



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MALINDI

JUDICIAL REVIEW MISC.APP. 13 OF 2013

FRANCI LIMITED.....EX PARTE APPLICANT

=VERSUS=

THE DEFUCT MUNICIPAL COUNCIL OF MALINDI

THE COUNTY OF KILIFI

THE COUNTY CHIEF OFFICER OF KILIFI.....RESPONDENTS

AND

GORDON HELLIER & SONS LTD.....INTERESTED PARTY

JUDGMENT

Introduction

1. What is before me is the *Ex-parte* Applicant's Notice of Motion dated 16th September 2013 seeking for the following prerogative orders:
 - i. **THAT an order of mandamus do issue and be granted by the Honourable Court directing and compelling each and all the Respondents to comply with the Court Orders issued on 7th September 2012 in Malindi High Court Civil Suit No. 37 of 2007: Franci Limited Vs Gordon Heller & Sons Limited and more particularly to execute the terms of the enforcement notice to the extent that the 1st Respondent had failed to approve the Interested Party's application approval.**
 - ii. **THAT the costs of this application and the entire suit be provided for.**
2. The Application is grounded on the Verifying Affidavit and the statutory Statement dated 12th September 2013.

The Ex-parte Applicant's case:

3. According to the *Ex parte* Applicant's verifying Affidavit, she filed a suit on 16th August 2007 seeking for temporary orders of injunction restraining the Defendant, who is the Interested

Party herein, from carrying out development or construction works on plot number 772 in Malindi HCCC. No. 37 of 2007.

4. Judgment was entered into in the said matter in favour of the *Ex-parte* Applicant. In the Judgment, the court restrained the Interested Party from carrying on with development of the second floor until it gets a decision from the defunct Malindi Municipal Council, the 1st Respondent herein.
5. The *Ex-parte* Applicant has deponed that the defunct Malindi Municipal Council was directed by the court to act on the Interested Party's application within 30 days from the date of the Judgment failure to which the defunct Municipal Council of Malindi was to enforce the Notice of Removal it had issued.
6. The *Ex-parte* Applicant finally deponed that his advocate wrote to the Respondents demanding them to comply with the order issued on 7th September 2013 in Malindi HCCC NO. 37 of 2007 but the Respondents never responded.
7. In its Supplementary Affidavit filed on 30th January, 2014, the *Ex-parte* Applicant deponed that the allegation by the 1st Respondent that there is no decree is baseless and that in fact, the Respondents have made several correspondences in regard to the issue in question and the fact that the Respondents issued to the Interested Party with an Enforcement Notice dated 6th December 2013 is evidence of their knowledge of the court order.

Respondents' case:

8. The County Secretary of the 2nd Respondent deponed in his Replying Affidavit sworn on 4th December 2013 that the 1st Respondent was not a party in Malindi HCCC No. 37 of 2007; that the 1st Respondent was never served with the order or decree in the primary suit requiring specific compliance on its part and that the Respondents have never been served to date with the decree in Malindi HCCC No. 37 of 2007.
9. The 2nd Respondent's County Secretary finally deponed that this court has a complete mechanism of effecting the execution of its orders and decrees which must be complied with.

The Interested Party's case:

10. The Interested Party filed his Replying Affidavit on 31st January 2014. The Interested Party deponed that the 1st Respondent was not a party in the parent suit; that the mal-intentions of the *ex-parte* Applicant are to have the development made by the Interested Party demolished and that the discretion of the 1st Respondent in the circumstances was being interfered with and its decision making process poisoned by the *malafides* demonstrated by the *Ex-parte* Applicant.
11. It is the Interested Party's deposition that the *Ex-parte* Applicant is seeking to force the Council that found itself in error of section 33(2) of the Physical Planning Act to order for the removal of the development and that had the 1st Respondent acted on the application for development approval presented to it in 2006, the conflict between the applicant and the Respondent could have been avoided.

Submissions:

12. The parties' advocates appeared before me and made oral submissions. Ms. Opiyo, counsel for the *Ex-parte* Applicant submitted that according to the provisions of section 29 of the Physical Planning Act, a local authority has the power to prohibit and control the use of land. Counsel submitted that the same Act at Section 30 prohibits any person from carrying out development without the approval of a local authority. In the event that a person carries out development without the approval of the local authority, the local authority may serve an enforcement notice on the person.
13. Counsel submitted that the Respondents' are under an obligation to enforce the notice that had earlier been issued by the 1st Respondent in line with the Judgment of the court of 9th August 2012.

14. According to counsel, the Interested Party was supposed to forward the original documents for the purposes of getting approval which she did not do and consequently an enforcement notice was issued on 6th December 2013. It is the position of the *Ex parte* Applicant's advocate that because the Interested Party's application for development was not approved within 30 days as ordered by the court, then the Respondents should enforce its "enforcement notice". It does not matter, it was submitted, that the Interested Party was granted an approval on 17th December 2013. Counsel finally submitted that in any event, there was no evidence that the procedure stipulated in the Physical Planning Act was followed before the approval of 17th December 2013 was granted.
15. Mr. Sichangi, counsel for the Respondents submitted that the Respondents were not parties in HCCC. No. 37 of 2007. According to counsel, the Applicant should have extracted the decree and served it upon the Respondents.
16. Counsel submitted that court orders are not enforced through letters but by way of serving them. Counsel finally submitted that the Respondents have now complied with order of the court.
17. Mr. Ole Kina, counsel for the Interested Party submitted that the Application has been overtaken by events. Counsel stated that the Interested Party cannot be faulted for the delay in having his application for development approved.
18. It was the position of counsel that by the time the Judgment in Malindi HCCC No. No. 37 of 2007 was delivered, his client had made an application for approval of the developments and submitted the original plans. The Council had to either approve or reject the application for development within 30 days in accordance with the order of the court.
19. In any event, it was submitted, the Respondents have complied with the Judgment of the court albeit after 30 days.

Analysis and findings

20. The *Ex parte* Applicant is seeking for an order of Mandamus directing and compelling the Respondents to comply with the court order issued on 7th September 2012 in **Malindi High Court Civil Suit No. 37 of 2007: Franci Limited Vs. Gordon Heller & Sons Limited** and more particularly to execute the terms of the enforcement notice to the extent that the 1st Respondent has failed to approve the Interested Party application for development.
21. The Judgment of Omondi J. in Malindi HCCC. No. 37 of 2007 stated as follows:

"Since the development has stalled for a long time, the council is directed to act on the application and communicate within 30 days from today in compliance with the provisions of the Physical Planning Act. It follows that if the council fails to approve the application then the council (the 1st Respondent) be at liberty to execute the terms of which notice had been issued regarding the removal of that extension."

22. It is obvious from the Judgment of the court that the Interested Party, who was the Defendant in HCCC. No. 37 of 2007 had already made an application to the 1st Respondent herein for the approval of the development which had stalled. The Council was directed to either approve or reject the Interested Party's application within 30 days.
23. I say so because the judge at paragraph 40 of the judgment held as follows:

"I have no doubt in my mind that this portion of the development was done without approval. The remedy in my view lies in the defendant following up with the local authority the application for approval of that extension since Pw4 confirmed that to date that provisional approval has not been acted upon....."

24. It is not in dispute that the Council, the 1st Respondent, was not a party in HCCC. No. 37 of 2007. It would appear that the 1st Respondent was never "formally" served with the judgment/decreed of the court directing it to approve or reject the Interested Party's application within 30 days. There is no affidavit of service before me to that effect. According to the Judgment, the 1st

Respondent was supposed to execute an enforcement notice it had issued earlier on if it rejected the Interested Party's application.

25. It would appear that the *Ex-parte* Applicant informed the 1st Respondent about the Judgment vide a letter. In its advocate's letter dated 19th October 2012, the Applicant seems to have learnt that the Interested Party's application had been approved without following the law. The *Ex-parte* Applicant demanded that the Council should execute its enforcement notice.
26. **The Halsbury's Laws of England, 4th Edition volume 1 at page 11** addresses the scope of an order of Mandamus as follows:-

“The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a Mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a Mandamus cannot command the duty in question to be carried out in a specific way.”

27. Under the Physical Planning Act, the Respondents have the discretion to approve or reject applications for developments within their areas of jurisdiction. It is trite that the discretion by the Respondents has to be exercised judiciously. No evidence has been placed before this court to show that the Respondents did not exercise their discretion judiciously when they approved the Interested Party's application for the development of the 2nd floor on 30th December 2013 and this court cannot interfere with that discretion.
28. It may be true that the said approval was not done in accordance with the provisions of the Physical Planning Act. If that is the case, the *Ex parte* Applicant's remedy is to move the court appropriately to quash the said approval.
29. The Respondents cannot be faulted for not approving the Interested Party's application within 30 days as ordered by the court because there is no evidence that they were served with the Decree. The mere fact that the Applicant informed the 1st Respondent about the order vide a letter is not enough. A party can only be accused of not obeying a court order if it is shown that the order was indeed served upon it. No such evidence was placed before this court. In the circumstances, the court cannot compel the Respondents to comply with that which they were never served with in view of the fact that they were not parties to the suit.
30. For the reasons I have given above, I dismiss the *Ex-parte* Applicant's Application dated 16th September 2013 with costs.

Dated and delivered this 14th day of **March**, 2014.

O.A. Angote

Judge