REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC MISC APPLICATION NO. 8 OF 2017

REPUBLIC...APPLICANT

-VERSUS-

COUNTY GOVERNMENT OF KWALE...........RESPONDENT

EX-PARTE: LEISURE LODGES LTD

JUDGEMENT

1. By a Notice of Motion dated 22nd May, 2017, the ex parte applicant herein, Leisure Lodges Limited, seeks the following orders"

> ***1) That an order of certiorari be issued to remove into this Honourable court the decision of the County Physical Planner County Government of Kwale contained in the Enforcement Notice dated 6th April, 2017 requiring the Ex-parte Applicant to stop construction of a boundary and remove the said development with immediate effect on the grounds that the same is being carried out without development permission from the county Government, for the purposes of quashing the said decision.***
>
> ***2) That an order of prohibition be issued to prohibit the county physical planner county Government of Kwale, its employees, officers, servants and or agents from enforcing the enforcement Notice dated 6th April, 2017 requiring the Ex-parte Applicant, Leisure Lodges Limited to stop construction of the boundary and remove the said development with immediate effect and or from issuing any further or other enforcement notices in respect of the said development.***
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> ***3) That the costs of this Application be provided for.***

2. The application is supported by the supporting affidavit and verifying affidavit sworn by John K. Mutua on 10th May 2017. It is also supported by the annextures to the affidavits and the statutory statement filed together with the chamber summons application for leave on 11th May 2017.

3. The applicant's case is that it is the registered proprietor of various parcels of land situated in the Diani Beach area of South Coast within Kwale County including Land Reference Number Kwale/Diani Beach/979, wherein the applicant has a golf course and carries on the business of a Golf Club. The applicant avers sometime in the year 2003 there were unlawful invasions occupation and grabbing by some senior land officials, surveyors Kwale Council Officers and physical planning officers working in various capacities in government of the applicant's various parcels of land known as Kwale/Diani Beach/551,552,553,554,555,556,557,558,559 and 856, which actions the applicant resisted by filing numerous suits in the High Court at Mombasa and Nairobi, including Constitution Petition No. 21 of 2010 (Leisure Lodges Limited –vs- Commissioner for Lands and 267 others) in which all the persons with titles on the said parcels of land were sued as interested parties, while the County Government of Kwale was one of the Respondents. That all suits filed by and or against the Ex-parte Applicant were stayed by an order in the said petition.

4. The applicant's case is that sometime in 2008, it made a decision to build boundary walls in an attempt to stop further grabbing of its said land, which walls were commenced in the year 2010 after the then County Council of Kwale granted the Ex-parte Applicant approvals to build the said walls sometimes in January 2010 and the walls surrounding the parcels of land known as Kwale/Diani Beach551,552,553,554,555,556,557,559 and 856 were completed. That the wall surrounding the Golf course which is built over Land Reference Number Kwale/Diani Beach/979 was commenced in 2010 but was not completed due to shortage of funds. It is the applicant's case that in September 2017 (sic) it looked for and obtained funds to complete the wall of the Golf Course.

5. The applicant states that on 6th April 2017 at about 4pm, they received a notice dated 6th April 2017 from the county physical planner County Government of Kwale requiring the applicant to stop construction of the boundary wall and remove the said development with immediate effect, failure to which the interested party would enter the said land and remove the said boundary wall and recover the related

expenses incurred as a civil debt against the applicant. The said Enforcement Notice was allegedly issued in exercise of the power granted to the Respondent under provisions of the Physical Planning Act, Cap 286 Laws of Kenya, and provided that the applicant may appeal to the liason committee or High Court under the provisions of Part III of the Act before 7th April 2017, in which case the operation of the said to notice would be suspended pending the determination or withdrawal of appeal. It is the applicant's contentions that the said notice was served late on 6th April, 2017 which denied the applicant the right to be heard in appeal. The applicant avers that it is apprehensive that because the said notice dated 6th April, 2017 vague and does not specify the plot number on which the development is being carried out allegedly without development permission from the respondent or the specific areas of the applicant's different parcels of land affected by the said notice, the respondent may have deliberately issued a blanket enforcement notice with the ill motive of unlawfully demolishing all walls built around the applicant's establishments.

6. The applicant further avers that they have been pleading with the respondent to withdraw the said notice because the development being carried out was approved in January 2010 by its predecessor, the County Council of Kwale, but that the respondent has been adamant and have threatened to demolish and remove the said walls without further notice to the applicant. The applicant states that sometime in March 2010, the County Council of Kwale issued similar notices to the applicant who filed Mombasa Miscelleneous Civil Application No. 48 of 2010 (JR) wherein an order was issued for the leave granted to operate as a stay of the said enforcement notices but the matter was stayed by an order made in Petition No. 21 of 2010.

7. Based on legal advice, it is the applicant's contention that the decision contained in the Enforcement Notice dated 6th April, 2017 from the respondent is arbitrary, malicious and issued in bad faith because; i) the applicant had been given valid approvals to construct the said boundary wall surrounding its properties, ii) the wall is being constructed to deter and keep out land grabbers who have unlawfully entered and occupied some of the applicant's parcels of land and are carrying on various acts of waste and construction thereon, including wanton destruction of the applicant's facilities, and

iii) that an order for stay of previous notices was issued in Mombasa High Court miscellenous Civil Application No. 48 of 2010 (JR). The applicant further contends that the Respondent has failed to give it a hearing on the basis that the time for an appeal against the said enforcement notices has lapsed, and therefore the applicant is apprehensive that the respondent will unlawfully carry out its threats and demolish and remove its perimeter walls which have been built at great expense, leaving the applicant's prime properties exposed to damage, in total violation of the law, procedure and the principles of natural justice.

8. The respondent opposed the application through the affidavit of Ali A Budzuma sworn on 31st July, 2017 in which he avers that the interested party is required by law to control all manner of development within her jurisdiction including the execution of boundary walls as provided for in the Physical Planning Act. That parcel number KWALE/DIANI BEACH/979 is situate within Diani in the respondent's jurisdiction and as such the interested party is properly mandated to supervise all development. That on or about end of March 2017, the respondent noticed that the Applicant herein was constructing a wall without notifying the respondent and without any approval, and the applicant was requested to cease developing the wall without approval and more so when no notification had been issued by the applicant that they intended to develop a wall. That this was in furtherance of a further cessation request made in October 2016. According to him, on receiving the verbal request to cease building the wall, the applicant ceased for a few hours, but on departure of the officer of the respondent the applicant escalated the building of the wall in fragrant abuse of the instructions of the respondent necessating the issuance of the Enforcement Notice dated 6th April 2017. That though the Enforcement Notice had a misprint on the date that it was to take effect, the applicant ignored the same, proceeded with the construction of the wall before coming to court on 12th May 2017. He avers that though the Enforcement Notice had an error on the date the applicant should have sought clarification from the respondent while the cassation of the construction was in force or appeal to the liason committee as provided for in the Physical Planning Act, instead of ignoring the notice and rushing to court.

9. The respondent denies that any development approval was issued and that if any was issued in 2008, then the same had by operation of law lapsed and ceased to have any effect. It is the respondent's contention that the applicant's action is in abuse of the Physical Planning Act, government mandate and or authority and an abuse of the court process. The respondent further contends that if stay was earlier issued as stated by the applicant, then the present proceedings are res judicata sub jundice and an abuse of the court process and bad in law.

10. Both parties filed written submissions which I have considered. The purview of judicial review was clearly set by Lord Diplock in the case of Council for Civil Service Unions –vs- Minister for Civil Service (1985) A.C 374 AT 401D when he stated that:

> ***"judicial review has I think developed to a stage today when… one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground 1 would call illegality, the second irrationality, and the third "procedural impropriety…"***
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> ***… By illegality as a ground for judicial review I mean that the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it…By 'irrationality' I mean what can now be succinctly referred to as "wednes bury unreasonabless" …it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it… I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision."***

11 Article 47 of the constitution provides:

> ***1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***
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> ***2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.***

12 Section 38 of the Physical Planning Act, Cap286 Laws of Kenya provides as follows:

> ***1) When it comes to the notice of a local authority that the development of land has been or is being carried out after the commencement of this Act without the required development permission having been obtained, or that any of the conditions of a development permission granted under this Act has not been complied with, the local authority may serve enforcement notice on the owner, occupier or developer of the land.***
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> ***2) An enforcement notice shall specify the development alleged to have been carried out without development permission, or the conditions of the development permission alleged to have been contravened and such measures as may be required to be taken within the period specified in the notice to restore the land to its original condition before the development took place, or for securing compliance with those conditions, as the case may be, and in particular such enforcement notice may require the demolition or alteration of any building or works or the discountinuance of any use of land or the construction of any building or the carrying out of any other activities.***
>
> ***3) Unless an appeal has been lodged under subsection (4) an enforcement notice shall take effect after the expiration of such period as may be specified in the notice.***
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> ***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 liason committee under section13.***

13. That the issuance of the Enforcement Notice was an administrative action by the Respondent is not in dispute. The Respondent was therefore under a duty to ensure that its action was expeditious, efficient, lawful, reasonable and procedurally fair. Procedural fairness necessarily requires that persons who are likely to be effected by the decision be afforded an opportunity of being heard before the decision is taken. Further, in my view, the above provision contemplates the service of a valid notice.

14. In this case the notice dated 6th April 2017 required the applicant "to stop and remove the said development with immediate effect" from the date of the notice and was to take effect on 7th April 2017. Clearly, a notice crafted in such a manner can only be deemed as vague. The Respondent admits that the notice had an error on the date. Since under Section 38(4) the right of appeal to the liason committee only accrues upon service of the enforcement notice, which in my view must be a valid notice, where no such notice is served the alternative remedy of challenging the decision by the Respondent is non-existent and hence the applicant cannot be driven from the seat of justice on the basis of the existence of such alternative remedy.

15. Before the Respondent can determine whether a person has carried out constructions without development permission and hence needs to remove the same, it is my view and I so hold that the Respondent ought first to afford the person concerned an opportunity of addressing the issue before issuing an enforcement notice. There is no such evidence on record. The applicant contends that it had the necessary approvals. Had it been accorded an opportunity to be heard, it could have shown the same to the Respondent. The notice, which I have found to be invalid, did not even give the applicant time to appeal as the same was to take effect immediately and by the following day. The applicant avers that it only received the notice about 4.00pm on 6th April 2017.

16. It is clear that the said notice was both unlawful and unprocedural. The Respondent was obliged to afford the applicant a hearing before it made its decision which decision, was undoubtedly bound to adversely affect the interest of the applicant by requiring it to stop and remove the perimeter wall with immediate effect. As was held by the court of Appeal in Onyango Oloo –vs-Attorney General (1989) EA 456,

> ***"The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly, and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard… There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principles of natural justice…A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at…"***

17. Where a party has not been heard, to contend that the applicant could have appealed the decision of the respondent is to miss the point. This must be so since a decision made in breach of the rules of natural justice is null and void ab initio. In addition it is the body making the adverse decision which is obliged to afford the party to be affected an opportunity of being heard and not the appellate body. Moreover, the enforcement notice issued had some errors as admitted by the Respondent and therefore the notice was not valid. It did not give the applicant sufficient time to appeal. The applicant was not given sufficient time to appeal.

18. It is therefore my view that as the rules of natural justice were flouted, all actions taken pursuant thereto were null and void. And as the appellate option was clearly less convenient, beneficial and effectual, the proper remedy was to move to this court.

19. Consequently, I find merit in the notice of motion dated 22nd May 2017 and grant the following orders:

> **1) An order of certiorari removing into this court the Enforcement Notice dated 6th April 2017 requiring the Ex-parte Applicant to stop construction of a boundary wall and remove the said development with immediate effect which decision is hereby quashed.**
>
> **2) An order of prohibition against the Respondent, its employees, officers, servants and or agents from enforcing the Enforcement Notice dated 6th April 2017 requiring the Ex-parte applicant, Leisure Lodges Limited to stop construction of a boundary wall and to remove the said development with immediate effect.**

3) The Applicant will have the costs of these proceedings.

20. Orders accordingly.

Dated signed and delivered at Mombasa this 25th day of April 2018.

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C.YANO

JUDGE