REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC JR NO.79 OF 2018

THE GROVE LIMITED.....APPLICANT

=VERSUS=

COUNTY GOVERNMENT OF NAIROBI.....RESPONDENT

JUDGEMENT

1. This judgement is in a respect of an Originating Notice of Motion filed by The Grove Limited (The Applicant) under Sections 7,9,11 and 12 of the Fair Administrative Action Act 2015 (The Act). The Originating Notice of Motion seeks the following orders:-

> ***1) That a declaration be issued that the Respondent's letter dated 30th April 2018 is unconstitutional, illegal null and void.***
>
> ***2) That the Respondent be restrained from cancelling the approvals granted for the Applicant's development vide plan registration No. CPF AG 174 on 7th February 2014 subsequent to approvals of change of use and amalgamation on 14th November 2013 either as it purported to vide its letter of 30th April 2018 or at all.***
>
> ***3) That the costs of and occasioned by these proceedings be paid by the Respondent.***

2. The Applicant is the registered proprietor of LR No.7785/145 which is an amalgamation of three parcels of land originally known as LR Nos 29173, 7785/345 and 7785/352 ; The Applicant sought and obtained from all relevant authorities ,permission, approvals and licences to construct a low density mixed use development on its property.

3. On 30th April 2018, without any prior notice, the Respondent cancelled the approval which it had granted to the Applicant pursuant to section 10 of the Building Code and Section 43 of the Physical Planning Act. It is this action by the Respondent that prompted the Applicant to move to this court and filed the current Originating Notice of Motion.

4. The Applicant contends that the Respondent's action was capricious, irrational and was made in excess of power of the Respondent without affording the applicant the opportunity to be heard. The Applicant further contends that the Respondent's action was done in misapprehension of the law and that the Respondent's actions amounted to the Respondent usurping the role of other independent Tribunals and the Court.

5. The Applicant argues that the grounds upon which the Respondent acted had been addressed by the National Environment Tribunal (NET) and on appeal by this court. The Applicant therefore argues that the Respondent's action was taken with ulterior motive and ought not to stand.

6. The Respondent opposed the Applicant's application based on a replying affidavit sworn on 8th March 2019. The deponent who is the Director of Planning, compliance and enforcement deponed that the approvals which had been granted to the Applicant were cancelled after complaints were received from neighbours of the Applicant who complained that they had not been involved in public participation in line with section 30,41(3) and 52 of the Physical Planning Act. The deponent further argues that the Applicant never affixed an advert on the site to notify members of the public of the upcoming project which was against the law.

7. The Respondent further contends that during the approval committee sittings , the Applicant did not comply with the provisions of the Physical Planning Act as regards change of user and that the provisions of Regulation 7(2) of Legal Notice No.101, Environmental Impact Assessment and Strategic Management Assessment Regulations ,2009 were never followed.

8. In answer to the issues raised in the replying affidavit of the Respondent, the applicant argues that the Respondent had not provided any evidence to back its assertions and that contrary to the allegations by the Respondent; the Applicant met all the necessary requirements

before the approvals were granted.

9. I have carefully considered the Applicant's application as well as the opposition to the same by the Respondent. I have also considered the submissions by the parties herein. This originating Notice of Motion had been brought pursuant to the provisions of the Fair Administrative Action Act of 2015. This Act was enacted pursuant to the provisions of Article 47 (3) of the Constitution. Article 47(1) of the Constitution provides as follows:-

> ***" Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair".***

10. The question which then falls for determination is whether the respondent's action was done in accordance with the provisions of the Act. The impugned letter of 30th April 2018 states as follows:-

> ***" It has come to the attention of the Nairobi City County Government that despite the approvals granted for your development vide plan registration No.CPF AG 174 on 7th February 2014 subsequent to approvals to change of use and amalgamation on 14th November 2013 the process lacked adequate public participation . Apparently this explains why the project remains a contentious issue with the neighbourhood residents.***
>
> ***Further the approvals have lapsed and not renewed as stipulated therefore void for purposes of implementing the project.***
>
> ***As a result and pursuant to section 41(3) of the Physical Planning Act and section 10 of the Building Code, the approvals are hereby cancelled.".***

11. The approvals which had been granted to the Applicant were cancelled without affording the Applicant the opportunity to be heard. The cancellation was based on section 10 of the Building Code and section 41(3) of the Physical Planning Act. Section 10 of the Building By – laws provides as follows:-

> ***" Subject to any power of relaxation conferred upon the council by these by-laws , the council shall disapprove the plans for erection of a building if-***
>
> > ***a. The plans are not correctly drawn or do not provide sufficient information or details to show whether or not the submissions complies with these by-laws;***
> >
> > ***b. Such plans disclose a contravention of the by-laws or any other written law".***

12. Section 41(3) of the Physical Planning Act provides as follows:-

> ***" Where in the opinion of a local authority an application in respect of development, change of user or sub-division has important impact on contiguous land or does not conform to any conditions registered against the title deed of property, the local authority shall at the expense of the applicant publish the notice of the application in the Gazette or in such other manner as it deems expedient, and shall serve copies of the application on every owner or occupier of the property adjacent to the land to which the application relates and to such other persons as the local authority may deem fit".***

13. The above quoted sections do not give power to the Respondent to cancel approvals which have been granted. Section 41(3) is clear that the Respondent in its discretion had the option of asking the Applicant to serve all land owners in the neighbourhood. The Respondent did not impose this condition upon the applicant during the approval process and therefore by purporting to cancel the approvals based on that section was clearly acting in misapprehension of the law which is a ground for quashing any decision made pursuant to that misapprehension. In **Pastoli Vs Kabale District Local Government Council and Others (2008)2 EA 200**, it was held hat illegality is when the decision making authority commits an error of law in the process of taking or making the act, the subject of the complaint.

14. The Respondent's action was based on lack of adequate public participation. Lack of adequate public participation was allegedly raised by the residents.The issue of public participation had been raised before the NET which found that there had been adequate public participation. The residents of Runda appealed to this court and in a judgement delivered on 2nd October 2017, this court found that there was indeed public participation and dismissed the appeal. By the Respondent again raising the issue of lack of adequate public participation, it was acting ultra vires its powers. A competent Tribunal had found that there was adequate public participation and this court on appeal agreed with the findings of NET. The Respondent was therefore being malicious in cancelling the approvals based on a matter which had been settled and there was no provision for a further appeal to a higher court.

15. The Respondent seems to think that as the approvals had lapsed, the cancellation of the same was justified. It may be true that the approvals had lapsed. It was a requirement that construction begins within 12 months of the approval and the construction completed within two years of the grant of approvals. It should be noted however that the Applicant could not beat this requirement because an appeal had been filed before the NET. There was a stay and the applicant could not proceed. Then there was an appeal to this court which appeal was determined on 2nd October 2017. Six months after the appeal had been decided, the approvals were cancelled on grounds of lack of adequate public participation and in passing an observation was made that the approvals had in any case lapsed.

16. By the Respondent acting on alleged inadequate public participation and lapse of the approvals, the Respondent was being unreasonable and irrational. The Respondent's decision was not intelligible. The Applicant could not have been expected to comply when the law stood on its way. The Respondent in its submissions argued that the Applicant did not exhaust the available remedies before coming to this court. The

Respondent had in mind the liason committee under the Physical Planning Act. Whereas this may be true, the truth of the matter is that there is no liason committee in place. To expect the applicant to go a non-existent committee is clearly denying it an effective remedy. In **Republic Vs Nairobi City County, Director of Panning Nairobi City County & Engineer of Roads Nairobi City County Ex-parte Suad Salim Abubakar T/A Saab Royal Hotel (2018)eKLR** Justice Odunga held that whereas the availability of an alternative remedy is a factor to be taken into consideration , the court ought not ,in its decision to sanitise a patently illegal action on the basis that there is a right of appeal provided by the statute where such a right is practically non-existent.

17. It is my finding that the Respondent's action through its letter of 30th Aril 2018 was procedurally unfair and cannot be allowed to stand. It is unconstitutional, null and void. This being the case the Applicant is entitled to an injunction restraining the Respondent from cancelling the approvals which had been granted to the applicant. I therefore find that the applicant's Originating Notice of Motion has merit. I allow the same in its entirety.

Dated, signed, and delivered at Nairobi on this 19th day of September 2019.

E.O.OBAGA

JUDGE

In the presence of :-

M/s Munyasia for defendant and M/s Okutta for Mr Amoko for Plaintiff

Court Clerk : Hilda

E.O.OBAGA

JUDGE