REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

CONSTITUTIONAL PETITION NO. 16 OF 2018

HEMPSTEAD INVESTMENTS LIMITED.....PETITIONER

VERSUS

THE COUNTY GOVERNMENT OF MOMBASA.....1ST RESPONDENT

EDWARD DZILLA NYALE.....2ND RESPONDENT

HON. ATTORNEY GENERAL.....3RD RESPONDENT

JUDGEMENT

1. Hempstead Investments Limited petitioned this court vide her Petition dated 28th August 2018 seeking the following remedies;

(a) A declaration that the Respondents by themselves and their officers while exercising the functions under the Physical Planning Act and the e-construction system or such other portal are bound by the provisions of Chapter six of the Constitution.

(b) A declaration that the functions of the Respondents by themselves their officers or agents under the Physical Planning Act and the e-Construction System or any other portal are administrative and subject to Article 47 of the Constitution.

(c) A declaration that the Petitioner's right to fair administrative action under Article 47 of the Constitution have been breached.

(d) A declaration that the economic rights of the Petitioner provided under Article 43 of the Constitution have been breached.

(e) An order of judicial review in the form of orders of Mandamus compelling the respondents through the 2nd Respondent or otherwise to issue a building permit to the Petitioner immediately or lawful reasons for failure to approve.

(f) An order for damages for the delay in approving the building plans.

(g) Costs of the Petition.

2. The 1st and 2nd Respondents filed grounds of opposition on 12th November 2018 to challenge the reliefs sought in the Petition. The grounds raised are;

(a) That the Applicant is not entitled to the orders sought as it was already issued with an explanation as to why the approval of the building application number P/2017/167 has been withheld.

(b) That the application is unmeritious, untenable, an abuse of the court process and a perfect candidate for striking out with costs to the Respondents.

(c) That the petitioner is directly to blame for the delay in processing the application for failure to comply with all the necessary requirements needed prior to issuance of a building permit and is in essence the author of his misfortune.

(d) That the whole application is unprocedural and does not warrant deliberation by the Honourable Court.

3. The parties opted to prosecute this petition by way of affidavit evidence and the filing of written submissions. The Petitioner filed her submissions on 23rd January 2019 while the 1st and 2nd Respondents filed theirs on 14th March 2019. The Attorney General sued as the 3rd Respondent did not file any document.

4. The Petitioner pleaded that she lodged her building plans seeking approval of her proposed development on plot No Mombasa/Block IX/159 on 6th April 2017. That the application was assessed and an invoice issued by the 1st Respondent for Kshs779,378 which the Petitioner paid as shown in the receipt annexed as **MW7**. Subsequently the application was given a number **P/2017/167.**

5. The Petitioner deposed further at paragraph 13 of the supporting affidavit on the steps her application went through from 6th April 2017 when it was lodged to 25th January 2018 when it was sent to CP to approve. Thereafter on 24th July 2018 at 4:27pm it moved from C//2017/167 to CP – Pre submission comments. That after waiting for more than one year the Petitioner became concerned leading to the filing of this Petition.

6. The Petitioner pleaded that the 1st and 2nd Respondents are bound by the provisions of article 73 of Chapter 6 of the Constitution. That in this case the approval or rejection process has failed the integrity test in that;

(a) The delay in processing the application is unexplained and is clouded with improper motives to invite the Petitioner to engage the 2nd Respondent directly outside the provisions of the law. This contravenes Article 73(2)(b) of the Constitution.

(b) The process of approval/rejection is clouded with mystery where after all the approvals by the professionals and agencies of the 1st Respondent, the 2nd Respondent has made nonsense, those approvals. This denies accountability and transparency to the process and offends Article 73(1) of the Constitution.

(c) Failure to explain the delay denies accountability and respect to the applicant by the 1st and 2nd Respondents contrary to Article 73(1) and (2) of the Constitution.

(d) Failure to explain the decision of non-approval offends section 31 of the Physical Planning Act and Article 35 of the Constitution.

7. The Petitioner further pleaded that she is entitled to fair administrative action as set out in Article 47 of the Constitution by being given written reasons for the delay and eventual reserval of the process under the construction system. Therefore she urged the court to grant the orders being sought in her petition.

8. In her submission, the Petitioner put reliance on the findings in the case of;

(i) JSC –versus- Mbalu Mutava & Another (2015) eKLR where the Court stated thus **"if a right or fundamental freedom of a person has been or is likely to be adversely affected by the administrative action, the person has the right to be given written reasons for the action."**

(ii) Kenya Human Rights Commission & Another –versus- NGO Co-ordination Board & Another (2018) eKLR where the Court held thus **"The Constitution is the Supreme law of the Republic and decrees as such in Article 2(1). It binds all persons and all state organs in the course of performing their duties. The provisions in Article 47 to the extent that they require that an administrative action to be expeditious, fair, lawful and reasonable, and that where such an action adversely affect a person's right or fundamental freedom, the affected person is entitled to be given written reasons for the action, is a constitutional control over administrative bodies to ensure that they do not abuse their power and that individuals concerned receive fair treatment when actions are taken against them. Failure to observe this constitutional decree, for all intent and purposes, undermines the rule of law and the value of Article 19(1) of the Constitution which states that the Bill of Rights is an integral part of Kenya's democratic state as the framework for social, economic and cultural policies."**

9. The 1st & 2nd Respondents on their part submits that this court lacks jurisdiction to entertain this Petition by virtue of the following provisions of the law;

A. Physical Planning Act which provides at**;**

Section 13(1) Provides,

"Any person aggrieved by a decision of the Director concerning any physical development plan or matters connected therewith, may within sixty days of receipt by him of notice of such decision, appeal to the respective liaison committee in writing against the decision in such manner an may be prescribed."

Section 15(1) provides,

"Any person aggrieved by a decision of a liaison committee may, within sixty days of receipt by him of the notice of such a decision, appeal to the National Liaison Committee in writing against the decision in the manner prescribed."

Section 15(4) provides,

> **"Any person aggrieved by a decision of the National Liaison Committee under this section may appeal to the High Court against such decision in accordance with the rules of procedure for the time being applicable to the High Court."**

10. The Respondents further relied on the decision of **Erick Dunde & Another –versus- City Council of Nairobi & 3 Others (2016) eKLR** where the Court found that the Petitioners had not shown the court that they had followed the laid down procedures set out in the Physical Planning Act for challenging the validity of the Development Approval. Similar position was taken by the Court of Appeal in the case of **Ndiara Enterprises Ltd –versus- Nairobi City County Government (2018) eKLR**.

11. The 1st & 2nd Respondents submitted further that the delay in issuing the development permit was occasioned by the negligence of the Petitioner in obtaining the structural calculations, geotechnical survey report & failure to appear for pre-submission report as evidenced in annexure marked **EDN** in their replying affidavit to the interlocutory application dated 28th August 2018. The 1st and 2nd Respondents submit that they are aware of their responsibilities under Chapter six of the constitution and have not breached any of them.

12. The 1st and 2nd Respondents submitted on the Provisions of Section 9(2) & 9(3) of the Fair Administrative Actions Act No 4 of 2015 which requires the Courts not to review an administrative action or decision unless the mechanisms for appeal or review and all remedies available under any other written law are first exhausted. The Respondents lastly submit that the orders of mandamus are not available to the Petitioner herein as she did not follow the right procedure. The Respondents cited the High Court decision of **Mwangaza Humanitarian Assistance –versus- National Environment & Management Authority & 2 Others (2013) eKLR** to support this submission. In conclusion, the 1st & 2nd Respondents urged the Court to dismiss the Petition with costs to them.

13. I have considered all the facts and law raised in the pleadings and the submissions filed. The Petitioner complained that her rights under the constitution were violated by the 1st & 2nd Respondents in their delay to give reasons for the rejection/approval of the Petitioner's development plans. The 1st & 2nd Respondents instead rebutted that the Petitioner had herself to blame for failing to attend pre-submission and other documents. That the Petitioner did not exhaust the mechanisms provided in the Physical Planning Act.

14. Although the Petitioner in her supplementary affidavit deposed that although Mr. Nyale (2nd Respondent) attempted to shift blame on the Petitioner, he did not explain why a period which is supposed to take 30 days ended up taking 422 days. That such delay is unconstitutional and the explanation given by Mr Nyale in annexure **EDN** is not adequate.

15. Indeed 422 days is along time for waiting of an approval process. However there is applicable law (the Physical Planning Act) which provides mechanisms to be followed by a party who is dissatisfied by the decision of the 2nd Respondent before coming to court. The provisions of Section 13 and 15 of Cap 286 establishes the National Liaison Committee to deal with review or appeals against decisions of the Director. In this instance, the development sought to be undertaken by the Petitioner was quite massive as she pleaded i.e 100 units of 3 bedroomed houses/apartments.

16. The effect of such a development on the environment cannot be taken for granted. It is therefore proper to leave the professionals to ensure that all issues are taken into account for the best interest of both the developer and the interest. Consequently it is premature to ask the court to intervene where there is a necessary alternative mechanism to resolve the dispute. The Petitioner has quoted several provisions of the Physical Planning Act meaning she is equally aware of the provisions of Sections 13 and 15. The Petitioner did not explain why she did not apply for review to the Liaison Committee.

17. Consequently, in light of the provisions of Section 13 and 15 of the Physical planning Act, I make a finding that this Petition is premature. I decline to grant any of the orders sought. Instead I order it struck out. The 1st and 2nd Respondents are not entitled to costs because they did not prudently carry out their duties.

Dated, Signed and Delivered at Mombasa this 31st day of July 2019.

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A. OMOLLO

JUDGE.