REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

MISCELLANEOUS CAUSE NO. 11 OF 2017

IN THE MATTER OF AN APPLICATION BY MAKUPA TRANSIT SHADE LIMITED FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIONARI AND PROHIBITION

AND

IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

AND

IN THE MATTER OF ARTICLE 40 & 47 OF THE CONSTITUTION OF KENYA

BETWEEN

MAKUPA TRANSIT SHADE LIMITED… ..….INTENDED APPLICANT

AND

COUNTY DIRECTOR OF PLANNING AND ARCHITECTURE, COUNTY

GOVERNMENT OF MOMBASA…............... .INTENDED RESPONDENT

RULING

1. This is the Notice of Motion dated 20th February 2017. It is brought under section 3A of the Civil Procedure Act, Order 53 Rule 1 (4) of the Civil Procedure Rules and the Inherent powers of the court. It seeks orders that ;

a. Spent

b. Order no 2 of the order of this court made and issued on 10th February 2017 in these proceedings and drawn in these terms;

"That leave so granted does operate as a stay of the implementation of the Respondent's suspension of Approval of a proposed land reclamation construction of yard on plot No. 4106/vi/MN dated 27th October, SUBJECT to the Applicant filing the substantive motion within twenty one (21) days of this order" be vacated, set aside and/or unconditionally discharged forthwith.

c. The leave granted to the alleged "INTENDED APPLICANT" or any such Applicant to apply for the orders of certiorai ad prohibition given and issued the same day be similarly sec aside, and or discharged.

d. The exparte chamber summons application dated 9th February 2017 and filed in court on the 10th February 2017 under certificate of urgency be struck out and/or alternatively, be dismissed with costs.

e. Further to prayer (d) above any Notice of Motion filed herein pursuant to the leave granted by the court on the 10th February be similarly struck out and/or in the alternative be dismissed with costs.

f. The costs of this litigation be awarded to the Respondent/Applicant in this motion.

2. The Application as premised on the grounds on the face of the application that:

a. This court has no jurisdiction at this stage to entertain, hear and determine the present proceedings.

b. The present proceedings are premised on the notification of approval of Development issued to Makupa transit shade Limited (herein after referred to as "Makupa") and dated 25th May 2016. This approval of planning permissions was suspended by the letter of 27th October

A perusal of that Development permission with show the same is issued in a statutory form PPA 2 issued under section 33 (i) (a) of the Physical Planning Act and in accordance with the fifth schedule of that Act. Similarly the action of the county government of Mombasa to suspend the Approval permission previously given was done pursuant to powers conferred under it by section 38 (1) of the Act

c. For the undeniable reasons advanced in (b) above the jurisdiction of this court to entertain the present proceedings has not arisen because "Makupa" which initiated the same has not first complied with the provisions of section 9 (2) of the Fair Administrative Action Act, 2015 in so far as the same apply wholly to these proceedings.

d. The leave sought by the so called Intended Applicant is to institute judicial review proceedings against an individual person employee and not against a public body as required by law.

3. The application is supported by the affidavit of Paul Manyala the county director of planning and Architecture, county government of Mombasa sworn on the 20th February 2017.

4. The application is opposed. There is a replying affidavit sworn by David Killoran the Chief Executive Officer of Makupa Transit Shade Limited (Intended Applicant) sworn on the 9th March, 2017.

The respondent (Makupa) also filed grounds of opposition dated 24th February 2017. The grounds are listed as follows;

1. The Respondent's letter dated 27th October 2017 to the Intended Applicant was not an "enforcement notice" as contemplated under section 38(1) of the Physical Planning Act:

For a person to avail himself or herself of the appellate process under section 38 (4) of the Act, the notice must have been given pursuant to section 38(1) thereof. Accordingly the

Intended Applicant could not fall back to or/initiate the appellate procedure stipulated under section 38 (4) thereof for the apparent reason that the letter dated 27th October 2016 does not amount to an "Enforcement Notice"

2. Additionally the letter dated 27th October 2016 which the Respondent contends to be an "enforcement notice" is not in accord with section 38 (1) if the Physical Planning Act (Cap 286 Laws of Kenya) in order to properly trigger the appeal process for reasons that:

a. The Applicant was not accorded an opportunity to be heard by the Respondent prior to issuance of the purpoted "enforcement notice." To contend that the Applicant should have appealed the decision of the Respondents to miss the point by a wide margin. It is the body making the adverse decision that is, the Respondent, which is obliged to afford the party to be affected, that is the Applicant, an opportunity to be heard and not the appellate body.

b. In any event the opposed "Enforcement notice" indicated to take effect "forthwith" (on the same day) in the premises even if the Applicant were to resort to the alternative appellate process stipulated under section 38(4) of the Physical Planning Act, it would not be an equally convenient, beneficial and effective remedy.

3. The respondent appears to have failed entirely to appreciate that prerogative orders like old prerogative writs are issued in the name of the crown (in this instance the Republic") at the instance of the applicant and are directed to the person) who is/are to comply therewith.

Applications for such orders must be instituted and served accordingly upon specific officer(s) who is/are to comply with the orders.

4. Judicial review proceedings are proceedings brought against public officials acting in exercise of their official powers where they act un procedurally and unfairly to grant relief to those affected by the actions or in actions of those public officials.

5. In the instant case the person or public officer to comply with the orders herein, is the county director of planning and Architecture within the county government of Mombasa. As such he is properly impleaded in these proceedings.

6. Leave granted exparte can only be set aside in very clear cut and obvious cases for instance, where it is crisp clear that there are no prospects at all of success.

The Applicants case is definitely arguable and has high prospects of success.

BACKGROUND

5. By an application dated 9th February 2017 brought by way of exparte chamber summons and brought under order 53 Rule 1 (1)(2)(4) of the Civil Procedure Rules, 2010 section 8, 9 of the Law Reform Act, Cap 26 Laws of Kenya, the Application moved the court and sought the following orders;

1. That this application be certified as urgent and be heard exparte in the first instance with service thereof being dispensed with.

2. The Honourable court be and is hereby pleased to grant leave for the Applicant to apply for:

i. An order of certorari to remove into the Honourable court and quash the suspension of. Approval for proposed Land reclamation and construction of yard on plot No. 4106/VI/MN dated 27th October 2016 issued by the Respondent to the Applicant.

ii. An order of prohibition directed at the Respondent her employees, officers, agents and

persons working under her instructions restraining them from interfering and/or enforcing in any way the suspension of Approval for proposed land and reclamation and construction of fyard on Plot No. 4106/VI/MN dated 27th October 2016 being undertaken by the Applicant.

iii. An order of prohibition directed at the Respondent, her employees, officers, agents and persons working under her instructions restraining them from interfering in any way whatsoever with the Applicant's land reclamation and construction of yard on Plot NO. 4106/VI/MN.

3. That leave granted does operate as a stay of the implementation of the Respondent's suspension of Approval for proposed land reclamation and construction of yard on Plot No. 4106/VI/MN dated 27th October 2016

4. Costs of and incidental to this application be provided for.

5. Such further or other relief that this Honourable court may deem just and fit to grand.

On 10th February 2017 the application was presented before Lady Justice A. Amollo who certified the matter as urgent. The judge them granted the following orders; leave to institute judicial review proceedings and specifically;

> 2. "That leave be granted does operate as a stay of the implementation of the Respondents suspension of Approval for proposed Land reclamation and construction of yard on Plot No. 4106/VI/MN dated 27th October 2016 SUBJECT to the Applicant filing the substantive motion within twenty one (21) days of this order."

6. It is against this background that this application dated 20th February 2017 has been brought. Pursuant to the leave granted the substantive motion was filed on 27th February 2017.

APPLICANT'S SUBMISSIONS

7. Mr. Paul O. Buti learned counsel for the Applicant (in the application dated 20th February 2017) submitted that the Development permissions granted to Makupa transit Shade Limited on 25th May 2016 was suspended on the 27th October 2016 by the county government of Mombasa.

That the said permission was granted pursuant to section 30, 33 (1) (a) of the Physical Planning Act, and the authority of the county government to either suspend, revoke or cancel such permission is bestowed upon it by section 38(1) of the same Act. That any dispute arising them from regarding suspension, revocation or cancellation of the development permission must first be resolved in the manner provided in the physical planning act. That any aggrieved party had to go through the appellate procedures provided under section 38 (4) and 13 (1) of the Physical Planning Act.

8.That it is only after the provisions of section 13, 38(4) and (5) of the Physical Planning Act have been fully complied with that a party may prefer an appeal to this court pursuant to section 38 (6) of the Act. That the court can only entertain this matter in its appellate jurisdiction and not original jurisdiction. Further that this court has no jurisdiction to entertain these proceedings.

9. He relied on the case of **Samuel Kamau Macharia Vs Kenya Commercial Bank Limited (2012) e KLR** where the supreme court analyzed the sources of jurisdiction conferred on a court at paragraph 68 it held:

> "A court's jurisdiction flows for either the constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred to it by law.

We agree that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of procedural technical pity. It goes to the very heart of the matter for without jurisdiction the court cannot entertain any proceedings".

10. Further that this court can only exercise its appellate jurisdiction as per section 38 (6) of the Physical Planning Act. He also submitted that the proceedings instituted by the intended Applicant are incompetent since it failed to take the steps provided for under section 38 (4) of the Physical Planning Act. The also relied on the case of **Edward Mzee Krezi Vs Senior Registrar of Titles And Others CA Civil Appeal No 161 of 2009.** He further submitted that he intended Applicant failed to resort to the use of provisions under section 38 (4) and (5) of the Physical Planning Act therefore did not exhaust the procedural requirements of the Law. Further that Section 9 (2) of the Fair Administrative Action Act 2015 bars this court from entertaining the Intendent Applicant's application unless. It first resorts to and exhausts all the internal mechanisms provided by the physical Planning Act. He relied on the case of **Mumo Matemu vs. Trusted Society of Human Rights Alliance (2013) e KLR**. Finally that the orders of leave granted to the Intended Applicant to apply for Judicial review of the decision of the county government of Mombasa were given when the court lacked jurisdiction to issue the same.

RESPONDENT'S SUBMISSIONS

11. Mr. Mugambi learned counsel for the Respondent (in the Application dated 20th February 2017) submitted that the letter from the director of planning and Architecture dated 27th October 2016 to the Respondent was not a valid enforcement notice as contemplated under section 38(1) of the Act for it to invite appellate procedures provided under section 38(4) and (5) thereof. He relied on the case of **Republic –Versus- Nairobi City County expert Gurcham singh sihra And 4 others (2014) e KLR**.

He further submitted that the letter dated 27th October 2016 marked annexure "DK IO" does not state that it is an enforcement notice issued pursuant to section 38 (1) of the Act.

That under section 38(2) of the Act, the enforcement notice must specify 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 for securing compliance with those conditions.

He told the court that no period of compliance is indicated in the letter.

12. He again relied on the case of **Republic –Versus- Nairobi City County exparte Gurcham singh sihra And 4 others (2014) e KLR**. Where it was held that "without a valid notice having been given pursuant to section 38 (1) of the Act, the provisions of section 38 (4) cannot be said to have been triggered".

He submitted further that a party ought to have been invited for a hearing before an enforcement notice is issued. He gave the ingredients of what constitutes a valid enforcement notice. He further submitted that the Director Planning Architecture acted contrary to the rules of natural justice by arriving at the decision to suspend the project approval without giving the Respondent an opportunity to be heard. He relied on the case of **Republic Versus Nairobi City County exparte Gurcham singh sihra And 4 others (2014) e KLR** where it was quoted with approval the holding of **John Fitz Gerald kennedy Omanga Versus The Postmaster general, Postal corporation of kenya and 2 others Nairobi HCMA 997/2003** in which the learned Judge held that :

> **"for a court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very property regarded as a remedy of last resort, though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate".** He submitted that this court is properly seized of jurisdiction to hear and determine this matter.

13. As to whether leave sought against the county director in the department of Planning and Architecture was wrong he relied on the case of **Environmental and Combustion Consultants Limited Versus**

Kenya Pipeleine Co Ltd And 2 otehrs (2006) Eklr where GVOdunga J held,

> "In judicial review application the applicant is always the Respondent rather that the person aggrieved by the decision sought to be impugned …. The rationale for this was given in Mohamed Ahmed Vs Republic (1957) EA 523 where it was held:

The prerogative orders, like the old prerogative writs are issued in the name of the crown (in this instance "the republic") at the instance of the applicant and are directed to the person or persons who are to comply therewith.

Application for such orders must be intuited and served accordingly".

14. He further submitted that judicial review proceedings are proceedings brought against public officials acting in exercise of their official powers where they act unprocedurally and unfairly, to grant relief to those affected by the actions of those public officials.

That in the instant then start case the person or public officer to comply with the orders herein is the county director of the Applicant. As such has properly impleaded in these proceedings.

15. As to whether the court should grant the orders sought in the Notice of Motion dated 20th February 2017 he submitted that this motion cannot stand. He relied on the case of **Doris Cacheri And others Versus County commissioner Kiambu And another (2015) eKLR** where it was quoted with approval the holding of the court in **Nakumatt Holdings Limited Vs Commissioners of Value Added tax (2011) eKLR** in that;

> "Although leave granted exparte can be set aside on an application, that is a very limited jurisdiction and will obviously be exercised very sparingly and on very clear cut cases unless it be contended that judges as a matter of course which is not correct. Unless the case is an obvious one….. and there is therefore no prospects at all of success, we would ourselves discourage practitioners from routinely following the grant of leave with applications to set leave aside".

He prays that the Notice of motion dated 20th February 2014 be dismissed.

ANALYSIS AND DETERMINATION

16. I have considered the Notice of Motion dated 10th February 2017, the supporting affidavit ad the annexures.

I have also considered the grounds of opposition, the replying affidavit and the annexures.

I have given due consideration to the submissions of both counsels.

The issues for determination are:

> i. Whether or not this court has jurisdiction to her and determine this matter.
>
> ii. Does the letter dated 27th October 2016 amount to an "enforcement notice" as contemplated under section 38(1) of the physical planning Act.
>
> iii. Whether the leave sought against the Director Planning and Architecture in the county government of Mombasa was wrong.
>
> iv. Whether or not the proceedings instituted by Makupa are incompetent for failure to adhere to section 38(4) of the Physical Panning Act as read with Article 47 of the constitution and section 9(1) of the Fair Administrative Action Act 2015.

v. Whether or not the court should grant the orders sought in the Notice of motion dated 20th February 2017.

17. The first issue is whether or not this court has jurisdiction to hear and determine this matter.

The application dated 20th February 2017 is brought under order 53 Rules (1) (4) of the Civil Procedure Rules. The Intended Applicant (Makupa) had moved the court under order 53 Rule (1)(3). Rule (1)(3) states:

> "No application for an order of Mandamus, prohibition or certiorari shall be made unless leave therefore has been granted in accordance with this rule"
>
> Subsection (2) states;
>
> "An application for such leave as afore said shall be made exparte to a judge in chambers, and shall be accompanied by a statement setting out name and description of the applicant, the reliefs sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on".
>
> 3. The judge……
>
> 4. The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operates as a stay of the proceedings in question until the determination of the application or until the judge orders otherwise…"

18. The Applicant in the application dated 20th February 2017 contends that this court has no jurisdiction to try this matter. He held the view that if the Respondent was aggrieved by the Applicant's decision then he ought to have appealed to the liaison committee under section 38(4) and (5) of the physical planning Act.

That the Act has provided for an appeal mechanism through the liaison committee under section 38 (4) and (5) of the Act.

That the Act has provided for an appeal mechanism through the Liaison and National Liaison committees therefore his court does not have jurisdiction in the matter but can only deal with the matter at the appellate stage.

19. Section 38 (1) of the physical planning act provides that;

"When it comes to the notice of a local authority that the development of land has been or is being carried out after commencement of this Act without the required development permission having been obtained or that any of the conditions of 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."

38(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 as 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 security 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 any land in the construction of any building or the carrying out of the activities."

38(3) "unless an appeal has been lodged under subsection (4) an enforcement notice shall take effect after the exploitation of such period as may be specified in the notice"

38(4)"If a person on whom an enforcement notice has been served under subsection (1) is grieved by the

notice that may within the period specified in the notice appeal to the liaison committee under section 13"

38(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"

38(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".

20. The Environment and Land court is established by the constitution as a superior court with the status of the High court. Article 162 (2) states;

> "The superior courts are the supreme court the court, of Appeal, the High Court and the courts merit mentioned in clause (2).
>
> 2) "Parliament shall establish courts with the equal status of the High court to hear and determine disputes relating to
>
> > a. Employment and labour relations; and
> >
> > b. The environment and the use and/or occupation of and title to land.

Parliament shall determine the jurisdiction and functions of the court contemplated in clause (2)".

In compliance with Article 162 (2) and (3) of the constitution, parliament did pass the Environmental and land court Act No 19 of 2011 which set up the Environment and land court.

The jurisdiction of ELC as may be noted in Article 162(2) (b) of the constitution is to hear and determine disputes relating to the environment and the use and occupation of and title to land. The jurisdiction of ELC is set out in section 13 of ELC A as follows;

> 1. The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land
>
> 2. In exercise of its jurisdiction under Article 162(2)(b) of the constitution the court shall have power to hear and determine disputes
>
> > a. relating to environmental Planning title tenure boundaries rates, rents, valuations, mining minerals and other natural resources;
> >
> > b. Relating to compulsory acquisition of land;
> >
> > c. Relating to land administration and management;
> >
> > d. Relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land and
> >
> > e. Any other dispute relating to environment and land.
>
> 3) Nothing in this act shall preclude the court from determining applications for redress of a denial, violation or infringement or threat to rights or fundamental freedoms relating to a clean and healthy environment under Article 62, 69 and 70 of the constitution.
>
> 4) In addition to the matters referred to sub section (1) and (2) the court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the court

5………

6…….

7) In exercise of its jurisdiction under this Act the court shall have power to make any order and grant any relief the court deems fit and just including-

a. Interim or permanent preservation orders including injuctions;

b. Prerogative orders;

c. Award of damages;

d. Compensation;

e. Specific performance;

f. Restitution

g. Declarations; or

h. Costs."

21. Section 13 (1) of ELCA provides that this court has both original and appellate jurisdiction to hear all disputes relating to environment and land. The court has unlimited jurisdiction over all issues. It is true that the physical planning Act provides for an appellate procedure under section 38(4) and (5). This however does not prevent any party from invoking the jurisdiction of the court in the first instance.

Article 50 of the constitution guarantees every person a right to fair and public hearing before a court of law or independent body or impartial tribunal or body. I find that the respondent did not err by coming to court instead of going through the appellate procedures provided under the physical planning Act. I find that the court has jurisdiction to handle this matter.

I rely on the case of **Ken Kasinga Vs Daniel Kiplangat Kirui and 5 others Nakuru ELC petition No. 5 of 2013.**

22. As to whether the letter dated 27th October 2016 counts to enforcement notice contemplated under section 38(1) of the Act

Annexure "DK8" to the Intended Applicant's affidavit in the application dated 9th February 2017 is a notice issued by the county government of Mombasa. It is dated 25th May 2016. It is in form PPA2. The heading is "Notification of Approval of the Application for Development permission" it is and addressed to Makupa Transit Shade Limited. By another letter dated 27th October 2016 by Paul Manyala, County Director of planning and Architecture County of Mombasa, Makupa is informed of the suspension of Approval for proposed land reclamation and construction of yard on plot No. 4106/VI/MN. There reasons given as;

> "…… this goes against our condition for approval number (f) not withstanding part of disputed public or private and/or public utility land. Other than the afore mentioned condition, other conditions such as (a) (c) e and (g)".

The letter went ahead to state that Makupa were to stop the development forthwith.

23. I do not wish to go into the reasons given for stopping the development as these will be canvassed in depth during the hearing of the substantive motion. However, at a glance, an enforcement notice under

section 38(2) of the Act ought to specify the development being carried out without permission, conditions alleged to have been contravened, measures required to be taken and within the period specified in the notice.

The letter dated 27th October 2016 requires Makupa to stop to development forthwith. It does not set on the period what measures ought to be taken to comply and within which period. I find that this letter does not comply with section 38(2) of the Act.

I am guided by the case **Republic Vs Nairobi City County exparte Gurcham singh sihra And 4 others (2014) e KLR** where it was held that "for a person to avail himself or herself of the appellate process is under section 38(4) the notice must have been given pursuant to section 38(1) thereof. To make matters worse the notice was served on 6th November 2013 was indicated to take effect on the same day. I am therefore not satisfied that the notice which was served was in accord with section 38(1) of the Act in order to properly trigger the appeal process. In other words I am not satisfied that the alternative process was equally, convenient, beneficial or effective remedy."

24. I am of the view that the letter dated 27th October 2016 to Makupa does not amount to an enforcement notice contemplated in section 38(2) of the Act hence the Respondent was not obliged to go through the appellate process provided for under section 38 (4) and (5) of the Act.

I have warned myself that this issue will be canvassed in depth during the hearing of the substantive motion. For the above reasons I find that the proceedings by Makupa are not incompetent for failure to comply with section 38 (4) and (5) of the Physical Planning Act as read with Article 47 of the constitution and section 9 of the Fair Administrative Action Act, 2015.

I have already dealt with the issue in the proceeding paragraphs.

They were not obliged to go through the appellate process as the notice served did not meet the requirements of section 38 (2) of the Physical Planning Act. I find that the Director of Planning and Architecture is not sued in his personal capacity. Leave is sought against him by virtue of the public office he holds. The notice of Approval and the letter of suspension emanates from his office.

In this regard I find that the Applicant was not sued wrongly.

I am guided by the cases of **Environmental and Combustion Consultants Limited Vs Kenya Pipeline Company Limited And 2 others (2006)e KLR**.

25. Finally, as to whether this court should grant the orders sought in the application dated 20th February 2017, one of the grounds of the application is that leave granted to the Intended Applicant on 10th February 2017 ought to be set aside because the sub startive motion was not filed within twenty one (21) days.

I have perused the court record and find that the substantive motion was filed on 27th February 2017. This is within twenty one (21) days. The order of 10th February 2017 was therefore complied with. In the case of **Doris Gacheri and others Versus County commissioner Kiambu And Another (2015) e KLR** where Odunga J. declined to set aside the leave where the Applicant had an arguable case.

I am also guided by the case of **Aga Khan Education Service Kenya And Republic exparte Ali self And 3 others CA Civil Appeal No 257 of 2003** where the court of Appeal held that; "……………….. we would however caution practitioners that even though leave granted exparte can be set aside in an application, that is a very limited jurisdiction and will obviously be exercised very sparingly and in very clear cut cases unless it be contended that judges of the superior courts grant leave as a matter of course. We do not think that is correct unless the cases is an obvious one, such as, where an order of certiorari is being sought and it is clear to the court that the decision sought to be quashed was made more than six months prior to the applicant coming to court, and there is therefore no prospects at all of success, we

would ourselves discourage practitioners from routinely following the grant of leave with applications to set aside…….

We would also point out that the mere fact that an applicant may in the end have great difficulties in proving his case is no bases for settling aside leave a treaty granted".

26. Before I conclude, section 9(2) of the Fair Administrative Action Act 2015 is clear. The Respondent (Intended Applicant in the application dated 9th February 2017 would not exhaust the internal mechanisms available within section 38(4) and (5) of the Physical Planning Act. The reasons being according to the letter dated 27th October 2017 "Makupa" was to comply "forthwith".

I find that the Applicant has failed to place before this court any material to suggest that the Respondent's case is an obvious one with no prospects of success.

27. I find that Makupa appears to have an arguable case. They allege they were not given an opportunity to be heard before the decision to suspend the development was reached.

28.All these facts were presented before the Honourable Lady Justice A. Amollo who found it fit to grant leave.

I see no reason to interfere with the said orders. The applicant will have an opportunity to contest the Respondent's case in the substantive motion when the matter goes back to Honourable Judge A. Amollo.

29.The upshot of the matter is that I find no merit in the application dated 20th February 2017 and the same is dismissed.

30. Accordingly, I decline to set aside the leave.

31. I also find it prudent to keep the stay in place pending the hearing of the substantive motion.

32. Costs shall be in the cause. It is so ordered.

Dated and signed at Mombasa on the 24th day of July 2017

L. KOMINGOI

JUDGE

24/7/2017

Ruling dated and delivered in open court on the 24th July 2017 in the presence of Mr. P. Buti for the Application (in the appeal dated 20th February 2017) and Mr. Thiaka for Mr. Munyao for the Respondent and the Court Assistant Koitamet.

L. KOMINGOI

JUDGE

24/7/2017

Mr. Paul Buti apply to be supplied with a certified copy of the ruling.

L. KOMINGOI

JUDGE

24/7/2017

Order: The certified copy of ruling to be supplied to all parties at their expense.

L. KOMINGOI

JUDGE

24/7/2017