Globe Developers Limited v Nairobi City County (Civil Appeal 328 of 2018) [2024] KECA 1503 (KLR) (25 October 2024) (Judgment)

Neutral citation: [2024] KECA 1503 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 328 OF 2018

A ALI-ARONI, LA ACHODE & PM GACHOKA, JJA

OCTOBER 25, 2024

BETWEEN

GLOBE DEVELOPERS LIMITED ..... APPELLANT

AND

NAIROBI CITY COUNTY ..... RESPONDENT

(Being an Appeal from the Ruling and Order of the High Court of Kenya in Nairobi (Odunga, J.) delivered on 23rd January 2018 in JR Misc. Appl. No. 573 of 2016)

JUDGMENT

1. To contextualize the dispute, it is necessary to give the factual background of this case. The appellant herein filed an application dated 23rd November 2016 seeking an order of certiorari to remove and quash the decision of the respondent in an enforcement notice dated 7th November 2016 requiring the appellant to cease from using the garage, vacate the premises and remove its structures on Plot Nairobi/Block 91/159 Gigiri; an order of prohibition against the Director of County Planning Department of Nairobi County, prohibiting him from removing the structures erected on Plot Nairobi/Block 91/159 Gigiri and for leave to operate as stay.

2. The applicant's case is that it is the owner of Plot Nairobi/Block 91/159 Gigiri (the suit property), whose perimeter wall had fallen owing to the heavy rains in April 2016, which prompted the appellant to request for permission from the respondent to repair the boundary wall. The authorization was granted on 10th May, 2016, the appellant paid the requisite fees and upon receipt of the approvals the appellant proceeded with construction. However, the authorization was canceled without notice prompting the appellant to file JR No. 352 of 2016, seeking an order of prohibition against the respondent prohibiting it from demolishing the appellant's boundary wall and a further order of certiorari quashing the respondent's decision cancelling its authority for repairs of the boundary wall. The court granted the leave sought and further ordered that the leave issued do operate as a stay.

3. While the stay order was still in force the respondent served the appellant with an enforcement notice dated 7th November 2016 requiring it to stop using the premises as a garage, to vacate and to remove the structures erected on the suit property within 14 days of the notice, on grounds that the appellant had not obtained any approvals for erecting the structures therein and operating the premises as a garage. The appellant argues that the notice was brought in bad faith and with malice and it would be in the interests of justice if the decision of the respondent was quashed.

4. In opposition, the respondent filed grounds of opposition dated 29th November 2016, stating that the application was an abuse of court process; that the application was premature and bad in law as the appellant had not complied with Section 13(1) of the Physical Planning Act (the Act); that the appellant should have instituted an appeal before the Liaison Committee; that the court lacked jurisdiction to grant the orders as it ought to be tried in the Environment and Land Court; that immediately after the wall collapsed on the suit property, the respondent visited the sight and found that the said development lacked proper approvals from the respondent; that the appellant had illegally converted the use of the suit parcel from residential to a garage without approval from the respondent; that the enforcement notice issued related to the appellant's illegal conversion of land use and construction of a garage on the suit parcel without the requisite approvals from the respondent.

5. Further, that the respondent was authorized by Section 29 of the Act to regulate use and development of land and buildings within its jurisdiction; that Section 30(3) of the Act made any development without the respondent's approval illegal; the appellants did not obtain any approval; and therefore they do not have a cause of action as there is a clear breach of the law; that the grant of orders sought would greatly prejudice the respondent; the appellant was not above the law and is bound to follow laid down procedures.

6. In its determination the court was of the view that the issue it had to determine first was whether the action of the respondent was procedural. Upon hearing the parties, the court noted that by its order issued in JR. Misc. Appl. No. 352 of 2016, it had directed that the grant of leave therein would operate as a stay of the decision of the respondent to stop the construction and/or demolition of the wall erected on the suit property pending the hearing of the motion.

7. The court further found that as a general rule, there is no bar to an authority who, upon realizing that its actions are unlawful corrects the same during the pendency of the proceedings, and further the order of stay did not operate to bar the respondent from properly commencing the process afresh, as long as it was not purporting to implement the decision subject of the stay, in the earlier case the appellant complained that the enforcement notice had not served while in the matter before court the enforcement notice was served. In addition, the onus was upon the appellant to satisfy the court that it ought to be exempted from resorting to the available remedies; further, it had not been shown why the court ought to exempt it from the remedy provided for under Section 38 of the Act, by challenging the enforcement notice before the Liaison Committee.

8. The court having found that the appellant had to comply with the remedies provided for by the Act, decided not to deal with the other issues raised in the application so as not to prejudice proceedings which may be instituted after the alternative remedies were exhausted. The learned judge (Odunga, J.) therefore held that the proceedings were incompetent and misconceived and struck out the proceedings with no order as to costs.

9. Aggrieved by the judgment, in its memorandum of appeal to this Court dated 10th September 2018 the appellant raised grounds of appeal which we have summarized as follows:

a. the learned judge erred in finding that the issue for determination, was whether the respondent's action was procedural, and in the process disregarded the other facets of the application, which presented sufficient grounds for Judicial Review;

b. in finding that the action by the respondent to issue an enforcement notice was a fresh action which it was entitled to commence on the basis that it had no bearing and/or nexus with the earlier enforcement notice issued to the appellant purporting to cancel the authorization issued to the appellant to re-construct it's fallen wall;

c. in failing to find that the respondent lacked jurisdiction to issue the enforcement notice dated 7th November 2016 requiring the appellant to cease from using the garage, vacate the premises, and remove the structures from its plot to wit Nairobi/Block 91/159 Gigiri, as a basis for dealing with the application on the merits as basis for judicial review;

d. in failing to consider whether the respondent's decision was reasonable;

e. in finding that the appellant ought to have challenged the enforcement notice before the Liaison Committee;

f. in holding that the application sought to challenge the merits of the respondent's decision and in failing to consider the fact that the respondent's belated enforcement notice was a way to subvert the orders issued in JR No. 271 of 2016 and JR 352 of 2016, and therefore tainted with bias and an abuse of process.

10. Learned counsel for the appellant, Mr. Karani filed submissions dated 17th February 2023, where he submitted that in issuing the enforcement notice, the respondent was trying to subvert the cause of justice by attempting to sanitize their actions against the orders granted in JR No. 271 of 2016. Further, the enforcement notice ought not to be deemed as a fresh action, because the earlier complaint and the enforcement notice are intertwined. In this regard, it was submitted that the learned judge erred in finding that, the respondent's issuance of the enforcement notice requiring the appellant to cease from using the garage and vacating the premises was a fresh action; and which had no nexus with the earlier action purporting to cancel the authorization issued to the appellant to re-construct it's fallen wall.

11. Further learned counsel submitted that the existence of an alternative forum does not deny the appellant the right to come before the High Court for Judicial Review orders, as it was clear that the enforcement notice was intended to render a nullity the orders granted by the court in JR. Misc. Appl. No. 352 of 2016. Further, it demonstrated that the actions of the respondent were both irrational and unreasonable thereby necessitating the institution of Judicial Review proceedings. Learned counsel further argued that contextualizing the impugned decision within the circumstances of the case, ought to lead to the conclusion that the decision was influenced by other considerations; and is an utter abuse of power and discretion; that the respondent did not correctly understand the law that regulates its decision-making power; and that had it understood the law it would not have arbitrarily canceled the renovation approvals without allowing the appellant to present the architectural approvals.

12. Learned counsel posited that judicial intervention in judicial review matters applied to cases such as the one before court where the action taken was arbitrary, capricious, or mala fide, and therefore the proceedings in the High Court were properly before the court.

13. In objecting to the appeal, learned counsel for the respondent, Mr. Koceyo filed submissions dated 22nd March 2023 and submitted that the issues for our consideration are whether the learned judge was right in holding that the first issue for determination was whether the respondent's case was properly before the court; and whether the judge was right in holding that the appellant ought to have challenged

the enforcement notice before the Liaison Committee. Learned counsel argued that the respondent was acting within its mandate when it issued the enforcement notice to the appellant. Further as was noted by the trial judge, the stay in JR. Misc. Appl. No. 352 of 2016 did not bar the respondent from abandoning its earlier action and taking the proper action. Learned counsel contended that the trial judge was right in holding that the real issue for determination was whether the action of the respondent was procedural.

14. The respondent further submitted that the trial judge was right in determining that the appellant ought to have challenged the enforcement notice before the Liaison Committee. In support of this contention it cited the case of Republic vs. National Environment Management Authority [2011] eKLR, where the court held that where there is an alternative remedy, it was only in exceptional circumstances that an order for judicial review would be granted. It also relied on the case of Speaker of the National Assembly vs. Karume [1990 – 1994] EA 549, where the court held that where there was a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.

15. Also, reliance was placed on the case Eliud Wafala Maelo vs. Ministry of Agriculture and 3 Others [2016] eKLR, where the court held that the jurisdiction of the High Court in particular matters or instances can be ousted where a tribunal with exclusive jurisdiction has been specified by a statute to deal with claims arising under the statute. Learned counsel also referred to the cases of Revital Healthcare (EPZ) Limited & Another vs. Ministry of Health & 5 Others [2015] eKLR, Republic vs. Chief Magistrate Nanyuki Law Court Ex parte Purity Gathoni Macheru [2016] eKLR, International Center for Policy and Conflict and 5 Others vs. the Hon. Attorney General & 4 Others [2013] eKLR, Diana Kethi Kilonzo & Another vs. Independent Electoral & Boundaries Commission & 10 Others [2013] eKLR and Yusuf Gitau Abdallah vs. Building Centre (K) Limited & 4 Others [2014] eKLR.

16. The trial court considered a host of authorities from this Court and the provisions of the *Fair Administrative Action Act* in arriving at its determination, where the court (Odunga, J.) (as he then was) found that the applicant had not followed the remedies laid down in the Act; and further was of the view that the applicant had not shown why it ought to be exempted from the hierarchy of remedies provided under the Act.

17. In his findings the trial judge stated:

> " It has not been shown to me that the alternative statutory remedy provided by Parliament for the resolution of the grievances the applicant has brought before this Court is less convenient, beneficial and effectual. The applicants therefore ought to pursue the said remedy and only approach this Court after the same are exhausted or if the Court is satisfied that the existing alternative remedies are inappropriate in the circumstances of this case. However, the fear that such a remedy is unlikely to succeed, it has been recognised, does not constitute exceptional circumstances to warrant the Court in exempting a party from resorting thereto. This was the position adopted by Mohammed Ibrahim, JSC in Yusuf Gitau Abdallah vs. Buildine Centre (K)Ltd & A others (2014) e KLR where he held that:
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> > A party cannot be heard to move a Court in glaring contradiction of the judicial hierarchical system of the land on the pretext that an injustice will be perpetrated by the lower court. Courts of justice have the jurisdiction to do justice and not injustice. However, the law acknowledges that judges are human and are fallible

hence the judicial remedies of appeal and review. A party cannot in total disregard of these fundamental legal redress frameworks move the apex Court'.

" In the premises I will not deal with the substance of the other issues raised in this application in order not to prejudice proceedings"

We purposed to quote the above findings of the trial judge in extension for reasons to be explained later in this judgment.

18. This being a first appeal, it is our duty in addition to considering submissions by the appellant and the respondent, to analyze and re-assess the evidence on record and reach our independent conclusions. However, we must bear in mind the fact that we did not have the advantage of seeing or hearing the witnesses. This approach was adopted in Arthi Highway Developers Limited vs. West End Butchery Limited & 6 others (2015) eKLR where the court cited the case of Selle vs. Associated Motor Boat Co. [1968] EA 123 and held as follows; -

" An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

19. From a careful perusal of the record of appeal, parties' submissions, authorities cited, and the law, we discern the issues for determination to be:

i. Whether the application seeking for an order of certiorari to issue to remove into the court and quash the decision to issue the enforcement notice of 7th November 2016 and for an order of prohibition to issue to the Director of County Physical Planning prohibiting him from removing the structures erected on Plot No. Nairobi/Block91/159 Gigiri was properly before the trial court; and

ii. Whether the appellant ought to have channeled its grievances to the Liaison Committee as provided for under section 38 of the Physical Planning Act.

20. It is common ground that the parties are engaged in two other matters on the subject matter and that there exists an order of stay against the construction and/or demolition of a boundary wall on the suit premises. It is also acknowledged by the parties that on 7th November 2016 the respondent issued an enforcement notice requiring the appellant to vacate the premises, cease operating the garage thereon, and demolish the structures erected on the premises, on grounds that the structures were illegally constructed, without the respondent's approval and similarly the garage was operating without the necessary approval. It is the enforcement notice that triggered the matter before the High Court whose ruling is the subject of this appeal.

21. The parties have taken two opposite directions concerning the enforcement order of the 7th of November 2017. It is the appellant's position that the said enforcement order was issued during the pendency of JR Misc. Application No. 352 of 2016, R vs. Nairobi County Ex-parte Globe Developers

Limited, wherein the court issued leave which was to operate as a stay;secondly, the issue relating to the enforcement order was rightly placed before the court to adjudicate upon it and that the court ought to have considered whether the action by the respondent was procedural, or whether it was laced with illegality and irrationality, instead of confining itself to whether the matter was properly before it.

22. On its part the respondent took the position that the application was an abuse of the court process as there existed two other matters before the court touching on the same subject matter JR. No. 271 of 2016 & JR No. 352 of 2016; secondly the matter was premature as it ought first to have been referred to the respondent's Liaison Committee pursuant to Section 13(1) of the Act, which requires a party aggrieved by a decision of the Director concerning any physical planning development issue, to within 60 days of receipt of the notice appeal to the respective Liaison Committee in writing; further that the orders of the 8th of August 2016 were confined to the issue of stoppage of construction and/or demolition of the boundary wall, yet the enforcement notice related to the illegal use of the premises and construction of illegal structures therein; further Section 30 of the Act makes any development without the respondent's approval illegal; and that Section 29 of the Act authorizes it to regulate use and development of land and buildings and therefore its action was within the law; and further that the court does not have jurisdiction to handle the matter which ought to be adjudicated by the Environment and Land Court.

23. The structure that sets in motion the available remedies in a situation the parties found themselves in stems from *the Constitution*. Article 47 of *the Constitution* directs as follows:

> 1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
>
> 2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
>
> 3. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action-
>
> a. provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
>
> b. promote efficient administration. (Emphasis added)

24. Pursuant to the above provision of *the Constitution* the Fair Administration Action Act, Chapter 7 L was enacted and provides as follows:

> Section 3(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision–
>
> a. prior and adequate notice of the nature and reasons for the proposed administrative action;
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> b. an opportunity to be heard and to make representations in that regard;
>
> c. notice of a right to a review or internal appeal against an administrative decision, where applicable;
>
> d. a statement of reasons pursuant to section 6;

e. notice of the right to legal representation, where applicable;

f. notice of the right to cross-examine or where applicable; or

g. information, materials and evidence to be relied upon in making the decision or taking the administrative action. (Emphasis added)

25. The above section has to be read alongside the Physical Planning Act, Chapter 286, to be more relevant to the case at hand. The said Act provides in the relevant sections as follows:

Section 29: Powers of local authorities

Subject to the provisions of this Act, each local authority shall have the power—

a. to prohibit or control the use and development of land and buildings in the interests of proper and orderly development of its area;

b. to control or prohibit the subdivision of land or existing plots into smaller areas;

c. to consider and approve all development applications and grant all development permissions;

d. to ensure the proper execution and implementation of approved physical development plans;

e. to formulate by-laws to regulate zoning in respect of use and density of development; and

f. to reserve and maintain all the land planned for open spaces, parks, urban forests and green belts in accordance with the approved physical development plan. (Emphasize added)

Section 30: Development permission

(1) No person shall carry out development within the area of a local authority without a development permission granted by the local authority under section 33.

Section 31: Development application

1. Any person requiring a development permission shall make an application in the form prescribed in the Fourth Schedule, to the clerk of the local authority responsible for the area in which the land concerned is situated.

2. The application shall be accompanied by such plans and particulars as are necessary to indicate the purposes of the development, and in particular shall show the proposed use and density, and the land which the applicant intends to surrender for—

    a. purposes of principal and secondary means of access to any subdivisions within the area included in the application and to adjoining land;

    b. public purposes consequent upon the proposed development.

26. From the above-quoted sections of the Act, the law has laid stringent conditions that ought to be met by any person or entity wishing to carry out development in a local authority, for purposes of control and proper planning. The conditions must be adhered to, absent which the local authority is empowered to deal with such contravention in terms of Section 38 of the Act in the following terms:

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).

Section 13: Appeals to liaison committees

1. Any person aggrieved by a decision of the Director concerning any physical development plan or matters connected therewith, may within sixty days of receipt by him of notice of such decision, appeal to the respective liaison committee in writing against the decision in such manner as may be prescribed.

2. Subject to subsection (3), the liaison committee may reverse, confirm or vary the decision appealed against and make such order as it deems necessary or expedient to give effect to its decision.

3. When a decision is reversed by the liaison committee it shall, before making any order under subsection (2), afford the Director an opportunity of making representations as to any conditions or requirements which in his opinion ought to be included in the order, and shall also afford the appellant an opportunity to replying to such representations.

27. Section 38 of the Act elaborately gives the steps to be taken where the local authority finds that a developer has not complied with the provisions of the Act, and what ought to be done by a developer who is aggrieved with the issuance of an enforcement notice. Such a developer is required by law to refer an appeal to the Liaison Committee and if further aggrieved by the decision of the Liaison Committee, the developer ought to appeal to the National Liaison Committee, after which he may appeal to court.

28. We have deliberately covered the provision of the various sections of the law to emphasize the need for litigants to strictly adhere to laid down legal processes and structures that were deliberately and thoughtfully enacted and put in place to enable proper adjudication of issues in a quick and timely manner. *The Constitution* and statute place the court not as the only avenue to remedy issues but as the avenue of last recourse.

29. The above position has been enumerated in several decisions of this Court time without number, not limited to; -

The case of Republic vs. National Environment Management Authority [2011] eKLR, where this Court stated:

> " The principle running through these cases.is where there was an alternative remedy and especially where Parliament had provided a statutory appeal process, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it. - see for example R V Birmingham City Council, ex parte FERRERO LTD case. The Learned judge, in our respectful view, considered these strictures and come to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process"

In the case of Speaker of the National Assembly vs. Karume [1990-1994] EA the court stated:

> " Irrespective of the practical difficulties enumerated...these should not in our view be used as a justification for circumventing the statutory procedure.... In our view, there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that Order 53 of the Civil Procedure Rules cannot oust clear constitutional provisions and statutory provisions."

In the case of Diana Kethi Kilonzo vs. IEBC & 2 Others [2013] eKLR as follows:

> " We note that *the Constitution* allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by *the Constitution* so long as they comply with *the Constitution* and national legislation. These bodies and institutions should be allowed

to grow. The people of Kenya, in passing *the Constitution*, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities." (Emphasize added)

30. Similarly, the Supreme Court in the case of Albert Chaurembo Muumba & 7 Others vs. Maurice Munyao & 148 Others (Petition No. 3 of 2016) [2019] KESC 83 (KLR), had this to say on the issue at hand:

> " [107] Where an Act of Parliament confers administrative power to an authority or a person, there is a presumption that it will be exercised in a manner which is fair. The Court's role in such matters was explained in Judicial Review Handbook by Michael Fordham (Third Edition) p.249- 256 as hereunder: Every public body has its own role and has matters which it is to be trusted to decide for itself. The courts are careful to avoid usurping that role and interfering whenever it might disagree as regards those matters."

31. We have said enough to demonstrate that the trial court (Odunga, J.) (as he then was) was right to dismiss the case. We agree with the judge that the appellant did not explain why it failed to follow due process as laid down by the Act, and rushed the matter to court. Without fear of repeating ourselves, if aggrieved, the appellant ought to have referred the dispute first to the Liaison Committee, then the National Liaison Committee, and if aggrieved further by the outcome, preferred an appeal to the relevant court. And since the appellant was in the wrong forum the judge was right not to proceed to hear other issues placed before him and rightly dismissed the case.

32. We find the appeal devoid of merit. The same is dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF OCTOBER, 2024.

ALI-ARONI

JUDGE OF APPEAL

L. ACHODE

JUDGE OF APPEAL

L. GACHOKA C.Arb, FCIArb

JUDGE OF APPEAL

I CERTIFY THAT THIS IS A TRUE COPY OF THE ORIGINAL.

Signed DEPUTY REGISTRAR.