, the respondents submitted that the applicant should pay the costs of the application because the applicant bypassed the dispute resolution mechanism provided for under the Physical Planning Act, Chapter 486 Laws of Kenya (now repealed) thereby subjecting the respondents to prejudice and wasting judicial time.

Determination:

What I need to determine in the application before me is first, whether the applicant has made out a case for grant of leave to institute judicial review application against the respondents and secondly, whether leave if granted should operate as a stay.

In Njuguna *v* Minister for Agriculture [2000] 1 E.A 184, it was held that:

> **"the test as to whether leave should be granted to an applicant for judicial review is whether, without examining the matter in any depth, there is an arguable case, that the reliefs might be granted on the hearing of the substantive application.''**

In Republic *v* County Council of Kwale & Another Ex Parte Kondo & 57 Others [1998] 1 KLR (E&L) the court set out the rationale for seeking leave to apply for judicial review as follows:

> **"The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration."**

The court's power to grant leave is discretionary. This means that even where a case has been made out for grant of leave, the court may still decline to grant the same if in the opinion of the court it would not be appropriate to do so in the circumstances of the case. As I have stated earlier in this ruling, the applicant has sought leave to apply for an order of certiorari to quash the Enforcement Notice dated 9th August, 2018 served upon it by the respondents, an order of prohibition to prohibit the respondents from demolishing the structures on the suit property, a declaration that the applicant's fundamental right to a fair administrative action and right to property was infringed and /or violated by the respondents through the said Enforcement Notice and a declaration that the respondents were constitutionally under an obligation to act lawfully, fairly and reasonably in the exercise of their constitutional mandate which they failed to do in relation to the said Enforcement Notice. In the application, the applicant has accused the respondents of violating among others Section 4 of the Fair Administrative Action Act, 2015 and Articles 10(2), 27, 47, 48 and 50 of the Constitution. Section 9(1) of the Fair Administrative Action Act, 2015 provides that:

> **"Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Articles 22(3) of the Constitution."**

Section 9(2) of the said Act provides that:

> **"The High Court or subordinate court under subsection 1 shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under other written law are first exhausted (emphasis added)."**

The position of the law prior to the enactment of the Fair Administrative Action Act, 2015 was that the existence of an alternative remedy was not a bar to judicial review and that even where there was alternative remedy, the court could entertain an application for judicial review in exceptional circumstances. See, the decision of the Court of Appeal in Republic *v* National Environment Management Authority [2011] eKLR that was cited by the applicant in its further submissions. The need to exhaust alternative remedies before judicial review is sought is now a statutory requirement under section 9 (2) of the Fair Administrative Action Act No. 4 of 2015 cited above and is in tandem with Article 159(2)(c) of the Constitution. In Mutanga Tea & Coffee Company Ltd. *v* Shikara Limited & Another (supra) that was cited by the respondents in their submissions which also concerned decisions that were made under the Physical Planning Act, Chapter 286 Laws of Kenya (now repealed) and the Environmental Management and Co-ordination Act, Chapter 387 Laws of Kenya, the Court of Appeal stated as follows in conclusion:

> **"We are therefore satisfied that the learned judge did not err by striking out the appellant's suit and application which sought to invoke the original jurisdiction of the High Court in circumstances whereas the relevant statutes prescribed alternative dispute resolution mechanisms and afforded the appellant the right to access the High Court by way of appeal, which mechanisms he had refused to invoke. To hold otherwise would, in the circumstances of this appeal, be to defeat the constitutional objective behind Article 159(2)(c) and the very *raison d'etre* of the mechanisms provided under the two Acts."**

I am in agreement with the respondents that where there are internal mechanisms provided for in law such as a review or appeal or where a written law provides for a remedy for an administrative action or decision, this court is barred by section 9 (2) of the Fair Administrative Action Act, 2015 from entertaining any application for judicial review of such action or decision unless it is satisfied that such remedies have been exhausted. I am of the view that the court has no discretion in the matter save where due to exceptional circumstances an applicant has sought exemption from the provisions of section 9(2) of the Fair Administrative Action Act, 2015 pursuant to section 9(4) of the said Act.

The applicant's complaint is against the administrative action by the respondents. The applicant was aggrieved with the Enforcement Notice dated 9th August, 2018 that was served upon it by the respondents in which the respondents had claimed that the applicant had constructed a car bazaar and offices on the suit property illegally and demanded that the same be removed within 7 days from the date of the notice. The said Enforcement Notice was issued under section 38(1) of the Physical Planning Act, Chapter 286 Laws of Kenya ("the Act") (now repealed). Section 38(4), (5) and (6) of the Act gave a person served with an Enforcement Notice and who was aggrieved with the same a right of appeal. The first appeal was to the Liaison Committee. There was a right of a second appeal to the National Liaison Committee and a final right of appeal to the High Court.

In the circumstances, the Act provided a remedy against administrative actions by the respondents in the form of Enforcement Notices. I am in agreement with the respondents that the applicant should have exhausted this remedy before seeking leave to apply for judicial review. The applicant has not given any reason in its application why it did not consider this alternative remedy before approaching this court for leave. I am not in agreement with the applicant's submission that it could only pursue an appeal provided for under the Act if the notice that was served upon it was valid. I am of the view that if the applicant was convinced that the Enforcement Notice served upon it was invalid, that would have been aground of appeal rather than judicial review.

A part from the alternative remedy provided under section 38 of the Act, I have also noted from the replying affidavit filed by the respondents that there is a pending civil suit over the ownership of the suit property namely, Nairobi HCCC No. 2156 of 2007 in which both the applicant and the 2nd respondent are parties. It is clear from the contents of the affidavits filed by the parties herein that there is a dispute over the ownership of the suit property. The applicant has claimed that it is the registered owner of the suit property. The respondents have claimed on the other hand that the suit property was reserved for a fire station and that the same was acquired by the applicant unlawfully and this is what prompted the issuance of the Enforcement Notice which is the subject of the present application. It is not disputed that the suit property was mentioned in the Ndungu Report as one of the public land that was illegally/irregularly allocated to private entities. The report recommended the revocation of the title. This court would not be able to determine in a judicial review application the issue of the ownership of the suit property. In Republic *v* National Land Commission Ex-Parte Ephrahim Muriuki Wilson & others [2018] eKLR) the court stated as follows:

> **"In this regard, it is important to mention that what emerges is that there is a land dispute, and this Court cannot allow itself to be used to resolve a land dispute disguised as a Judicial Review application. Behind the curtain of these Judicial Review proceedings is the real dispute, namely, ownership, use and or occupation of land. These questions call for the need for this Court to exercise caution, care and circumspection. First, there is the question of jurisdiction discussed earlier. Second, there is a real danger of this Court rendering a decision that will have the implication of determining ownership of the disputed land. I decline the invitation to venture into this forbidden territory.**
>
> **The upshot is that I dismiss this Judicial Review application with costs to the Interested Parties. I award no costs to the Respondent since it did not participate in the proceedings."**

In Republic *v* Cabinet Secretary, Ministry of Interior & Co-ordination of National Government & 2 others Ex-Parte Kisimani Holdings Ltd [2015] eKLR

The court dealing with a similar issue stated as follows:

> "26. As was held in **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354**:
>
> **"Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application…..…Whereas it is true that the underlying dispute herein is ownership of the land, Judicial Review proceedings is not a forum where such a dispute can be adjudicated and determined as there would be a need for *viva voce* evidence to be adduced on how the land was acquired and came to be registered in the names of the applicant; whether the title is genuine or not. In cases where the subject matter or the question to be determined involves ownership of land, and the rights to occupy land namely occupation, and disposition, there would be need to allow *viva voce evidence* and cross-examination of the witnesses which is not available in judicial review proceedings. Even if the respondents had filed documents, they would be copies that would not be sufficient to establish authenticity of the title. The original documents would need to be produced at a full hearing where oral evidence would be adduced……….It may indeed be true that the notice that is impugned is irregular or unlawful and an order of *certiorari* would be deserved, but it is not in every case that the court will grant an order of judicial review even though it is deserved. Judicial review being discretionary remedy will only issue if it will serve some purpose. *Certiorari* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the Court being a judicial one must be exercised on the basis of evidence and sound legal principles…..So that in this case, even though this application were properly before this Court and the application had merit, the court may not have granted an order of *certiorari* because it would not be the most efficacious remedy in the circumstances. Even if the notice under challenge is quashed, the issue over the ownership of the land still stands and it will require determination by way of filing pleadings and *viva voce evidence* at another forum preferably the Civil Courts**."
>
> **27. To grant the orders sought herein will leave the serious conflicting issues of fact raised in these proceedings unresolved hence will be a source of future conflicts since as already stated judicial review applications do not deal with the merits of the case but only with the process. In other words in judicial review applications the Court's jurisdiction is to determine whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts with an intention of securing a determination on the merits of the dispute the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits."**

I am of the view that since the applicant was aware that there was a dispute over the ownership of the suit property and that the respondents were challenging its title, the applicant should have challenged the respondents' Enforcement Notice in the pending civil suit in which all the issues that have been raised herein could be determined through *viva voce* evidence. In my view, HCCC No. 2156 of 2007 would be a better forum to thrush out all the issues surrounding the ownership of the suit property.

On the merit of the application, I am not satisfied that the applicant has established a prima facie case against the respondents. It is not dispute that the Enforcement Notice that was served by the respondents upon the applicant was provided for in law. Whether the notice had any basis was something that could only be interrogated through an appeal process provided for under the Act. I am not in agreement with the applicant that it was entitled to be heard before the notice was issued. As correctly submitted by the respondents in the event that the applicant objected to the notice and lodged an appeal, the notice was to stand suspended until the appeal process was exhausted. The applicant was entitled to be heard only after objecting to the notice and filing an appeal. I am in agreement with the respondents that the applicant had a right to be heard before the notice could take effect but did not make use of the same. In the circumstances, there is no prima facie evidence that the applicant's right to fair administrative action was violated.

In the final analysis and for the foregoing reasons, I would exercise my discretion against granting the leave sought by the applicant. Having reached that conclusion, it is not necessary for me to consider the limb of the application that is seeking a stay. The applicant's Chamber Summons application dated 15th August, 2018 is dismissed with costs to the respondents.

Delivered and Signed at Nairobi this 19th day of November, 2020

S. OKONG'O

JUDGE

Ruling delivered through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Obae h/b for Mr. Omogeni S.C for the Applicant

N/A for the Respondents

Ms. C. Nyokabi-Court Assistant