



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

JUDICIAL REVIEW MISC. APPLICATION NO. 51 OF 2018

IN THE MATTER OF: AN APPLICATION BY KENAFRIC PROPERTIES LTD & KENAFRIC INDUSTRIES LTD FOR ORDERS OF PROHIBITION AND CERTIORARI;

AND

IN THE MATTER OF: FAIR ADMINISTRATIVE ACTION ACT, NO.4 OF THE LAWS OF KENYA;

AND

IN THE MATTER OF: PHYSICAL PLANNING ACT CAP 254 LAWS OF KENYA;

AND

IN THE MATTER OF: NAIROBI CITY COUNTY BUILDING BY LAWS;

AND

IN THE MATTER OF: ENFORCEMENT NOTICE DATED 29/5/2018;

AND

IN THE MATTER OF: ARTICLES 40, 43, AND 47 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF:

REPUBLIC.....APPLICANT

VERSUS

NAIROBI CITY COUNTY.....1ST RESPONDENT

DIRECTOR PLANNING, COMPLIANCE

& ENFORCEMENT, NAIROBI CITY COUNTY.....2ND RESPONDENT

EX PARTE

KENAFRIC PROPERTIES LTD.....1ST APPLICANT

KENAFRIC INDUSTRIES LTD.....2ND APPLICANT

JUDGEMENT

1. Through the Notice of Motion dated 31/10/2018 the *Ex parte* Applicants' seek an order of certiorari to quash the enforcement notice dated 29/5/2018 issued by the 1st and 2nd Respondents directing the 2nd *Ex parte* Applicant to demolish its boundary wall and to secure an

occupation certificate. They also seek an order against the 1st and 2nd Respondents to prohibit them from undertaking any further steps or actions or issuing orders and commands in furtherance to the enforcement notice issued on 29/05/2018. They also seek costs of the application.

2. The Motion is based on the grounds set out in the Statutory statement of facts in support of the application for leave as well as in the verifying affidavit of Lorna Salopian. The main ground is that the Respondents issued an enforcement notice to the 2nd Applicant directing it to demolish the boundary wall erected on L.R No. 209/13646 and to secure a certificate of occupation within 7 days without according the Applicants a hearing, and without serving the 1st Applicant who is the registered owner of the Suit Property.

3. The application is supported by the affidavit of the *Ex parte* Applicants' Head of Legal and Compliance, Lorna Salopian, dated 31/10/2018 in which she deposes that the 1st *Ex parte* Applicant is the registered owner of land reference number 209/13646 situate in Nairobi County ("the Suit Property") whereas the 2nd *Ex parte* Applicant is its lessee. She annexed copies of the title over the Suit Property and the lease agreement between the 1st and 2nd *Ex parte* Applicants. She averred that on or about 12/05/2004, the 2nd *Ex parte* Applicant, who was the owner of the Suit Property at the time, submitted its building plans in respect of the Suit Property to the 1st Respondent for approval. The plans were approved by the 1st Respondent and on the strength of that approval, the 2nd *Ex parte* Applicant constructed a warehouse for its confectionary factory together with a perimeter wall including the impugned wall. The 1st Respondent inspected the warehouse and issued a certificate of occupation dated 25/11/2015. She deposed that from 2004 up to 29/05/2018, the 2nd *Ex parte* Applicant has been lawfully conducting its business in the premises in compliance with the county and national laws. She attached copies of the occupation certificate and the approved plans.

4. She averred that on or about 29/5/2018, the Respondents acted contrary to Article 47 of the Constitution and Section 4(3)(b) of the Fair Administrative Action Act No. 4 of 2015 when they issued an enforcement notice to the 2nd *Ex parte* Applicant claiming that it had illegally constructed a boundary wall encroaching onto a road reserve without according the *Ex parte* Applicants a hearing hence its decision was in excess of jurisdiction. She further deposed that she was advised by the *Ex parte* Applicant's surveyor that the approved architectural plans tally with what was on the ground and the survey plan. She attached copies of the survey report, survey plan and the enforcement notice.

5. The 1st and 2nd Respondents opposed the application through the affidavit sworn by Fredrick Ochanda Ondari, a Senior Building Inspector within Nairobi City County Government on 27/6/2018. He conceded that the Applicants submitted development plans relating to the Suit Property to the City Council of Nairobi on 12/5/2004 vide plan Reg. No. DS 885 but contended that the plan was erroneously approved and that the occupation certificate was therefore granted based on erroneous building plans as there was material non-disclosure on the part of the *Ex parte* Applicants. He deposed that the *Ex parte* Applicants misled the Nairobi City Council as the plans they submitted did not indicate the existence of an 8-metre-wide wayleave contrary to Section 29(1) of the Building Code. He also admitted that the 2nd Respondent issued the enforcement notice- S/NO. 8246 to the Applicants pursuant to Sections 5, 30(1) and 38 of the Physical Planning Act upon discovering that the Suit Property had a drainage wayleave contrary to the approval issued. In addition, he averred that the Applicants had put up a perimeter wall on the Suit Property exceeding six (6) feet. He also deposed that the suit was brought to court prematurely before the *Ex parte* Applicants had exhausted the remedies available to them under Section 13 of the Physical Planning Act "the Act"). He deposed that the *Ex parte* Applicants could not claim that their rights had been infringed when they failed to disclose material facts and that their claim was frivolous.

6. The 1st and 2nd *Ex parte* Applicants filed a further affidavit dated 27/2/2019 which was also sworn by Lorna Soloipan, in response to the Respondents' averments. Ms. Soloipan averred that the 1st and 2nd *Ex parte* Applicants did not fail to disclose material facts as alleged since their plan clearly showed the wayleave. She further deposed that the approvals given by the Respondent have never been cancelled to date, and that in any event, there was no evidence placed before the court to show that the Respondents conducted an investigation through the Urban Planning Office which led to the conclusion that the *Ex parte* Applicants' plan was erroneous owing to misrepresentation on the part of the *Ex parte* Applicants that there was no drainage wayleave along the Suit Property.

7. On the issue that this suit is premature because Section 13 of the Physical Planning Act provides a remedy, she deposed that currently, there is no liaison committee in Nairobi in place to which the *Ex parte* Applicants could have lodged their appeal. Further, that the availability of an alternative remedy is not a bar to judicial review proceedings. The *Ex parte* Applicants urged that the Respondents' decision to issue the enforcement notice was communicated after it was made and not before it was made.

8. The *Ex parte* Applicants submitted that the enforcement notice served on the 2nd *Ex parte* Applicant requiring it to demolish its boundary wall was defective because it was issued without according the *Ex parte* Applicants a hearing and further, that it did not indicate violations of any actions by the *Ex parte* Applicants. They further reiterated that there is no liaison committee to which the *Ex parte* Applicants could have lodged their appeal against the decision. The *Ex parte* Applicants urged that the notice is ultra vires the statute and that it was in conflict with the Constitution hence void.

9. The Respondents maintained that the *Ex parte* Applicants failed to comply with Section 13(1) of the Physical Planning Act which requires a party aggrieved by an enforcement notice to lodge an appeal to the liaison committee.

10. The court has considered the application, statutory statement of fact, affidavits, submissions filed by parties and the law applicable. The issues for determination are firstly, whether a valid enforcement notice was served on the *Ex parte* Applicants; secondly, whether the Respondents' impugned decision was properly arrived at; thirdly, whether the availability of an alternative remedy is a bar to the orders sought; and lastly, whether the court should grant the orders of certiorari and prohibition sought by the *Ex parte* Applicants.

11. Section 38 of the Act empowers local authorities to issue enforcement notices to land owners or occupiers of land within their area of jurisdiction when it comes to the notice of the local authority that the development of land had been or was being carried out without the required development permission or where the conditions of the development permission were not complied with. The enforcement notice should specify the development that was carried out without permission or the conditions for the development permission said to have been

contravened; and measures required to restore the land to its original condition before the development took place. Further, the enforcement notice may require the demolition or alteration of any building or works or the discontinuance of any use of land. The Section stipulates that the enforcement notice may be served on the owner, occupier or developer of the land. The 2nd *Ex parte* Applicant was served with the enforcement notice dated 29/5/2018. The notice is addressed to the owner, developer or occupier of the Suit Property.

12. In the court's view, the local authority or the County Government, as is the case now, does not need to communicate to the affected party before making its decision as the *Ex parte* Applicants' urged. Section 38 of the Act empowers the local authority to issue the enforcement notice when it comes to its notice that any development of land had been or was being carried out without the required development permission or where the conditions of the development permission were not complied with.

13. The court has looked at the enforcement notice dated 29/5/2018. It describes the development for which the permission granted was not complied with as illegal construction of a boundary wall encroaching on a road reserve and illegal occupation of the same. The notice gives the steps the *Ex parte* Applicants were to undertake as removing the structure along the road reserve and securing an occupation certificate from Nairobi City County. The court finds that the enforcement notice was properly issued by the Respondents and it complies with Section 38 of the Physical Planning Act.

14. The 1st *Ex parte* Applicant contended that it was the registered owner of the Suit Property yet it was never served with the enforcement notice dated 29/5/2018. The 2nd *Ex parte* Applicant leased the Suit Property from the 1st *Ex parte* Applicant. Being the occupier of the property at the time of service, the court finds that the 1st *Ex parte* Applicant was properly served with the enforcement notice dated 29/5/2018. The notice period indicated on the enforcement notice was 7 days and it clearly stipulated that the 1st *Ex parte* Applicant was entitled to appeal to the liaison committee if it felt aggrieved by the enforcement notice.

15. Under Section 29 of the Act, each local authority has power to prohibit or control the use and development of land and buildings in the interests of proper and orderly development of its area. Section 30 prohibits any person from carrying out development within the area of the local authority without the authority's development permission.

16. The *Ex parte* Applicants contended that they disclosed the existence of the 8-meter-wide drainage wayleave on their development plan dated 25/2/2004 submitted for the Respondents' approval but did not respond to the issue of their boundary wall encroaching on the road reserve which is the subject of the enforcement notice.

17. The *Ex parte* Applicants urged that the Respondents approved their development plans as presented. The certificate of occupation issued by the City Council of Nairobi to the 2nd *Ex parte* Applicant on 25/11/20105 authorised the 2nd *Ex parte* Applicant to occupy and make use of the Suit Property for a warehouse class building- confectionery factory. It does not make any reference to the construction of the impugned boundary wall on the road reserve.

18. The *Ex parte* Applicants further urged that the decision by the Respondents to issue an enforcement notice to the *Ex parte* Applicants was an administrative action and is therefore amenable to the court's judicial review orders. They urged that they were not given an opportunity to be heard before the enforcement notice was given. The court does not agree that this is the scenario contemplated by Section 38 of the Act on the manner in which a local authority may issue an enforcement notice in relation to development of land which has been or was being carried out without the required development permission or where the conditions of the development permission were not complied with.

19. The Act gives a party aggrieved by the issuance of an enforcement notice the option to appeal to the liaison committee within the period specified in the notice. The *Ex parte* Applicants argued that there was no valid enforcement notice served upon the *Ex parte* Applicants hence the appeal mechanism was not available to the *Ex parte* Applicants. The court has found that the enforcement notice served on the *Ex parte* Applicants was properly issued and is valid. The *Ex parte* Applicants' recourse was to appeal against the issuance of the enforcement notice to the liaison committee.

20. In **Republic v Director of Land Housing and Urban Development - Laikipia County Ex Parte Philip King'ori Nderitu & Another [2017] eKLR**, the *Ex parte* Applicants had sought an order of certiorari to quash the Respondent's enforcement notice dated 15/9/2015 requiring them to open the access road that was the subject of the suit. They also accused the Respondents of having failed and or refused to constitute a physical planning liaison committee to hear their appeal. The *Ex parte* Applicants argued that the Respondents had given them permission to close the public utility road and use it, hence it was an affront to their rights for them to turn around and ask them to re-open the road. The Respondents argued that permission to use the road did not give the *Ex parte* Applicants proprietary rights. The court held as follows:- "As Section 39(2) of the Physical Planning Act does not allow a person who did not lodge an appeal as required by Section 38 to question the validity of any action taken by the local authority under Section 39(1) upon any grounds, that could have been raised in such appeal, I agree with the Respondent's submissions that she neither acted in excess of her powers nor acted illegally to warrant issuance of the orders sought."

21. In **Republic v Attorney General & 7 others Ex-parte Konza Ranching and Farming Co-operative Society Limited [2018] eKLR** Mbogo J. cited the Court of Appeal in the case of **The Speaker of the National Assembly v Hon. James Njenga Karume [2008] 1KLR 425** where it held that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. The court held that the *Ex parte* Applicant ought to have followed the clear procedure provided under the Physical Planning Act for the redress of his grievance against the Director of Physical Planning.

22. This court is persuaded by the decisions cited above and agrees with the Respondent that the *Ex parte* Applicants ought to have pursued the procedure under Section 13 of the Physical Planning Act. No evidence was provided that the 1st and 2nd *Ex parte* Applicants attempted to lodge an appeal with the liaison committee and found that there was none.

23. The *Ex parte* Applicants argued that there was no liaison committee in place which they could have appealed to, owing to the fact that the

positions of Provincial Commissioner, Commissioner of Lands and Town Clerk who would constitute members of the Nairobi Physical Planning Liaison Committee pursuant to Section 8 of the Act were done away with. The liaison committee is a creature of the Physical Planning Act. Section 8(2) of the Act provides for members of the Committee.

24. The Respondents did not demonstrate to the court that the liaison committee does exist or that the Nairobi Liaison Committee has had its meetings since the offices of Provincial Commissioner, Commissioner of Lands and Town Clerk were done away with, they only urged that one half of the members of the committee would constitute a quorum under Section 11 of the Act and may still perform the functions of the liaison committee. The liaison committee is required by law to meet at least once every month. In the circumstances, the court agrees that it was not possible for the *Ex parte* Applicants to lodge an appeal against the enforcement notice served by the Respondents.

25. Even though the Act is silent on who should constitute the liaison committee, it is only prudent and critical that the 1st Respondent takes steps to have the Nairobi Physical Planning Liaison Committee set up so that parties aggrieved by enforcement notices it serves when it contends that the development of land was carried out without the required development permission or where the conditions of the development permission were not complied with can pursue the appeals under the Act.

26. The court declines to issue the order of certiorari sought by the *Ex parte* Applicants. In light of the fact that no liaison committee exists currently in Nairobi, the court is inclined to issue an order prohibiting the Respondents from undertaking any further steps or actions in furtherance to the enforcement notice dated 29/5/2018 until such time as the Nairobi Physical Planning Liaison Committee shall have been set up and the general public made aware of its being set up and its discharging its duties under the Act.

Dated and delivered at Nairobi this 3rd day of June 2019

K.BOR

JUDGE

In the presence of: -

Mr. D. Makori for *Ex parte* Applicants

Mr. V. Owuor- Court Assistant

No appearance for the Respondents