



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. JUDICIAL REVIEW NO. 55 OF 2018

REPUBLIC.....APPLICANT

VERSUS

THE COUNTY GOVERNMENT OF MACHAKOS.....RESPONDENT

EX- PARTE APPLICANT: HOTEL CONNECTIONS LIMITED

RULING

1. This Ruling is in respect to the Respondent's/Applicant's Preliminary Objection dated 5th February, 2019. In the said Notice of Preliminary Objection, the Respondent has averred as follows:

- a. That this Honourable Court lacks jurisdiction to entertain the Application for Judicial Review orders as the Applicant has not exhausted all the dispute resolution mechanisms provided by law, specifically Section 38 of the Physical Planning Act, prior to the filing of this suit.***
- b. That the suit offends the mandatory provisions of Section 9(2) of the Fair Administrative Act, No. 4 of 2015.***
- c. That Judicial Review orders are not available to a party where an alternative remedy provided by law has not been exhausted.***
- d. That the proceedings herein are frivolous, premature; an abuse of the due process of this court.***

2. On the basis of the above grounds, the Respondent is seeking for an order striking out the entire suit. The Preliminary Objection proceeded by way of written submissions. The Respondent's/Applicant's counsel submitted that the Notice of Motion by the Ex-parte Applicant is in opposition to the Enforcement Notice of 16th November, 2018 which was issued to the Applicant by the Mavoko Sub-County Physical Planner, on behalf of the Respondent.

3. The Respondent's counsel submitted that this court lacks jurisdiction to adjudicate the matter by virtue of the provisions of Section 38 of the Physical Planning Act; that the law provides that a challenge to an Enforcement Notice lies with the relevant liaison committee; that where a statute has provided a remedy to a party, this court must exercise restraint and give an opportunity to the relevant bodies or State organs to deal with the dispute and that the Applicant has not shown why it should be exempted from the remedy provided under the Physical Planning Act. Counsel relied on numerous authorities, which include ***Speaker of the National Assembly vs. James Njenga Karume (1992) eKLR; Thuku Kirori & 4 others vs. County Government of Murang'a (2014) eKLR; Diana Kethi Kilonzo & Anor. vs. Independent Electoral & Boundaries Commission & others (2013) eKLR***, amongst others.

4. The Ex-parte Applicant's counsel submitted that the proceedings before the court are in the nature of Judicial Review; that the reliefs sought are founded on the provisions of the Constitution, the Fair Administrative Actions Act and Order 53 of the Civil Procedure Rules and that the quashing of an illegal, unfair, unreasonable and biased decision is not in the realm of an Appeal as provided for under Section 38 of the Physical Planning Act.

5. The Applicant's counsel deponed that the Enforcement Notice was so unequivocal in its timelines as to be incapable of reasonable construction; that the notice was for one day from the date of notice; that by the time the Notice was served on the Applicant, the one day had lapsed and that there was no telling what the Respondent would have done. Due to these circumstances, it was submitted, the provisions of the Physical Planning Act were inapplicable.

6. The Applicant's counsel submitted that in any event, the requirement to exhaust a remedy is not cast in stone and that this court has discretion to exempt the obligation to exhaust any remedy. Counsel relied on numerous authorities, including ***Republic vs. The Commissioner of Lands, Ex-parte Lake Flowers Limited, Nairobi HC Misc. Application Number 1235 of 1998; Republic vs. Secretary of the Firearms Licensing Board & 2 others, Ex-parte Senator Johnson Muthama (2018) eKLR*** amongst others.

7. In the Notice of Motion dated 13th December, 2018, the Ex-parte Applicant is seeking for the following orders of Judicial Review:

a. An order of certiorari do issue to remove into this court for quashing the Enforcement Notice dated 16th November, 2018 and served on the Ex-parte Applicant through its employees on the 21st November, 2018 at 12.30 p.m by the Mavoko Sub-County Physical Planner on behalf of the Respondent.

b. An order of prohibition do issue to forbid and prohibit the Respondent by itself or any of its agents/servants from implementing and or howsoever giving effect to the Enforcement Notice dated 16th November, 2018 and served on the Ex-parte Applicant through its employee on the 21st November, 2018 at 12.30 p.m by the Mavoko Sub-County Physical Planner on behalf of the Respondent and any such further and or subsequent notice issued in similar terms, import and purport.

c. An order of prohibition do issue to restrain the Respondent herein by itself, or any of its agents and/or servants from entering, alienating or otherwise however interfering with the Ex-parte Applicant's hotel premises hotel on Land Title Number Athi River/Athi River Block 1/88, use, occupation or enjoyment of the premises on the basis of the said dated 16th November, 2018 and served on the Ex-parte Applicant through its employee on the 21st November, 2018 at 12.30 p.m by the Mavoko Sub-County Physical Planner on behalf of the Respondent and any such further and subsequent notice issued by or on behalf of the Respondent in similar terms, import and purport.

d. That the costs of this Application and incidentals to the Application be provided for.

8. In the Verifying Affidavit sworn by the Ex-parte Applicant's Director, it was deponed that the Ex-parte Applicant is a limited liability company engaged in hotel and related businesses; that the Ex-parte Applicant is the registered proprietor of land whose title number is Athi River/Athi River Block 1/88 and that the Ex-parte Applicant has been undertaking construction of hotel premises on the said land since the year 2016.

9. It is the Ex-parte Applicant's case that on 21st November, 2018, at about 12.30 p.m, in a blatant breach of the rules of natural justice, the Respondent's agents served one of the workers of the Ex-parte Applicant at the suit property with a purported Enforcement Notice giving a notice expiring on the same date of 21st November, 2018 directing a plethora of action to be taken within the said notice.

10. The Ex-parte Applicant's Director deponed that the three (3) hours' notice that the Respondent gave to the Ex-parte Applicant is the Enforcement notice dated 16th November, 2018 and served on 21st November, 2018 is actuated by ulterior motive, malice, ill-will and amounts to abuse of office on the part of the Respondent's employees.

11. The Ex-parte Applicant's Director finally deponed that the Enforcement Notice was issued after the Ex-parte Applicant had complied with all the necessary laws, procedures and was openly carrying on the construction of the premises; that the Ex-parte Applicant will suffer injustice and irreparable loss should the Respondent proceed to implement the Enforcement Notice and that a statutory power can only be exercised validly and reasonably and not arbitrarily, capriciously or in bad faith.

12. On the basis of the depositions in the Ex-parte Applicant's Verifying Affidavit, which I have summarized above, and the Statutory Statement of Facts, this court granted to the Ex-parte Applicant leave to commence Judicial Review proceedings. The said leave is also to operate as a stay of the implementation of the Enforcement Notice dated 16th November, 2018 and which was served on the Applicant's workers on 21st November, 2018.

13. It is true, as submitted by the Respondent's advocate, that Section 38 of the Physical Planning Act provides for the remedy to be sought where any person is aggrieved by an Enforcement Notice issued by any Physical Planning Office. Section 38(4) and (5) of the Physical Planning Act provides as follows:

“(4) If a person on whom an enforcement notice has been served under subsection (1) is aggrieved by the notice he may within the period specified in the notice appeal to the relevant liaison committee under section 13.

(5) Any person who is aggrieved by a decision of the liaison committee may appeal against such decision to the National Liaison Committee under section 15.”

14. The Respondent did not file a Replying Affidavit denying that the Enforcement Notice dated 16th November, 2018 was served on the Applicant's workers at the suit property on 21st November, 2018. The Respondent has also not denied that the Enforcement Notice that was served on the Applicant's employees on 21st November, 2018 was to be implemented the same day.

15. Although it is true, as submitted by the Respondent's advocate, that where a statute has provided a remedy to a party, the court must give an opportunity to the relevant bodies or State organs to deal with the dispute as provided by the statute, the circumstances of this case did not give the Ex-parte Applicant such an opportunity.

16. I say so because under Section 38(3) of the Physical Planning Act, unless an Appeal is lodged with the relevant liaison committee, an Enforcement Notice is to take effect after the expiration of such period as may be specified in the notice. Now, if the Respondent was supposed to implement the Enforcement Notice on the same day the Notice was served on the Ex-parte Applicant, how was the Ex-parte Applicant supposed to serve the relevant liaison committee with appeal, whose physical address is uncertain, and whose sittings are sporadic and on a need by need basis?

17. Section 9(4) of the Fair Administrative Actions Act provides as follows:

“(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.”

18. The above provision gives the court a window of allowing an Application for Judicial Review to be heard even where the statute provides an alternative remedy *“if the court considers such exemption to be in the interest of justice.”* If the depositions by the Applicant’s Director are true, then the filing of these proceedings provide the exemption allowed by Section 9(4) of the Act.

19. The provisions of Section 9(4) of the Fair Administrative Act notwithstanding, it has been held by this court and the Court of Appeal that an Applicant need not resort to some other procedure if that other procedure is less convenient or otherwise less appropriate (*See John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 others, Nairobi HCMA No. 997 of 2003*). On the face of the Applicant’s Application, the filing of these proceedings was more convenient and appropriate.

20. Indeed, the availability of other remedies is no bar to the granting of the Judicial Review reliefs, especially where the Applicant is alleging unreasonableness, unfairness, irrationality and the breach of the rules of natural justice on the part of the decision maker. That is what the Applicant is alleging in the proceedings before this court. Consequently, this court has the requisite jurisdiction to handle the dispute.

21. For the reasons I have given above, I dismiss the Respondent’s Preliminary Objection dated 5th February, 2019 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 21ST DAY OF JUNE, 2019.

O.A. ANGOTE

JUDGE