



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS CIVIL APPLICATION NO. 56 OF 2017**

**(formerly MACHAKOS HCCC MISC. APPLICATION NO. 20 2014 (JR))**

**IN THE MATTER OF ORDER 53 RULE 1 OF THE CIVIL PROCEDURE ACT CAP 21**

**AND**

**IN THE MATTER OF THE PHYSICAL PLANNING ACT CAP. 286**

**AND**

**IN THE MATTER OF AN ENFORCEMENT NOTICE**

**AND**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE COUNTY GOVERNMENT OF KAJIADO.....RESPONDENT**

**EX PARTE APPLICANT:.....MOHAMED ABDI GUHAD**

**JUDGEMENT**

**Introduction**

By a Notice of Motion dated 16th October, 2014, the applicant herein, **Mohamed Abdi Guhad** , seeks the following orders:

1. The Court be pleased to grant Judicial Review Orders of Certiorari to quash the enforcement notice issued against the applicant on 19th August, 2014 with respect to LR. 1820 B/Saina Annexe.
2. The Court be pleased to grant Judicial Review orders of prohibition to prevent the respondent from acting upon the enforcement notice issued against the applicant on 19th August, 2014 with respect to LR. 1820 B/Saina Annexe or in any other way demolishing or interfering with the applicant's ownership and use of the said premises.
3. The costs of this application.

4. Any other relief deemed expedient in the circumstances.

## **Facts**

The application was supported by the grounds set out in the Statement attached hereunder and the grounds which in summary are that the Respondent allotted the ex parte Applicant the suit parcel to be used for a residential development. The ex parte Applicant duly applied for and was granted planning approval by the said County Government of Kajiado to construct a residential house, and the applicant thereafter proceeded to construct a house at the cost of Kshs. 16 million, which house is complete. The Respondent has now issued an Enforcement Notice claiming that the land is reserved for agricultural demonstrations with the implicit threat to enter upon and demolish or otherwise interfere with the ex parte Applicant's development. It is manifestly unjust and irrational for the respondent to allot the ex parte applicant land for use as a residential development, then grant planning approvals only to turn round and claim the land is for another use.

The Application is supported by the affidavit of MOHAMED ABDI GUHAD (ex parte applicant) dated the 16th October, 2014 where he verified the truthfulness of the facts set out in his Statement, and deposed that he is the owner of Plot No. 1820 B/Saina Annex which was allocated to him by the defunct Town Council of Kajiado on 2nd November, 2012 and specifically upon the condition that it was to be for residential development. He states that he applied for planning permission for construction of a residential house and on 29th November, 2013 he was granted the requisite approval by the County Physical Planning Department and embarked on construction of four apartments at the cost of Kshs. 16 million. He avers that on 20th August, 2014 he was shocked when he was called by the construction supervisor that a notice had been dropped by the Respondent demanding that he ceases construction alleging the land is for agricultural demonstration. He affirms that he was surprised by the turn of events since he was allocated the plot for residential development and he had made all the necessary applications, obtained planning approvals/permissions and he is wondering why the Respondent would wait for him to construct, then suddenly claim his development is illegal.

He claims that when he made an Appeal to the Liaison Committee as stated in clause 5 of the Enforcement Notice and as per the provisions of the Physical Planning Act and went to lodge it, he was informed by Mr. Swaleh the Director of Physical Planning at the County Government Offices that the committee does not exist and that they will not accept nor entertain the matter further but he will have to move to court. He is apprehensive that the County Government of Kajiado that gave him the approvals will now demolish his buildings.

The Respondent opposed the application and filed a replying affidavit sworn by KENNEDY OLE KEREI who is its County Secretary where he deposes that while the ex parte Applicant claims ownership of plot known as LR No. 1820 B/ Saina Annex by virtue of a purported letter of allotment issued by the defunct Town Council of Kajiado on 2nd November, 2012, the said allocation and transfer of the suit land to the ex parte Applicant was patently contra statute, illegal and null and void ab initio as the same was undertaken during the transition period in contravention with the provisions of section 35 of the Transition to Devolved Government Act 2012 which came into force on 9th March, 2012. Further that under Section 35 (1) of the said Act, the Respondent being a local authority was prohibited and barred from transferring any assets during the transition period. He states that no approval for the purported alienation and transfer of the suit land to the ex parte applicant was sought or obtained from the Transition Authority, hence rendering the transaction invalid and incapable of conferring any interest, benefit or right on the ex parte applicant. He claims that the entire proceedings herein taken by the ex parte applicant seeking judicial review orders are entirely misconceived and the same do not lie as the ex parte Applicant has not demonstrated a case to warrant issuance of judicial review orders. He reiterates that the decision taken by the Respondent to issue the Enforcement Notice dated 19th August, 2014 cannot be questioned or quashed by way of judicial review proceedings. Further that the ex parte Applicant has not demonstrated that there are no other alternative remedies available to him apart from judicial review remedies including the appellate process provided for under the Physical Planning Act Cap 286. He insists that in serving the Enforcement Notice, the Respondent was doing no more than exercising its statutory mandate under the Physical Planning Act in the interests of safeguarding the rights

of public in general with respect to what is manifestly public utility land. He further avers that as expressed in the Enforcement Notice, the suit land could not be lawfully private property over which development permission could be sought nor obtained by the ex parte applicant, but it forms part of a larger parcel of land owned by the Respondent, which has always been used as a demonstration farm by the defunct County Council of Ol Kejuado and was not available for allocation by the Town Council of Kajiado to the ex parte applicant or any other person whatsoever as it did not have proprietorship rights thereto. He further states that the purported development permission was on the face thereof at condition number 3, granted on the understanding that the suit land did not constitute a disputed public utility and the Enforcement Notice was issued upon the ground that the purported plots lies within public utility land used as demonstration farm. He asserts that the ex parte Applicant has not produced any map or plan whatsoever to support the purported allocation of the public utility land and has not furnished court with any evidence to show existence of Plot 182 B/Saina Annex on the ground as claimed.

He maintains that from the purported letter of allotment, the ex parte applicant did not pay any premium in consideration of the said allocation of the suit land and thus cannot claim any protection under the doctrine of innocent purchaser for value without notice of and defect. He affirms the suit land was part of demonstration land which was enclosed with a fence and the approval obtained by the ex parte applicant was irregularly obtained as it is also inexplicable how the approval was applied for on 29th November, 2013 and granted on the same date, yet this is a process involving scrutiny and takes considerable time to complete. Further that there was no meeting on 29th November, 2013 to consider development applications when the approval was purportedly obtained. He further asserts that the ex parte applicant has not exhibited the purported application for approval pursuant to which development permission was issued and neither has he exhibited the duly approved plans/ drawings in respect thereof. He states that whilst the approval purportedly granted permission to build a residential development on the suit land, it is inexplicable how the ex parte applicant could construct four (4) apartments at the purported cost of Kshs. 16 million as claimed, without providing any evidence, which figure differs with the Kshs. 6 million disclosed in the Appeal to the Physical Planning Liaison Committee.

Both parties filed their respective submissions which were highlighted on 19th July, 2017.

## **Submissions**

### ***Ex Parte Applicant's submissions***

Mr. Rombo Counsel for the ex parte Applicant reiterated the facts of the case and submitted that for the Respondent to state that the suit land is for demonstration is an abuse of power. He stated that the County is estopped from claiming the land is for agricultural demonstration purposes and relied on the case of ***Judicial Commission of Inquiry into Goldenbag Affairs & 2 others Ex parte George Saitoti*** at Page 42 clearly states when legitimate expectation arises. The County gave the ex parte applicant allotment and all permission and he had legitimate expectation to develop the land. He relied on the principle of estoppel which is enforced under section 2 of the Evidence Act. He submitted that the County Government is estopped from denying validity of allotment. He further submitted that Section 35 of Transition of Devolved Government Act 2012 is clear on position as this is not a transfer of assets but an allotment which gave the ex parte applicant 99 years lease and he did not have a duty to apply for consent. He insists Section 35 will hence not apply.

Further that the said Act does not stop tenancy agreement, while the Enforcement Notice did not state anything about the devolved or Transitional Authority. He insists matters raised in the Respondent's submissions are extraneous while the issue before court is about the Enforcement Notice. He further submitted that Judicial Review concerns the process and not the decision itself and the Court should exercise discretion and power to grant justice to ex parte Applicant.

Mr. Botani for the Respondent submitted that on breach of statute and public interest, the land in question is not subject to allocation as it was used for agricultural demonstration. He referred to section 35 of the Transition to Devolved Government Act and submitted that since there were no approvals, the alienation is null and void. He further stated that Letters of Allotment do not provide for payment of premiums. He

insisted that the Judicial Review proceedings herein were inapplicable because judicial review is commenced to review the decision making process while in the instant application the ex parte Applicant is only questioning the Enforcement Notice dated 19th August, 2014. He relied on the case of ***Municipal Council of Mombasa versus Republic & Umoja Construction Limited*** and stated that the ex parte Applicant had failed to show court that the necessary statutory procedures were not followed as provided under the Physical Planning Act. He further submitted that the ex parte Applicant had not exhausted the available remedies which included an Appeals mechanism as provided for under the Physical Planning Act. He further relied on the case of Ambrose Odwaya Onyango.

On the question of estoppel, he stated that the Respondent cannot validate an illegality as the allotment of land failed to adhere to the legal procedures. He averred that on the issue of legitimate expectation, it can only be used to cure acts which are clear and not in contravention of statutes. He said the land was not available for private use other than a public utility and referred Court to annexure "MAG 2" which showed application for approval was made on 29th November, 2013, the same date the said approval was granted. He further submitted that the authenticity of the allotment was doubtful as it requires scrutiny and approval of the Respondent and that condition no. 3 was clear as the land should not be part of disputed public utility. Further that application should have failed in the first instance and public interest should have prevailed.

Rombo reiterated that Letter of Allotment has several conditions and it is not the ex parte Applicant to tell Respondent conditions required. He insisted it is clear ex parte Applicant followed the steps and made an appeal but was turned away. He submitted that the Respondent has not shown what was illegal in the allotment or any zoning map to show land was for public utility. Further that application and approval made on one day does not make the allotment illegal and irregular. He stated that the County Government approved the plan and maybe they should compensate the ex parte Applicant as he has built a house way up to the roof.

### **Analysis and Determination**

I have considered the issues raised, the affidavits both in support of and in opposition to the application, the submissions and authorities relied upon. The following are the issues for determination:

- Whether the Enforcement Notice issued by the Respondent is legal
  
- Whether the Ex parte applicant was granted a forum by the Respondent to appeal against the Enforcement Notice

The ex parte applicant claims to have been legally allotted the suit land on 2nd November, 2012, after which he obtained approval from the Respondent on 29th November, 2013 to construct thereon but the Respondent later served him with an Enforcement Notice issued on 19th August, 2014 with respect to LR. 1820 B/Saina Annexe. The ex parte Applicant states that when he sought to Appeal to the Liaison Committee in accordance with the Physical Planning Act, he was denied such a forum and advised to proceed to court by a Mr. Swaleh. The Respondent on other hand contends that the allotment was an illegality as it was done during the transition period when there was a moratorium over the assets of the County Government. The Respondent has relied on section 35 of the Transition to Devolved Government Act to support its claim.

Section 35 of the Transition to Devolved Government Act stipulates as follows:

***'(1) A State organ, public office, public entity or local authority shall not transfer assets and liabilities during the transition period.***

***(2) Despite subsection (1), a State organ, public office, public entity or local authority shall—***

***(a) during Phase One, transfer assets or liabilities with the approval of the Authority, in consultation with the National Treasury, the Commission on Revenue Allocation, the***

*Ministry of Local Government and the Ministry of Lands; or*

*(b) during Phase Two, transfer assets or liabilities with the approval of the Authority, in consultation with the National Treasury, the Commission on Revenue Allocation and the Cabinet Secretary responsible for matters relating to intergovernmental relations; and*

*(c) transfer immovable property, with the approval of the Authority, in consultation with the National Treasury, the Commission on Revenue Allocation and the Cabinet Secretary responsible for matters relating to intergovernmental relations and lands.*

*(3) The Authority may, on its own motion or on a petition by any person, review or reverse any irregular transfer of assets or liabilities in contravention of subsection (1).*

*(4) Any transfer of assets or liabilities made in contravention of subsection (1) shall be invalid.*

In so far as these provisions are very clear in terms of how county assets were supposed to be handled during the transition period, I will not delve into the ownership of the suit land at this juncture or whether the letter of allotment was legal or not. Since this is a judicial review I will only tackle whether the ex Parte Applicant was accorded a fair hearing after the Enforcement Notice was served upon him.

**Lord Diplock** in the case of **Council for Civil Service Unions vs. Minister for Civil Service [1985] A.C. 374, at 401D** clearly set the purview of judicial review 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 I would call ‘illegality’, the second ‘irrationality’ and the third ‘procedural impropriety’...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 ‘Wednesbury unreasonableness’...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.”**

I note that on 29th November, 2013 the ex parte Applicant was granted the requisite approval by the County Physical Planning Department and he embarked on construction of four apartments at the cost of Kshs. 16 million. I also note that on 20th August, 2014 the ex parte Applicant was served with an Enforcement Notice that he ceases construction because it was meant for agricultural demonstration. I note that the ex Parte Applicant claims that when he sought to lodge an appeal to the Liaison Committee as stated in clause 5 of the Enforcement Notice and as per the provisions of the Physical Planning Act, he was unable to lodge the Appeal as he informed by Mr. Swaleh the Director of Physical Planning at the County Government Offices that the Liaison committee does not and that they will not accept nor entertain the matter further and he will have to move to court. All these averments are not controverted by the Respondent who state that the allotment was an illegality as it was done during the moratorium and the land in question is for agricultural demonstration and not residential.

In the case of **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**, it was held that:

**“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision**

**itself such as whether there was or there was not sufficient evidence to support the decision... It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but it a statutory body which can only do what is authorised by the statute creating it and in the manner authorised by statute.”**

In relying on the case above, I will not go to the merits of the decision of the Respondent. I find that the ex parte Applicant was indeed not accorded a fair hearing against the Enforcement Notice as stipulated by the Physical Planning Act. It is unfortunate that the ex parte Applicant was not even allowed to lodge the Appeal with the Liaison Committee as he was told it was not in place. Despite the moratorium, there is no legal provision that indicated that a Liaison Committee which is an establishment by the Physical Planning Act should not be in place. The question of the validity of the letter of allotment and approvals are issues best determined in a civil suit and not at this juncture.

In the circumstances, I find that the ex parte applicant's Notice of Motion application dated 16th October, 2014 is merited and allow it as prayed. The Enforcement Notice issued against the applicant on 19<sup>th</sup> August 2014 in respect to LR NO. 1820 B/Saina Annex be and is hereby quashed.

**Dated signed and delivered in open court at Kajiado this 6<sup>th</sup> day of November, 2017.**

**CHRISTINE OCHIENG**

**JUDGE**

**REPRESENTATION.**

Wafula holding brief for Rombo & Co. Advocate for respondents

No appearance for Applicant.

Court Assistant - Mpoye