



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC MISC APPLICATION NO. 109 OF 2017**

**(formerly Nairobi ELC Misc. No. 18 of 2015)**

**IN THE MATTER OF AN APPLICATION BY EUNICE MUTIO FOR AN ORDER OF CERTIORARI**

**AND**

**IN THE MATTER OF THE COUNTY PHYSICAL PLANNER, KAJIADO COUNTY**

**AND**

**IN THE MATTER OF GOVERNMENT PROCEEDINGS ACT, CAP 40 LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE PHYSICAL PLANNING ACT, CAP 286 LAWS OF KENYA**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE COUNTY PHYSICAL, PLANNER KAJIADO COUNTY.....1<sup>ST</sup> RESPONDENT**

**THE PRINCIPAL SECRETARY, LANDS HOUSING**

**& URBAN DEVELOPMENT.....2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**EX PARTE EUNICE MUTIO**

**JUDGEMENT**

By a Notice of Motion dated the 11<sup>th</sup> February, 2015, the Ex parte Applicant seeks the following orders:

- a) An order of CERTIORARI to remove into this honourable court and quash the decision of the Respondent dated January, 21<sup>st</sup>, 2015 purporting to stop the Applicant’s construction works on property known as PLOTS KJD/KAPUTIE – NORTH/15271 & 15272 with effect from 21<sup>st</sup> January, 2015.
- b) Costs of and incidental to the application be provided for.
- c) Such further and other reliefs that the Honourable Court may deem just and expedient to grant.

The application is based upon the grounds set out in the Statutory Statement and Verifying Affidavit of EUNICE MUTIO sworn on the 9<sup>th</sup> February, 2015 accompanying the application for leave.

The grounds upon which reliefs are sought are:

- a. The decision to stop the construction works was made in breach of the rules of natural justice as the applicant was not afforded fair hearing.
- b. The decision making process leading to stoppage of the applicant's construction works was procedurally *ultra vires* and contravened procedure for fair hearing provided for in Law and therefore in bad faith.
- c. The decision making process was in breach of the applicant's natural justice rights of fair hearing, the Respondent purported to stop construction works, even before giving the applicant an opportunity to present her case and the applicant's request for disclosure of information on which she was accused were met with futility and he was never furnished with any particulars of the complaints against her or her construction works.
- d. There was high likelihood of bias since the Respondent, though being the decision maker, also has substantial pecuniary interest in the form of construction works in the area and as such he had personal interests on the outcome of the applicant's case.
- e. The decision to stop the applicant's construction works were in breach of her legitimate expectations since the same building plans and architectural designs were already approved by the same authority now purporting to stop the works.
- f. Such other and further reasons to be adduced at the hearing hereof.

In the verifying affidavit of EUNICE MUTIO the ex parte applicant herein, she deposes that she is the registered proprietor of plots KJD/KAPUTIE – NORTH/15271 & 15272 hereinafter referred to as the 'suit lands'. She claims prior to the commencement of the construction works on the suit lands, she applied for local authority as well as NEMA approvals using the building designs and plans made by her architect for the construction works. She confirms that her plans including designs were duly approved and she paid the requisite fees for the approvals as well as inspections, prior to the commencement of the construction works. She states that the instant proceedings challenge the decisions allegedly made by the Respondent (Physical Planner, Kajiado County) and contained in a notice issued on 21<sup>st</sup> January, 2015 written by one Fred Swallah on behalf of the Respondent, the County Physical Planner in charge of Kajiado County Government Physical Planning Department on the ostensible ground of breach of area zoning regulations. She denies breaching any zoning regulations to warrant such action and that at the time of applying for approvals, no such regulations or byelaws were disclosed to her as a condition precedent to the said approvals. She contends that at one occasion, after the commencement of the construction works, the Respondent being the Kajiado County Physical Planner came to her construction site, while drunk and verbally stopped the works citing no reasons except that he was the Physical Planner for the area. Further, that through her lawyer's intervention, the Respondent allowed her work to progress. She claims on 21<sup>st</sup> January, 2015, she received a letter bearing the same date, from one Fred Swallah on behalf of the Respondent notifying her to stop the development works and to arrange for a meeting to make representations relating to allegations of her breach of area zoning regulations. She further denies that prior to the said notice, she never received any reprimand or communication with regard to any violation of the alleged zoning regulations and on 29<sup>th</sup> January, 2015 she went with her lawyer to the Respondent's office in Kajiado to deliver copies of the approvals by the County Physical Planning Department, NEMA approvals as well as titles to the suit lands including approved plans for the construction works. She contends that her lawyer sent a demand letter to the Respondent's office which letter the Respondent including his deputy one Mr. Swallah declined to receive. She insists she was denied a right to hearing as guaranteed by the Constitution and that she has further written to the National Physical Planning Liaison Committee responsible to handle such matters, but to date, she is yet to receive a response from them. She reiterates that there has never been any public complaint against her or her construction works or substantial report to warrant such action. She reiterates that the allegations spelt out against them in the meeting attended with her lawyers, were ambiguous and not defined in law.

The application is opposed by the 1<sup>st</sup> Respondent whose County Secretary Dr. Kennedy Ole Kerei filed a replying affidavit where he confirmed that the ex parte applicant is the proprietor of the suit lands which are located within Upper Kapiti Estate in Kitengela Township, where she had commenced construction. He claims the said area is a Controlled Development Area as per the Zoning Regulations approved by the Physical Planning Department and as provided by the Physical Planning Act No. 6 of 1996 and adopted by the defunct County Council of Ol Kejuado, succeeded by the County Government of Kajiado. He contends that the purpose of the zoning regulations is, among others to achieve orderly development to preserve and protect the decent character of neighbourhood including environmentally friendly good living. Further, that the principle guiding the regulations is community interests which override individual interests as well as suitable use of space to meet inter-generational justice of which the Physical Planner including the County Government endeavors to uphold. He insists the zoning regulations for Upper Kapiti Estate – Kitengela is divided into three zones i. e Commercial, Bungalow including Maisonnettes and Residential Apartments. He avers that the suit lands lie in zone two (2) accommodating bungalows including maisonnettes and the Applicant's structure once completed shall be multi – storeyed family flats beyond the zones acceptable heights. He states that on 1<sup>st</sup> December, 2014, the office of the County Planner received a written complaint from residents of Upper Kapiti Estate complaining of the structures set up by the applicant. Further, that the County Planner on visiting the suit lands found that there were provisions for shops on ground floor; partitions on 1<sup>st</sup> floor suggesting there shall be many family units and the layout of the 2<sup>nd</sup> floor indicated beginning of a third floor. He insists the applicant violated the provisions of the zoning regulations of Upper Kapiti Estate in Kitengela, and the County Planner ordered the stoppage of the construction verbally and later gave the Applicant a written enforcement notice as provided by the Physical Planning Act. He reiterates that the Applicant accompanied with her advocate visited the County Planner's office and threatened him with dire consequences including court action. He reiterates that the County Government has no ill will against the Applicant or any one at all but only urges developers to adhere to the applicable laws, rules as well as regulations for the common good of all including the applicant. He notes that unless the applicant follows the rules like everybody else, the results will be unlimited structural chaos all over the estate, with everybody constructing whatever they wish. He urged the Court to uphold the County Physical Planner's decision stopping the applicant's construction and dismiss the application with costs.

The ex parte applicant filed a further affidavit in rejoinder to the 1<sup>st</sup> Respondent's response and reiterated her claim. She insisted the 1<sup>st</sup> Respondent failed to provide information to her as well as avail the zoning regulations including the complaints from the Upper Kapiti Estate Resident's Association. She contended that it is the 1<sup>st</sup> Respondent including NEMA that approved her plans and yet he knew there were

zoning regulations and that there are flats in the vicinity of the suit land. She claims that she is incurring losses including bank interests as a result of the stalled development works. She explains that during the meeting at the 1<sup>st</sup> Respondent's offices on 29<sup>th</sup> January, 2015, no complaints were availed to her nor complainants showed up at the meeting. Further, she instructed her lawyers to send a demand letter to the 1<sup>st</sup> Respondent and denies threatening him. She contends that being an owner of the suit lands within the Upper Kapiti Estate, she ought to have been allowed to be a member of the Upper Kapiti Estate Resident's Association so as to participate and ratify any by laws allegedly limiting any resident's right to develop their plot as allegedly provided for in the regulations. She denies seeing any gazette notice to ascertain the legality of the alleged regulations to make them binding as law.

Both the applicant and the 1<sup>st</sup> Respondent filed their respective submissions that I have considered.

### **Analysis and Determination**

Upon perusal of the Notice of Motion dated the 11<sup>th</sup> February, 2015 including the various affidavits filed by the parties, Statutory Statement and the submissions, the following are the issues for determination:

- Whether the ex parte applicant was accorded a fair hearing by the 1<sup>st</sup> Respondent before stopping the construction on the suit land.
- Whether the Enforcement Notice should be quashed.
- Whether the applicant has exhausted the appeals mechanism at the National Physical Planning Liaison Committee.
- Who should bear the costs of the application?

The instant proceedings are on Judicial review where the ex parte applicant is challenging the enforcement notice issued by the 1<sup>st</sup> Respondent and insists her building plans were duly approved by the 1<sup>st</sup> Respondent as well as NEMA. She denies being served with the zoning regulations and any complaint from Upper Kapiti Estate Resident's Association.

Justice Mativo in the case of **Sceneries Limited v National Land Commission [2017] eKLR** stated as follows: '**Judicial review is a judicial invention to ensure that a decision by the executive or a public body was made according to law, even if the decision does not otherwise involve an actionable wrong. The superior Courts developed their review jurisdiction to fulfill their function of administering justice according to law. The legitimacy of judicial review is based in the rule of law, and the need for public bodies to act according to law. Judicial review is a means to hold those who exercise public power accountable for the manner of its exercise, especially when decisions lie outside the effective control of the political process. The primary role of the Courts is to uphold the fundamental and enduring values that constitute the rule of law. As with any other form of governmental authority, discretionary exercise of public power is subject to the Courts supervision in order to ensure the paramourcy of the law. Judicial review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere.'**

In the current scenario, the ex parte applicant challenges the Enforcement Notice from the 1<sup>st</sup> Respondent that culminated in the stoppage of her construction in the suit lands. She insists that she was not granted adequate hearing before the said notice was served upon her. In her submissions, the Applicant contended that the Enforcement Notice should be quashed as she was not accorded proper hearing before the said notice was served upon her. Further, that her plans were duly approved by the 1<sup>st</sup> Respondent before she commenced construction on the suit lands. She relied on the case of **Republic Vs Disciplinary Committee of Jomo Kenyatta of Agriculture & Technology (2014) eKLR** and **R Vs Kenya Medical Training College ex parte James Chepkonga Kendagor (2006) eKLR** to support her arguments. The 1<sup>st</sup> Respondent urged the Court to dismiss the instant application and relied on sections 13, 15 and 38 of the Physical Planning Act to support its arguments. It insisted that the Applicant had not exhausted the remedies of appeal set out in the Physical Planning Act before lodging the instant application.

Clause 2 and 3 of the aforementioned Enforcement Notice dated the 21<sup>st</sup> January, 2015 stated as follows:

**'2. Description of development: Construction of multi – family residential flats beyond acceptable building heights.' 3. You are hereby required to STOP all construction works with IMMEDIATE effect and avail all approved drawings to the undersigned within seven (7) days from the date of this notice falling which the County Government of Kajiado may enter the said land and exercise the requirements as outlined herein above and may recover as a civil debt in any court of competent jurisdiction from any related expenses incurred.'**

It is evident from the said Enforcement Notice that the Applicant was directed to stop construction and avail all the approved drawings within seven (7) days to the 1<sup>st</sup> Respondent. The Applicant confirms going for a meeting with her lawyer to the 1<sup>st</sup> Respondent's office but does not state whether she availed the approved drawings as per the said Enforcement Notice.

In its replying affidavit, the 1<sup>st</sup> Respondent annexed copies of the Zoning Regulations for Upper Kapiti Estate Kitengela Town dated January, 2012 which were certified by the District Physical Planning Officer on 12<sup>th</sup> March, 2012 and adopted by the Clerk to County Council of Ol Kejuado on the 22<sup>nd</sup> April, 2012; Letters dated the 1<sup>st</sup> December, 2014 and 17<sup>th</sup> January, 2015 from the Upper Kapiti Plains Estate. As per the Letters from the Upper Kapiti Plains Estate, the residents therein were lodging an objection against the construction on the suit lands and insisted it is contrary to the estate zoned plan. In the letter dated the 1<sup>st</sup> December, 2014 they intimated that the gazette notice in respect of the said plan is at the estate main gate and thus no person could infer ignorance nor assumption.

Section 38 of the Physical Planning Act provides that: '**(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 an enforcement notice on the owner, occupier or developer of the land. (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 discontinuance 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. (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 liaison committee under section 13. (5) Any person who is aggrieved by a decision of the liaison committee may appeal against such decision to the National Liaison Committee under section 15. (6) An appeal against a decision of the National Liaison Committee may be made to the High Court in accordance with the rules of procedure for the time being applicable to the High Court. (7) Any development affecting any land to which an enforcement notice relates shall be discontinued and execution of the enforcement notice shall be stayed pending determination of an appeal made under subsection (4), (5) or (6).'

I note that in the said Enforcement Notice the 1<sup>st</sup> Respondent gave the applicant the period within which to avail her approved plans. As per the Court records, I note the Applicant did not annex the approved plan in her verifying affidavit but only a copy of the form 'PP2' indicating the said Plan was approved. It is hence difficult for the court to decipher which Plan was approved. Further, I note as per the provisions of the Physical Planning Act cited above, there are appeal mechanisms set out for an aggrieved party, before one pursues a recourse in a court of law. From the Applicant's averments, she states that she lodged an appeal with the National Liaison Committee on 4<sup>th</sup> February, 2015. I note the letter dated the 4<sup>th</sup> February, 2015 to the said Committee was sent by the applicant's lawyers messrs Robi Kerato Partners Advocates and received on 5<sup>th</sup> February, 2015. In the said letter, the applicant's lawyers demanded for the National Liaison Committee's intervention within seven (7) days or else the applicant would proceed to lodge for judicial review. I note the application for leave to lodge the instant application for judicial was commenced on the 9<sup>th</sup> February, 2015 barely four days after the demand notice to the National Liaison Committee was sent out. Further, the Applicant has not informed Court of the outcome of the Appeal to the National Liaison Committee but averred in her affidavit dated the 9<sup>th</sup> February, 2015 that the Committee was yet to respond to her complaint.

In the case of **Matanga Tea & Coffee Company Limited Vs. Shikara Limited & Anor (2015) eKLR** it was held that: '**The reason why the Constitution and the law establish different institutions and mechanisms for dispute resolution in different sectors is to ensure that such disputes as may arise are resolved by those with the technical competence and the jurisdiction to deal with them. While the court retains the inherent and wide jurisdiction under article 165 to supervise bodies such as the 2<sup>nd</sup> Respondent, such supervision is limited in various respects, which I need, not go into here, Suffice to say that it (the court) cannot exercise such jurisdiction in circumstances where parties before it seek to avoid mechanisms and processes provided by law, and convert the issues in dispute into constitutional issues when it is not.**'

In relying on the above cited judicial authority and facts as presented, I find the Applicant failed to exhaust the existing remedies as set out in section 38 of the Physical Planning Act before instituting the instant judicial review application.

The Court takes judicial notice of the fact that vide the applicant's lawyer's letter dated the 4<sup>th</sup> February, 2015 to the National Liaison Committee the lawyer confirms there was a multi stakeholders meeting held to discuss the enforcement notice which meeting they attended. She however complains that the officers from the 1<sup>st</sup> Respondent failed to respond to her demands, failed to avail the nature of complaint and refused to receive her demand letter. I note that the Applicant's main contention is that she was not granted a hearing hence the enforcement notice should be quashed. However these averments are contrary to the contents of her lawyer's aforementioned letter to the National Liaison Committee confirming she was accorded a hearing at the multi stakeholders meeting held to discuss the enforcement notice.

It is against the foregoing that I find that the instant application dated the 11<sup>th</sup> February, 2015 is not merited and I dismiss it with costs. I will decline to quash the Enforcement Notice dated the 26<sup>th</sup> January, 2015 and direct the Applicant to first exhaust the remedies as envisaged in section 38 of the Physical Planning Act.

**Dated signed and delivered in open court at Kajjado this 27th day of September, 2018.**

**CHRISTINE OCHIENG**

**JUDGE**