

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**ELC JR NO. 3 OF 2022**

**REPUBLIC  
APPLICANT**

**VERSUS**

**COUNTY COUNCIL  
.....RESPONDENT**

**OF KWALE.....**

**AND**

**LEISURE LODGES  
APPLICANT**

**LIMITED.....**

**EX-PARTE**

**ATTORNEY  
PARTY**

**GENERAL.....**

**INTERESTED**

**JUDGMENT**

**A. Application for judicial review**

1. By a notice of motion dated 20.04.2010 filed pursuant to the leave of court granted on 31.03.2010, *Order 53 Rules 2, 4, and 5 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act (cap 21) and Sections 8 and 9 of the Law Reform Act (Cap 26)*, the ex-parte applicant (*the applicant*) sought the following orders against the respondent;

- a) *That an order of certiorari be issued to remove into this honourable court the decision of the County Council of Kwale dated 19.03.2010 that the perimeter wall surrounding water tanks at Diani Complex*

*Scheme, Darad Region has been erected by Leisure Lodges Limited without a grant of permission under the Physical Planning Act, for the purposes of quashing the said decision.*

- b) That an order of certiorari be issued to remove into this honourable court the decision of the County Council of Kwale dated 19.03.2010 that the perimeter wall surrounding the Golf course alongside Diani Beach Road has been erected by Leisure Lodges Limited without a grant of permission under the Physical Planning Act, for the purposes of quashing the said decision.*
- c) That an order of prohibition be issued prohibiting the County Council of Kwale, its employees, officers, servants and/or agents from enforcing the enforcement notices dated 19.03.2010 requiring Leisure Lodges Limited to demolish, suspend, pull down/uproot or relocate the perimeter walls.*
- d) That an order of prohibition be issued prohibiting the County Council of Kwale, its employees, officers, servants and/or agents from requiring Leisure Lodges Limited to demolish, suspend, pull down, uproot or relocate the approved walls erected or being erected by the Leisure Lodges Limited in the perimeter or the parcel of land known as Kwale/Diani Beach Block/856, the commercial plots known as Kwale/Diani Beach Block/551, 552, 553, 554, 555, 556, 557, 558 and 559 (commonly known as Leisure Lodge Golf Resort).*
- e) That the costs of the application be provided for.*

2. The application was based upon the grounds contained in the applicant's statutory statement dated 30.03.2010, the verifying affidavit sworn by John K. Mutua on even date and a further affidavit sworn by John K. Mutua on 28.06.2010. The gist of the

applicant's case was that the respondent had improperly and in bad faith issued enforcement notices for demolition of the perimeter walls securing water tanks and golf course in Diani on the basis that they were erected without its approval. The applicant contended that it had paid for and obtained the necessary approvals and that the respondent had not acted in good faith since it had failed to issue enforcement notices to some people who had invaded its land nearby and constructed some structures thereon.

**B. Respondent's response**

3. The respondent filed two affidavits in opposition to the application. The first one was sworn by Michael Maitha on 24.05.2010. He deposed that he was the County Engineer of the respondent and disputed that the applicant's perimeter walls were duly approved. It was contended that the relevant building plans had not been presented to the public health officer for scrutiny and that the same had not yet been tabled before the Works and Town Planning Committee.
4. The second affidavit was sworn by Wilberforce Wambulwa on 25.05.2010. He deposed that he was the clerk to the County Council of Kwale. He disputed that the applicant's walls had been approved and contended that the enforcement notices were validly issued for

demolition. It was pleaded that, in fact, no application for development permission was made by the applicant hence none could be granted. It was contended that the various stamps on the plans exhibited by the applicant could not constitute approval under the law.

**C. Directions on submissions**

5. It would appear that the applicant is the only party which filed written submissions in this matter. The respondent and the interested party did not file any submissions for reasons which are not clear from the record. The record shows that the applicant's submissions were filed way back on 24.07.2020.

**D. Issues for determination**

6. The court has considered the application for judicial review, the replying affidavits in response thereto as well as the submissions on record. The court is of the view that the following issues arise for determination herein;

*a) Whether the applicant has substantiated its claim for judicial review.*

*b) Whether the applicant is entitled to the reliefs sought in the application.*

**E. Analysis and determination**

**a. Whether the applicant has substantiated its claim for judicial review**

7. The court has considered the material and submissions on record on this issue. It is evident from the material on record that the applicant and the respondent have had some land disputes before which ended before court for resolution. One such matter is Mombasa High Court Petitioner No. 21 of 2010 in which the petitioner was the successful litigant.
8. The court has also noted from the material on record that there were attempts by government agencies to take over and subdivide some of the applicant's parcels of land in Diani for the purpose of resettling squatters. The said action was successfully challenged by the applicant before the High Court. There is also some material on record to show that the clerk of the respondent who swore a replying affidavit in this matter, Wilberforce Wambulwa, was allocated a plot within the applicant's land for which he was sued by the applicant in *Mombasa HCCC No. 2 of 2010* and an interim injunction obtained against him. One wonders how a clerk of a County Council became to be considered as squatter and to be allocated a plot on the applicant's land.

9. What is more strange is that upon the said clerk being sued in January 2010 he signed and swiftly issued enforcement notices for demolition of various walls within the applicant's properties. He did not even bother to give particulars of the parcel numbers where such demolition was required. The court also finds it strange that the respondent and its clerk did not find it fit to issue enforcement notices to the squatters who had invaded and commenced construction on the applicant's properties in the same area of Diani. The court cannot help but find that the respondent and its officers acted in bad faith and with ulterior motives in issuing the enforcement notices in view of the previous suits which the applicant had filed.
10. There is another reason why the court is of the view that the respondent and its officers acted irregularly and in bad faith in the issuance of the enforcement notices. The material on record shows that the applicant presented the relevant drawings for approval and paid for them in January 2010. The question which arises is why the respondent could not wait for the plans to be circulated to all relevant departments and committees before issuing enforcement notices upon rejection of approval. The speed and zeal with which the respondent moved in taking adverse action before completing

its internal processes could only be an indication of bad faith and not a genuine desire to enforce physical planning laws. In *Mombasa HC Petition in 21 of 2010* the High Court found that the respondent's officers had acted with impunity in breaking some of the applicant's walls.

11. The court is of the view that the applicant has sufficiently demonstrated legal impropriety and bad faith on the part of the respondent. The applicant has proved its application for judicial review of administrative action. It is thus entitled to appropriate remedies as against the respondent only. There is no reason to hold the Attorney General culpable since he was not involved in the issuance of the impugned enforcement notices.

**b. Whether the applicant is entitled to the reliefs sought in the application**

12. The court has found that the applicant has demonstrated its claim against the respondent. The court is thus of the view that the applicant is entitled to appropriate remedies to vindicate its legal rights. As a result, the court is inclined to grant the prayers sought in the application save for costs of the suit. The court is of the view that in the circumstances of the case there should be no order as to costs.

## **F. Conclusion and disposal orders**

13. The upshot of the foregoing is that the court finds merit in the instant application for judicial review. As a consequence, judgment is hereby entered for the applicant against the respondent in the following terms;

***a) That the order of certiorari be and is hereby issued to remove into this honourable court the decision of the County Council of Kwale dated 19.03.2010 that the perimeter wall surrounding water tanks at Diani Complex Scheme, Darad Region has been erected by Leisure Lodges Limited without a grant of permission under the Physical Planning Act, for the purposes of quashing the said decision.***

***b) That an order of certiorari be and is hereby issued to remove into this honourable court the decision of the County Council of Kwale dated 19.03.2010 that the perimeter wall surrounding the Golf course alongside Diani Beach Road has been erected by Leisure Lodges Limited without a grant of permission under the Physical Planning Act, for the purposes of quashing the said decision.***

***c) That an order of prohibition be and is hereby issued prohibiting the County Council of Kwale, its employees, officers, servants and/or agents from enforcing the enforcement notices dated 19.03.2010 requiring Leisure Lodges Limited to demolish, suspend, pull down/uproot or relocate the perimeter walls.***

***d) That an order of prohibition be and is hereby issued prohibiting the County Council of Kwale, its employees,***

***officers, servants and/or agents from requiring Leisure Lodges Limited to demolish, suspend, pull down, uproot or relocate the approved walls erected or being erected by the Leisure Lodges Limited in the perimeter or the parcel of land known as Kwale/Diani Beach Block/856, the commercial plots known as Kwale/Diani Beach Block/551, 552, 553, 554, 555, 556, 557, 558 and 559 (commonly known as Leisure Lodge Golf Resort).***

***e) There shall be no order as to costs.***

Orders accordingly.

**Judgment dated and signed at Mombasa and delivered** virtually via Microsoft Teams on this **16<sup>th</sup> day of October 2025.**

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**Y. M. ANGIMA**

**JUDGE**

**In the presence**

Court assistant Gillian

Mrs. Eunice Njeru for the ex-parte applicant

No appearance for the respondent

No appearance for the interested party.