



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC PET NO. 4 OF 2019

FRANCIS MUNUVE KASYI.....PETITIONER

-VERSUS-

1. THE COUNTY GOVERNMENT OF MOMBASA

2. EDWARD DZILLA NYALE.....RESPONDENTS

JUDGMENT

1. In the Petition dated 4th March, 2019, the Petitioner seeks the following orders:

- 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 mandamus compelling the Respondents through the 2nd Respondent or otherwise to issue a building permit to the Petitioner immediately and further that the said permit be deemed to have been issued.**
- f. An order for damages for the delay in approving the building plans.**
- g. Costs of the petition.**

2. The petition was supported by the facts set out in the petition and the affidavit of Francis Munuve Kasyi sworn on 4th March 2019. The Petitioner's case in a nutshell is that he is the registered proprietor of the property known as PLOT TITLE MSA/BLOCK XXVI/351 within Mombasa County (hereinafter "the suit property"). The Petitioner avers that on or about 24th July, 2018, through his architect, Mr. Philip Angore made an application for approval of building plans for a proposed development of 50 units of three (3) bedrooms each on the suit property and being alive to the provisions of Sections 31 and 32 of the Physical Planning Act, supplied all the required documents to the 1st Respondent. That for development approvals under the Physical Planning Act, the 1st Respondent had adopted the use of e-construction permit portal which allows developers/architects to submit their plans online for vetting and approval by various departments of construction permit. The Petitioner avers that he constantly followed up with his architect and confirmed that the application was assessed and an invoice for Kshs. 801,995.00 was issued by the 1st Respondent which the Petitioner paid and was issued with a receipt. That the application was given a number 9772/2992/3408.

3. The Petitioner states, that it was his expectation that after payment of the required fee of Kshs.801,995.00 which was made on 24th July, 2018, the process of approval was to be expedited. That instead, the 1st Respondent went quiet and despite several visits by the Petitioner's agents, there was no word from the Respondents. The Petitioner avers that after waiting for more than six (6) months, he instructed his advocates to formally enquire above the cause of the delay and the advocate issued a formal demand on 8th February 2019 which elicited no

response from the Respondents. The Petitioner states that the duty to approve or reject an application for building plan is vested upon the 1st Respondent under the Physical Planning Act and integrated under the e-construction system is administrative, and that while considering the application lodged by a developer, the officers of the 1st Respondent including the 2nd Respondent are bound by the provisions of Chapter Six of the Constitution in particular Article 73 (1) (a)(ii) to demonstrate respect for people; Article 73(1) (a)(iii) to bring honour to the nation and dignity to the office; Article 73(i)(a)(iv) to promote public confidence in the integrity of the office; 73(1)(b) offer service to people rather than the power to rule them; 73(2)(b) reflect objectivity and impartiality in decision making which is not influenced by nepotism, favouritism, other improper motives of corrupt practice; and, 73(2) (d) accountability to the public for decisions and actions. The Petitioner states that the process of approval/rejection has failed the integrity test under Chapter Six of the Constitution in that 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 which contravenes Article 73(2)(b) of the Constitution; that the process of approval/rejection is clouded in mystery where after all the approvals by the professionals and agencies of the 1st Respondent has made nonsense those approvals and this denies accountability and transparency to the process and offends Article 73(1) of the Constitution and the failure to explain the delays denies accountability and respect to the applicant contrary to Article 73(1) and (2) of the Constitution and of the failure to explain the decision of non-approval offends Section 31 of the Physical Planning Act and Article 35 of the Constitution. The Petitioner states that he is entitled to a fair administrative action as set out in Article 47 of the Constitution and his right to fair administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair has been and continues to be breached. The Petitioner avers that he is entitled to a remedy under Article 47(1) and Article 23 of the Constitution and written reasons for the delay in approval/rejection of his application. The Petitioner has annexed copies of the Certificate of Title, Joint Venture Agreement, architects credentials, invoice, receipt and demand letter.

4. In opposing the petition, the Respondents filed a replying affidavit sworn by Edward Dzilla Nyale, the 2nd Respondent on 28th June, 2019 in which he admits that the Petitioner is the registered owner of the suit property and that the Petitioner through his architect, one Mr. Francis Angore submitted a building plan for approval and paid a construction permit fee of Kshs.801,905.00 together with a convenience fee of Kshs.50.00 on 23rd July 2018. He clarified that the approval process is done online through the Mombasa e-construction permit system which allows all persons who submit their building plans for approval to track the processing of the said building plans and thereby allowing applicants to get real time feedback which is crucial in the event that there is something that is to be done by the applicant to enable completion of the process. The Respondents state that Mr. Francis Angore who submitted the building plans on behalf of the Petitioner had the duty to track the processing of the application and deal with any feedback that required action on the part of the owner of the suit property. That after submission of the building plan, the 1st Respondent informed the Petitioner that the development was a major development (it being a project comprising of ten grounds with 41 separate units) and therefore the Petitioner was required to provide a traffic management plan, geotechnical report, waste water management system, design calculations and presentations before the 1st Respondent approves the building plan. A copy of a print out of that information has been annexed.

5. The Respondents state that the Petitioner has admitted that all communication is done through the e-portal which means, through his architect, the Petitioner ought to have knowledge of the comments made regarding his application and that it is wrong for the Petitioner to turn around and mislead the court by stating that there was no communication whatsoever from the 1st Respondent as to why the building plan that he submitted for approval has never been approved to date. The Respondents aver that the 1st Respondent is very keen on the social, safety and architectural integrity of buildings that are constructed within Mombasa County and therefore the decisions not to approve the building plan was not done out of malice, and that the 1st Respondent could have gladly issued the Petitioner with the requisite approval had all the requirements been made. The Respondents aver that it is important to note that a building of 10 floors must have working lifts, a proper drainage system, a proper traffic management system among other requirements all to be considered during construction for it to be approved. The Respondents have annexed a print out from the e-portal detailing the stages the Application had gone through with comments from the relevant departments to confirm that the Petitioner was informed during every stage of the application.

6. It is the Respondents' contention that under the physical Planning Act, the court lacks the requisite jurisdiction to handle the suit and cited Section 13(1) which provides as follows:

“Any person aggrieved by a decision of the Director concerning any physical development 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 as may be prescribed.”

The 1st Respondent states that in line with the above provision, when it decided not to issue the approval and instead made comments regarding the application, the Petitioner, being aggrieved, should have directed any complaints to the liaison committee before coming to court. The Respondents state that the process would have failed the integrity test had the approval been made without considering the fundamental issues that led to the comments that were made regarding that building plan, and therefore deny the Petitioner's assertion that the approval process does not meet the integrity test. The Respondents state that the delay in approving the building plan was caused by the Petitioner's non-compliance with the comments made regarding the building plan he submitted to the 1st Respondent. The Respondents further state that it is important to note that the approval of building plans is an exercise that involves several departments such as those dealing with environment, public health, physical planning, infrastructure among others and that the 1st Respondent can only issue approvals if the intended building plan has been given a clean bill of health by those other departments. The Respondents conclude by stating that the Petitioner is the author of his own misfortune and should not be allowed to use the courts to circumvent due process involved in securing the safety of buildings within Mombasa County. The Respondents urged the court to dismiss the petition with costs since it lacks merit.

7. Mr. Kenzi, learned counsel for the Petitioner submitted that the action of the 2nd Respondent of refusing to issue the Petitioner with a permit is ultra vires the powers donated under the e-construction system and the Physical Planning Act and cited Sections 31 and 32 which he submitted have strict timelines within which the application was to be approved or disapproved. Further, counsel submitted that the actions of the Respondents are unconstitutional for being in total breach of Article 47 of the Constitution, arguing that under the Physical Planning Act an application for approval of building plans should be processed expeditiously and in any case within 90 days, and therefore a delay of more than 8 months cannot be said to be expeditious. Counsel submitted that by denying the Petitioner the building permit, the Respondents have denied the Petitioner his economic rights contemplated in Article 43 of the Constitution. It was submitted that had the approval been granted expeditiously, the Petitioner could have completed the proposed construction and would have started earning

reasonable income from the units.

8. Relying on the case of **Judicial Service Commission –v- Mbalu Mutava & Another (2015)eKLR**, the Petitioner submitted that his right has been infringed by the Respondents’ refusal to grant the permit and the failure to give reasons a breach of his constitutional rights. The Petitioner submitted that he is entitled to orders of judicial review in form of orders of mandamus to compel the Respondents to issue the construction permit, arguing that the relevant departments and professionals of the 1st Respondent approved the application by the Petitioner and the 2nd Respondent role was not to approve but exercise an administrative function of issuing the building permit. That the denial is not justifiable and is against public policy. The Petitioner’s counsel relied on the case of **Republic-v- Retirement Benefit Authority Ex Parte Moses O. Odongo & 5 Others (2018)eKLR; Kenya Human Rights Commission & Another –v- Non- Governmental Organizations Co-ordination Board & Another (2018)eKLR and Multiple Hauliers East Africa Limited –v- Attorney General & 10 Others (2013)eKLR** and submitted that the Petitioner is entitled to a sum of Kshs.5,000,000.00 in damages.

9. During the hearing, Mr. Kenzi submitted that the replying affidavit filed by the Respondents out of the timelines given by the court should be expunged, adding that the annexure marked “EDN 2” thereto was made when this matter was already before the court.

10. On his part, Mr. Tajbhai learned counsel for the Respondents submitted that the court lacks the requisite jurisdiction to handle the case and argued that the Petitioner ought to have lodged an appeal to the Liaison Committee as provided for under Section 13(1) and Section 15(1) and (4) of the Physical Planning Act. Counsel relied on the case of **Republic –v- National Environmental Management Authority, Civil Appeal No.84 of 2010; Director of Planning & Architecture, County Government of Mombasa –v- Makupa Transit Shade Limited (2019) eKLR**. And while relying on the case of **Ndiara Enterprises Ltd –v- Nairobi City County Government (2018)eKLR**, the Respondents’ counsel blamed the Petitioner for the delay for failing to supply the additional information requested for in the e-portal. Counsel submitted that the order of mandamus cannot issue under the Fair Administrative Action Act or Article 47 of the Constitution because the procedure laid out in the Physical Planning Act was not followed. It was further submitted that even if the procedure under the Physical Planning Act was followed, the orders sought can only be granted by way of a judicial review application. The Respondents’ counsel cited Sections 7, 8 and 9 of Fair Administrative Action Act and relied on the case of **Mwangaza Humanitarian Assistance –v- National Environmental Management Authority & Another (2013) eKLR**. It was the Respondents submission that the Petitioner is not entitled to damages because failure to obtain the approvals was through his own doing and negligence and that none of his rights were infringed/violated. The Respondents urged the court to dismiss the petition with costs.

11. Having analysed the pleadings and the submission filed, I pose the following questions for my determination:

i. Whether this court has jurisdiction to determine this matter?

ii. Whether there has been a violation of the Petitioner’s constitutional rights as set out in the petition and the reliefs sought?

iii. What orders are appropriate in the circumstances?

12. In this case, the Petitioner’s complaint is the Respondents’ failure to approve the building plans submitted by the Petitioner through his architects. From my own analysis of the matter, the Petitioner has construed that the refusal to issue the permit amounted to a dispute under the Physical Planning Act. Indeed the petition is brought under the provisions of the Physical Planning Act, among others. Section 13(1) of the said Act provides that:

“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.”

13. Jurisdiction is given either by the statute or the constitution. In the case of **Republic-v- National Management Authority Civil Appeal No.84 of 2010 (2010)eKLR**, the Court of Appeal stated:

“The principle running through these acts through these cases is where there was an alternative remedy and especially where parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exceptions should be made and judicial review granted it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case ask itself what in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it...”

14. The issue herein is whether this court has jurisdiction over the judicial review proceedings in view of the provisions of section 38 of the Physical Planning Act and Section 9 of the Fair Administrative Action Act. Section 9(2) of the Fair Administrative Action Act provides as follows:

“The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted”

In line with the above provisions, it has been held time and again that where specific grievance redress mechanisms is stipulated under statute, the same must be strictly adhered to. See also Speaker of the **National Assembly –v- Njenga Karume (1990-1994) EA 546**.

15. In this case, it is common ground that the Petitioner lodged his application for approval of building plans and paid the requisite construction permit fee. The application was done online through 1st Respondent’s e-construction permit. The Respondents contend that the

Petitioner is yet to meet certain conditions before he can be issued with the approval permit. In my considered view, if the Respondents failed to approve the plans submitted by the Petitioner, the Petitioner ought to have followed and exhausted the alternative mechanism provided for by parliament under the Physical Planning Act before engaging this court. Moreover, in my view, the Petitioner's application is premature as no decision has been reached by the Respondents and the court lack the jurisdiction to entertain the application at this stage. The Respondent has also indicated that the Petitioner is yet to meet all the conditions required before an approval permit is given. If that be the case, the Petitioner in my view, is under an obligation to provide all the requirements before the Respondents can be compelled to issue the permit. As there exists a statutory procedure for questioning the Respondents' decision, which procedure has not been adhered to by the Petitioner, it would be procedurally wrong for this court to grant the reliefs sought in the petition. The Petitioner had urged the court to expunge the Respondents' replying affidavit for having been filed outside the timeline granted by the court. Under Article 159 (2) (d) of the constitution the court in exercising judicial authority shall be guided by the principle that justice shall be administered without undue regard to procedural technicalities. The court has therefore exercised its discretion and deem the said replying affidavit is filed in time and is properly on record and the court has considered it in arriving at this decision.

16. My conclusion therefore is that the petition has no merit and hereby dismiss it with costs to the Respondents.

DATED, SIGNED and DELIVERED at MOMBASA this 4th day of December 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Kenzi for Petitioner

Mwandeji holding brief for Tajbhai for Respondents

Yumna Court Assistant

C.K. YANO

JUDGE