



Republic v County Director Land & Physical Planning Officer, Nakuru & 2 others; Wanjigi (Exparte Applicant) (Environment and Land Case Judicial Review Application E009 of 2023) [2024] KEELC 1494 (KLR) (14 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1494 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND CASE JUDICIAL REVIEW APPLICATION E009 OF 2023
A OMBWAYO, J
MARCH 14, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

**THE COUNTY DIRECTOR LAND & PHYSICAL PLANNING OFFICER,
NAKURU 1ST RESPONDENT**

NAKURU COUNTY GOVERNMENT 2ND RESPONDENT

JOSEPH MWANGI MURAYA 3RD RESPONDENT

AND

JOHN MBUGUA WANJIGI EXPARTE APPLICANT

JUDGMENT

1. This is a Judicial Review application brought under the provisions of Order 53 Rule 3 of the Civil Procedure Rules and Sections 8 and 9 of the *Law Reform Act*. Leave to commence the Judicial Review Proceedings was obtained on 16th November, 2023. The Notice of Motion was filed on 4TH December, 2023.
2. The ex parte applicant seeks for the following orders;
 - a. An order of mandamus compelling the 1st and 2nd Respondents to grant approval to the Applicant’s application concerning the intended construction of a perimeter wall on the parcel number Naivasha Town Block 2/859.
 - b. An order of mandamus compelling the 1st and 2nd Respondents their officers, servant, agents and persons acting under their directions to honor the court’s finding in Nakuru Environment



and Land Court No. 258 of 2016 that the Applicant is the absolute proprietor of all that parcel of land known as Naivasha Town Block 2/859 and to accord him full rights as such.

- c. A prohibitory Order restraining the 1st and 2nd Respondents their officers, servants, agents and persons acting under their directions from entering remaining thereon, frustrating, defeating or in any other manner interfering with the Plaintiff's ownership, enjoyment and possession of the property known as Naivasha Town Block 2/859.
 - d. A prohibitory Order restraining the Respondents their officers, servants, agents and any other persons acting under their direction from disseminating falsehoods, participating or inviting participation or any process intended for entry remaining thereon or interfering with the Plaintiffs ownership of Naivasha Town Block 2/859.
 - e. An order requiring that the Respondents do pay monetary compensation to the Applicant for damages incurred from unlawful demolition of the perimeter wall partially constructed by the Applicant on Naivasha Town Block 2/859.
 - f. An order that costs of this application and the Application for leave be borne by the Respondents.
3. The application is supported by the grounds on its face and the supporting affidavit of John Mbugua Wanjigi sworn on 27th November, 2023. He deponed that he is a representative of the estate of Paul Wanjigi Njoroge. That the said Paul Wanjigi Njoroge (deceased) was the owner of land parcel No. Naivasha Town Block 2/859 and was issued with a lease on 29th March, 2012. That the ex parte applicant is now the registered owner of the suit property through transmission. That the said Paul Wanjigi Njoroge (deceased) had intended to develop the suit property and on 27th April, 2012 he was granted permission to fence it by the Municipal Council of Naivasha who was the predecessor of the 1st respondent.
 4. He also deposes that his late father was unable to fence the property because there were trespassers on the land so he filed a suit and sought for eviction orders. That his late father filed ELC Case No. 258 of 2016 and the court in its judgement delivered 19th January, 2022 affirmed that Paul Wanjigi Njoroge (deceased) was the owner of the suit property. That upon the trespassers leaving the land, he applied for approval for construction of a wall on the suit property. That upon confirmation that all his documents were in order he was asked to pay all the requisite charges which he paid.
 5. He further deposed that after he received oral confirmation from the Naivasha Sub-county Officers, he commenced construction of the wall which construction was stopped by the letter dated 19th December, 2022 addressed to a 'Paul Wanjigi Kamura' from the Physical Planning Office. That he received another letter dated 21st December, 2022 informing him that his application had been deferred pending confirmation of the plot area. That without any notice, the 1st and 2nd respondents and their agents invaded the suit property and demolished the partly constructed wall. That he believed that the demolition was maliciously instigated by the 3rd respondent who is a member of the 1st respondent's County Assembly. That this is because he had been seen surveying the suit property and that on the date of the demolition he was present. That as a result of the demolition, he suffered a loss of Kshs. 1,551,600/=. That his caretaker attempted to construct a temporary shelter on 21st February, 2023 which was stopped by the 1st and 2nd respondents. That he has not received any other information from the 1st and 2nd respondents despite sending reminders through his advocates and making several visits to the said offices.



6. He deposed that he cannot carry out any developments on the land without risking demolitions and that the conduct of the 1st and 2nd respondents constitutes malicious abuse of administrative powers conferred upon the 1st and 2nd respondents by law.
7. The 1st and 2nd respondents filed a replying affidavit sworn by Jackson Kibet on 12th January, 2024 on 15th January, 2024. He deposed that he was a physical planner working with the Nakuru County Government. That the county government is mandated by *the Constitution* of Kenya, the County Government Act and the Physical Planning and Land Use Act, 2019 to oversee issues relating to the planning and development within the County. That before persons begin to develop a parcel of land, they have to obtain approval from the 1st and 2nd respondents. That the 1st and 2nd respondents do not issue verbal approvals as there is always a formal document confirming approval or rejection of the same.
8. He deposed that because the Ex parte Applicant continued the construction of the perimeter wall without the requisite approval, a stop order was issued on 19th December, 2022 directing him to discontinue the construction pending review of his development application. That the ex parte applicant's application together with other applications were subjected to the Technical Committee for approval but it was not approved pending submission of the plot area Part Development Plan by the ex parte applicant. That the decision was conveyed to the ex parte applicant vide the letter dated 21st December, 2022. That to date the ex parte applicant has not availed the Part Development Plan which was used to allocate the land. That from the office of the 1st respondent, there are no records relating to the allocation of Naivasha Municipality Block 2/859 which could have advised on the original land use as it is a requirement in the planning approval process.
9. It is his deposition that he is advised by his advocates on record that the ex parte applicant's substantive motion is fatally defective to the extent that it does not disclose what decision or action is sought to be quashed or what contemplated decision or action is sought to be prohibited. That he is also advised that the ex parte applicant is seeking to challenge the merits of their decision and yet judicial review is not concerned with the merits of the decision but with the decision-making process. That the 1st and 2nd respondents did not participate in the demolition of the perimeter wall and cannot be forced to compensate the ex parte applicant for a demolition they were not a party to.
10. In response to the 1st and 2nd respondents replying affidavit, the ex parte applicant filed a further affidavit sworn on 25th January, 2024. He reiterated the averments in his supporting affidavit and deposed that if at all the construction was contrary to the provisions of the Physical Planning and Land Use Act, 2019, the 1st and 2nd respondents ought to have proceeded lawfully in the manner prescribed under the act and not to send askaris to demolish the wall.
11. He also deposed that neither the minutes nor the letter that was annexed by the 1st and 2nd respondents indicate who was to confirm the plot and the part development area or how it was to be done. That this was in sharp contrast with minute 3/20/12/2022 whereby in connection with Kiambogo/Kiambogo Block 2/22049 to 22085, the technical committee issued clear, express directions to the applicants. That the 1st and 2nd respondents survey department which was part of the Technical Committee was best placed to carry out the investigation and report the findings to the committee. He reiterated that his advocates on record made several visits to the 1st and 2nd respondent's offices and wrote various letters which were not responded to.
12. He further deposed that the 1st and 2nd respondents were dishonest when they denied involvement in the demolition of the wall which exercise was carried out in broad daylight by uniformed county askaris



who were captured photographically. That his application for judicial review has merits and he prayed that the same be allowed with appropriate orders.

Submissions

13. The ex parte applicant did not file any submissions to the application while the 1st and 2nd respondents filed their submissions on 13th February, 2014.
14. The 1st and 2nd respondents identified the following issues for determination;
 - a. Whether the applicant's application warrants an order of mandamus and prohibition.
 - b. Whether the applicant should be compensated for damages.
 - c. Who should bear the costs of the suit?
15. On the first issue, the 1st and 2nd respondents relied on the case of Council of Civil Servants Union vs Minister for the Civil Service [1985] 2 AC as was cited in Ernest B.M. Oranga v Kakamega County Commissioner of Cooperatives & 6 Others [2016] eKLR and submitted that the court has to satisfy itself that the ex parte applicant demonstrated that the Respondents actions were marred with illegality, irrationality and procedural impropriety.
16. The 1st and 2nd respondents also relied on the case of Kenya National Examinations Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR, Section 57 of the Physical Planning and Land Use Act and submitted that before a person commences development of a parcel of land, approval has to be first obtained. In the present matter, the ex parte applicant failed to obtain the necessary approval and commenced construction. They argued that because the ex parte applicant commenced construction without the approval of the respondents, a stop order was issued directing him to stop construction pending review of his development application.
17. The 1st and 2nd respondents further submitted that the ex parte applicant's application was subjected to the Technical Committee for approval but it was not approved pending submission of the Part Development Plan by the ex parte applicant which was never availed.
18. The Respondents argue that there are no records relating to the allocation of Naivasha Municipality Block 2/859 which could have advised on the original land use which is a requirement for planning approval process. The 1st and 2nd respondents relied on Municipal Council of Mombasa versus Republic & another [2002] eKLR and submitted that the court sitting on judicial review is not concerned with the merits of a decision but with the decision-making process.
19. On the second issue, the 1st and 2nd respondents relied on the case of John Njue Nyaga vs Nicholas Njiru Nyaga & another [2013] and submitted that the ex parte applicant did not adduce any evidence to support the claim of monetary compensation. They also denied demolishing the ex parte applicant's wall and argued that they should not be forced to compensate the ex parte applicant for a demolition that they did not participate in.
20. On the third issue, they relied on Section 27(1) of the *Civil Procedure Act*, the case of Cecilia Karuru Ngayu vs Barclays Bank of Kenya & another [2016] eKLR and sought that the ex parte applicant's application be dismissed with costs.

Analysis and determination

21. After considering the pleadings, the only issue that arises for determination is whether the ex parte Applicant's Notice of Motion application dated 1st December, 2023 has merit.



22. The ex parte applicant is seeking for orders of mandamus and prohibition against the respondents. He argues that he is the owner of land parcel No. Naivasha Town Block 2/859 and he sought for approval to commence construction of a wall on the suit property. He stated that he was given verbal approval and upon payment of the necessary fee he commenced construction. On 23rd January, 2023, the 1st and 2nd respondents demolished his wall and have since then refused to give him the necessary approvals to continue with his developments.
23. In response, the 1st and 2nd respondents opposed the said application and argued that they do not give oral approval to commence developments. They admitted that they received an application from the ex parte applicant seeking for approval to commence development which was not approved because the ex parte applicant had not availed the part development plan. They argued that the part development plan was to inform the purpose of the property before approval was given. They stated that the same was communicated to the ex parte Applicant and to date the part development plan has not been availed.
24. The ex parte applicant is seeking for an order of mandamus to compel the 1st and 2nd respondents to grant approval to his application concerning the intended construction of a perimeter wall on land parcel No. Naivasha Town Block 2/859. As aforementioned, the 1st and 2nd respondents argued that before such approval is given, the ex parte applicant has to first avail the part development plan.
25. The ex parte applicant annexed to his application dated 19th December, 2022 a letter written by J.K Kiplagat the physical Planner Naivasha sub-county. The said letter is addressed to the ex parte applicant and its subject was “Illegal development on Naivasha Municipality Block 2/859”. In the said letter the ex parte applicant was informed that he had commenced construction of a perimeter wall without the requisite approvals and he was advised to discontinue the said construction pending review of his development application.
26. The ex parte applicant also annexed another letter dated 21st December, 2022 that was addressed to his late father and written by Robert Kiprono the County Director, Land & Physical Planning. The letter stated that the application for development on plot No. Naivasha Town Block 2/859 was deferred to await confirmation of the Part Development Plan.
27. As aforementioned, the 1st and 2nd respondents admitted that the reason why the ex parte applicant’s developments plans were not approved was because of the absence of the part development plan. The ex parte applicant in response argued that it was the 1st and 2nd respondent’s survey department that was to carry out investigations and report their findings to the committee.
28. The Court of Appeal in *Five Forty Aviation Limited v Kenya Revenue Authority & 3 others* [2017] eKLR held as follows;

“It is trite in judicial review; the High Court is not concerned with the merits of the decision by a public or statutory body but rather undertakes a consideration of the procedures that were undertaken to arrive at the decision that is under challenge to ensure, the decision took into account rules of natural justice and due process. This much was stated by this Court in the case of;- *Ransa Company Ltd vs. Manca Francesco & 2 others*[2015] eKLR-

“As we all appreciate, a court sitting on Judicial Review exercises a sui generis jurisdiction which is very restrictive indeed, in the sense that it principally challenges the process, and other technical issues, like excessive jurisdiction, rather than the merits of the case. It is also very restrictive in the nature of the remedies or reliefs available to the parties.”



29. It is not disputed that after the ex parte applicant made an application for approval for development, the 1st and 2nd respondents technical committee sat to consider his application. It is further not disputed that in their deliberations they realized that the part development plan was not availed and the same was communicated to the ex parte applicant. As was held in *Five Forty Aviation Limited v Kenya Revenue Authority & 3 others*(supra), in judicial review proceedings, the court is concerned with the procedures undertaken rather than the merits of the decision. It is my view that in the present matter, the ex parte applicant essentially challenged the merits of the decision made by the 1st and 2nd respondent’s technical committee and not the procedure.
30. Consequently, the order of mandamus sought to compel the 1st and 2nd respondents to grant approval of the ex parte applicant’s application for the intended construction of a wall cannot be granted.
31. The ex parte applicant is also seeking for an order of mandamus to compel the 1st and 2nd respondents to honor the court’s finding in Nakuru ELC No. 258 of 2016 that he is the absolute proprietor of land parcel No. Naivasha Town Block 2/859.
32. The Court of Appeal in *Republic vs. Kenya National Examinations Council ex parte Gathenji & Others* (1997) eKLR explained the applicable principles for an order of mandamus to issue as follows:

“The next issue we must deal with is this: What is the scope and efficacy of an “ORDER OF MANDAMUS” Once again we turn to HALSBURY’S LAW OF ENGLAND, 4th Edition Volume 1 at page 111 FROM PARAGRAPH 89. That learned treatise says:-

“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”

At paragraph 90 headed “the mandate” it is stated:

“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.”

What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed...”

33. As was held in the above cited authority, an order of mandamus is issued to compel the performance of a public duty that is imposed by statute which has not been performed to the detriment of party that has a legal right to expect the performance of the said duty.



34. In the present matter the ex parte applicant is seeking for an order of mandamus to compel the 1st and 2nd respondents to honor the finding of the court in Nakuru ELC 258 of 2016 that the ex parte applicant is the absolute owner of the suit property. The ex parte applicant annexed to his supporting affidavit a copy of the decree issued in the said suit. The parties in Nakuru ELC 258 of 2016 were Paul Wanjigi Njoroge vs Come-Cons Africa Limited, Meshack Isikati and Kenya Power & Lighting Company. The court had issued the following orders;
- a. A permanent injunction/restraining orders do issue against the 1st and 2nd defendants on land known as Naivasha Town Block 2/859.
 - b. Orders of eviction and removal of all illegally erected structures do issue against the 1st and 2nd defendants.
 - c. The eviction orders in (b) above, to be effected after 90 days of service of this court order.
 - d. The claim for mesne profits fails.
 - e. The suit as against the 3rd defendant is dismissed with no order as to costs.
 - f. The plaintiff shall have costs of this suit as against the 1st and 2nd defendant.
35. It is important to note that the basis upon which the ex parte applicant is seeking for an order of mandamus is not public duty imposed by statute but a determination of this court where the respondents were not parties. In any event, the court did not determine any issues of ownership as it only issued eviction orders and a permanent injunction. This prayer sought by the ex parte applicant cannot also be granted.
36. Prayers 3 and 4 of the ex parte applicant's application seek for orders of prohibition against the respondents restraining them from interfering with the ex parte applicant's possession and/or ownership of the suit property.
37. In the case of Kenya National Examination Council versus Republic ex parte Geoffrey Gathenji Njoroge & 9 other [1997] eKLR, the Court set out the following grounds upon which an order of prohibition may issue;
- “What does an order of prohibition do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See HALSBURY'S LAW OF ENGLAND, 4th Edition, and Vol.1 at pg. 37 paragraphs 128”
38. The Court of Appeal in the case of Director of Public Prosecutions versus Martin Maina & 4 Others [2017] eKLR held as follows;
- “Judicial review is concerned with the decision-making process and not with the merits of the decision itself. Judicial review deals with the legality of the decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the face of it; it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power.”



39. It is my view that in the present matter, an order of prohibition cannot be granted because such an order is only issued to stop proceedings of a tribunal or body whose actions are beyond their jurisdiction. As aforementioned, the 1st and 2nd respondents herein through their technical committee requested the ex parte applicant to supply them with a Part Development Plan. They argued that they unable to proceed with their deliberations until the ex parte applicant has supplied the said Part Development Plan which is yet to be supplied. Therefore, in the circumstances of this case the said orders cannot be granted.
40. The ex parte applicant is also seeking that an order be issued requiring the respondents to pay monetary compensation for damages incurred from the demolition of a perimeter wall that he had partially constructed on Naivasha Town Block 2/859. It is my view that such an order cannot be granted in the present proceedings as it requires the tendering of documentary evidence so that the court can determine if at all the said wall was demolished, by whom and the requisite monetary compensation. Such an order is beyond the mandate of a judicial review court as the nature of remedies available to parties are very restrictive.
41. Consequently, the ex parte Applicant's application dated 1st December, 2023 lacks merit and is hereby dismissed with costs.

JUDGMENT DATED, SIGNED AND DELIVERED AT NAKURU VIRTUALLY THIS 14TH DAY OF MARCH 2024.

A.O .OMBWAYO

JUDGE

