



**Wamalwa & another v Director of Planning, City Council of Nairobi & 7 others
(Civil Appeal 326 of 2013) [2023] KECA 229 (KLR) (3 March 2023) (Judgment)**

Neutral citation: [2023] KECA 229 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 326 OF 2013
MSA MAKHANDIA, J MOHAMMED & HA OMONDI, JJA
MARCH 3, 2023**

BETWEEN

FREDRICK N. WAMALWA 1ST APPELLANT

MARY RABARE OMARE 2ND APPELLANT

AND

**THE DIRECTOR OF PLANNING, CITY COUNCIL OF
NAIROBI 1ST RESPONDENT**

DR ROBIN MOGERE 2ND RESPONDENT

WELLINGTON OMODHO 3RD RESPONDENT

JOSEPH NKAISSERY 4TH RESPONDENT

ERUSTUS MWONGERA 5TH RESPONDENT

KIEMA KILONZO 6TH RESPONDENT

JOHN LOKORIO 7TH RESPONDENT

JOSEPH NGOK 8TH RESPONDENT

*(An appeal from the judgment and order of the High Court of Kenya at
Nairobi (Korir, J.) made on 7th August 2013 In JR ELC NO 102 OF 2011)*

JUDGMENT

Background

1. The facts leading up to this appeal are not in contention. The 1st appellant herein, Fredrick N. Wamalwa was the owner of a parcel of land known as LR No 1160/89 in Karen, Nairobi. In 1989, he commenced the process leading to the subdivision of this parcel of land into three parcels: LR No 1160/450,



1160/451 and 1160/452. He later sold the parcel of land known as LR No 1160/452 to Kenya Reinsurance Corporation, which in turn also subdivided this parcel into 7 parcels of land, known as LR No 1160/606, 607, 608, 609, 610, 611, 612 and 613. The seven (7) parcels of land were bought by Wellington Omodho, Robin Mogere, Joseph Nkaisery, Erustus Mwongera, John Lokorio, Kiema Kilonzo and Joseph Ngok, who are the 2nd to 8th respondents herein. Upon this subdivision, a portion of land known as LR No 1160/452/1 was excised out as an access road.

Mary Rabare Omare is the 2nd appellant herein.

The Director of Planning, City Council of Nairobi (as it then was), Wellington Omodho, Dr Robin Mogere, Hon. Joseph Nkaisery, Erustus Mwongera, John Lokorio, Kiema Kilonzo and Joseph Ngok are the 1st to 8th respondents respectively.

2. On February 9, 2008 the 1st appellant applied for subdivision permission in respect of his parcel of land, known as LR No 1160/451. That subdivision was approved by the Town Planning Committee of the Nairobi City Council in a meeting held on June 19, 2008. The 1st appellant obtained authority to subdivide LR No 1160/451 into five (5) parcels of land, known as LR Nos 1160/965, 1160/966, 1160/967, 1160/968 and 1160/969, and also designated as subplots A, B, C, D and E. respectively. Two of those subplots, that is LR Nos 1160/965, and 1160/966 (A and B), were sold to the late Dr Hezron Nyangito, whose estate is represented in these proceedings by the 2nd appellant herein.
3. The 1st respondent communicated to the 1st appellant vide its letter of July 16, 2008 that one of the conditions of the approval was that subplots A, B, C and D be provided combined access from the existing 12-meter road. This approval was also communicated through a letter by the Commissioner of Lands on September 29, 2008 who indicated that final approval would be granted upon receiving a recommendation from the 1st respondent.
4. Subplots A and B were issued with their own certificates of title and transferred to Dr Nyangito on January 30, 2009. The 1st appellant continued to follow up on the certificates of title for the remaining subplots and through his development planner, prompted the 1st respondent on January 10, 2009 to provide a recommendation to the Commissioner of Lands for final approval of the sub-division scheme.
5. From the record, upon purchase of their respective plots, the 2nd to 8th respondents formed and registered a self-help group known as the Judge Borehole Water Project Self Help Group for the purposes of regulating the management and maintenance of the common areas of their respective plots.
6. The 2nd to 8th respondents upon discovering that the 1st respondent had issued a planning permission to the 1st appellant that permitted use of LR No 1160/452/1 as an access road, were aggrieved and lodged a complaint to the 1st respondent who notified the 1st appellant vide a letter dated March 11, 2010 to amend the subdivision scheme to use the existing approved 9 meter access neck meant to serve the original sub-plot 1160/89(B).
7. The 1st respondent notified Mr Kefa Mbarine, a Planner engaged by the 2nd to 8th respondents vide a letter dated April 27, 2011 that the approval of LR No 1160/451 into five (5) sub-plots whereby the sub- plots A to C were to be provided with access vide the 12M *cul-de-sac* meant for use by developments on LR No 1160/452 appears to have been permitted inadvertently and that the developer had been advised to amend their approved subdivision scheme to reflect the approval of the original property LR No 1160/89.



8. Aggrieved by this turn of events, the 1st appellant filed for orders of judicial review in the high court seeking three (3) main reliefs namely:

- “(i) Writ of mandamus compelling the Director of Criminal of Nairobi to issue to the applicants and certificate of subdivision of plots had Reference number 1160/967, 1160/968, 1160/969 being subdivision of Land Reference Number 1160/451 and the respondent to withdraw authorization for interested parties a barrier erected on LR No 1160/452/1 a subsequent at public road of access to plots LR No 1160/965, LR No 1160/966, LR No 1160/967 and LR No 1160/968.
- ii. The court to make further orders with its inherent jurisdiction.
- ii. Costs of the suit.”

9. The grounds upon which the reliefs sought were based were as follows:

- “a) That the Director of Planning of the 1st respondent lacked jurisdiction in his administrative capacity to overrule, set aside, vary, review the decision of the Planning Committee or delay or frustrate implementation of Planning permission or to delegate statutory duties or incidents thereof to the interested parties.
- b. The decision of the respondent mandating the interested parties to authorize access as a condition precedent to implementation of condition is irrational and calculated to frustrate implementation and issuance of certificate of subdivision.
- c. That the interested parties cannot sit as prosecutor and judge in their own cases.
- d. That the decision and actions and or inaction by the respondents are for the reasons above in excess of and without any jurisdiction to do so, and are arbitrary, irrational and an abuse of statutory powers and natural justice.”

10. The 2nd appellant supported the application through her replying affidavit sworn on April 23, 2012. She reiterated and supported the arguments made by the 1st appellant.

11. The 1st respondent opposed the application through a replying affidavit sworn on April 19, 2012 by the Director of City Planning, of the 1st respondent, Mr Patrick Tom Odongo.

12. It was the 1st respondent’s case that the issues raised by the appellants are technical in nature and the appellants should have exhausted the dispute resolution process provided by the *Physical Planning Act* (the Act) before instituting judicial review proceedings.

13. It was the 1st respondent’s case that after it discovered the inadvertence in approving the sub-divisions of LR No 1160/451 with the access road being LR No 1160/452/1, it gave consent to the 2nd to 8th respondents to erect a barrier at the entrance of the road. The 1st respondent averred that it would grant development permission to the appellants once the application for subdivision was amended as directed.

14. The 2nd to 8th respondents opposed the application vide a replying affidavit, urging inter alia that: the 1st appellant had no interest in the properties in question since he had since disposed of all of



them by sale; that the subdivision of the property known as LR No 1160/452 had clearly resulted in an access road that was to be used as a cul de sac road and only to access their properties; that their properties comprised of a gated community that did not provide for a public access road; and that the 1st respondent acted within its discretion when it set aside the planning permission previously granted to the 1st appellant. The 2nd to 8th respondents argued further that the 1st appellant ought to have appealed to the Liaison Committee of the City Council of Nairobi if he was aggrieved with the 1st respondent's decision asking him to vary his planning permission.

15. The High Court (W. Korir, J. - as he then was) considered the arguments set forth by each of the parties. The learned Judge held and found in part as follows:

“From the facts placed before this court it is clear that the respondent had the mandate to reverse its decision after discovering that permission was erroneously granted to the 1st applicant to subdivide his land. The 1st applicant was asked to amend his plan before his application could be considered afresh. He, however, opted to institute these proceedings. The reasons for denying him permission were given to him in writing. The rules of natural justice were complied with. The Respondent acted within the law and the only avenue open to the 1st Applicant is to file an appeal before the local liaison committee. He cannot therefore complain of having been subjected to an unfair procedure ...

Another issue is the applicants' prayer for an order of mandamus. An order of mandamus will issue to compel a public body to execute a statutory obligation where it has refused to do so. An order of mandamus will not issue to direct a public body to do something in a particular manner where it is given discretion while exercising its powers. The applicants have asked this court to order the respondent to remove a road barrier. The Respondent has the discretion to grant or not to grant permission to anybody to erect a road barrier on a private road. This court would exceed its jurisdiction if it directs the Respondent on how to discharge its mandate.

Considering the material placed before this court, I find that the applicants have not established grounds for the grant of the orders sought. Their application therefore fails and the same is dismissed. The applicants and the interested parties are neighbours and will continue being so notwithstanding this litigation. For this reason, I will make no orders as to costs.”

16. The appellants were aggrieved with these findings and have filed the instant appeal. The 1st appellant's memorandum of appeal contains 24 grounds of appeal, all of which can be condensed as the appellants taking issue with the trial court for: relying exclusively on the respondents' evidence and oral submissions in finding that the road on LR No 1160/452/1 was a private road; holding that the 1st respondent was an agent of the Planning Committee of the City Council of Nairobi and could therefore reverse the decision of the Planning Committee; failing to consider articles 62 and 64 of the *Constitution* and the provisions of the *Physical Planning Act* (the Act); failing to consider any of the arguments or submissions made by the 2nd appellant; and delivering its judgment in the absence of the 1st appellant and without prior notice to the 1st appellant in violation of his right to a fair hearing.
17. The 1st appellant seeks orders that the judgment of the High Court dismissing the 1st appellant's notice of motion dated December 6, 2011 be set aside; that the said application be allowed as prayed; and that the appellants be granted costs of the application and the instant appeal.



18. The 2nd to 8th respondents filed a notice of grounds for affirming the decision listing grounds in support of the trial court's decision and findings of the trial court. The grounds for affirming the learned Judge's decision were that the learned Judge in his judgment did not err *inter alia* on grounds :
- (a) that the appellants had knowledge that under the *Physical Planning Act* anyone aggrieved by a decision of the council with regard to application for sub-division ought to appeal the decision to the respective liaison committee which the appellants failed to do and that by filing for judicial review they were deliberately disregarding procedures and guidelines set by Parliament;
 - (b) that the appellants did not prove to the court why an order of mandamus ought to have been granted to them as such an order of judicial review compels a state organ to perform its functions mandated by law and not for discretionary functions;
 - (c) that the learned Judge considered issues before him and applied the law to determine the main issue regarding whether or not the 1st respondent had power to set aside planning permission granted by the City Planning Committee;
 - (d) that the learned Judge in considering whether LR No 1160/452/1 was a private road considered all the evidence tendered by the parties and determined that LR No 1160/452/1 was a private road for exclusive use of the 2nd to 8th respondents;
 - (e) that the learned Judge did not err in finding that LR No 1160/452/1 is a *cul-de-sac* which was a no-through road developed for the use of the 2nd to 8th respondents;
 - (f) that LR No 1160/452 was subdivided long before the approval of subdivision of LR No 1160/451 and the appellants cannot therefore be allowed to infringe on the quiet enjoyment of the respondent's property;
 - (g) that the appellants having been aggrieved by the decision of the 1st respondent ought to have appealed to the appropriate Liaison Committee which has more expertise on matters city planning and subdivision as compared to filing Judicial Review proceedings against the 1st respondent;
 - (h) that the appellants failed to meet the mandatory grounds for Judicial Review remedy to be made as the 1st appellant overlooked the Liaison Committee as the appropriate forum to file an appeal over an aggrieved decision against the City Planning Committee;
 - (i) that the learned Judge rightly held that the 1st respondent was an agent of the Council of the City of Nairobi and a decision by him was therefore a decision of the Council of the City of Nairobi and the Planning Committee and therefore binding;
 - (j) that pursuant to section 33 of the *Physical Planning Act*, the decisions of the Planning Committee are not final in accordance with section 34 & 41 of the *Act* and regulation 17 of the *Physical Planning (subdivision) Regulations, 1998* (the Regulations);
 - (k) that pursuant to sections 34 and 41 of the *Act* and regulation 17 of the *Regulations*, the 1st respondent being the Director of Planning City Council of Nairobi has powers to adopt wholly, or with amendments or reject any decisions by the Planning Committee and that by modifying implementation conditions for subdivision of LR No 1160/451, he acted well within his mandate;



- (l) that the decision by the 1st respondent was complimentary to the decision by the Planning Committee and also within powers granted under section 34 & 41 of the Act and Regulation 17 of the Regulations;
 - (m) that the 1st respondent notified the 1st appellant that approval for the subdivision in respect of LR No 1160/451 was inadvertent. That the respondent advised the appellants on the alternative options available for the subdivision to be approved which the appellants did not implement;
 - (n) that the appellants had the right to appeal to the rightful Liaison Committee but decided to circumvent the due process by filing Judicial Review which cannot stand where there is an available remedy provided by law: and
 - (o) that the decisions by the Planning Committee can be approved wholesomely or with amendments, reviewed, rejected by the Director of Physical Planning with regard to the implementation of the decisions and therefore the 1st respondents in so acting as per powers under the Act and all subsidiary regulations was within his mandate.
19. The 2nd to 8th respondents prayed that the judgment of the high court be upheld and that the appellants' appeal be dismissed with costs.

Submissions by Counsel

20. The appeal was canvassed by way of written submissions with oral highlights. Learned counsel, Mr Wamalwa represented the 1st appellant, Mr Morara represented the 2nd appellant, Ms Mercy Mogusu represented the 1st respondent while Mr Bundotich represented the 2nd to 8th respondents.
21. Mr Wamalwa submitted that the position taken by the 1st appellant is that none of the parties has an exclusive or legitimate claim to ownership of LR No 1160/452/1 which was and has always been a public road of access, and that by requiring the 1st appellant to seek permission to use this road in order to access the sub-divisions in respect of LR No 1160/451, the 1st respondent is acting unreasonably and unfairly. Further, that the 1st appellant also claims that he is now unable to obtain certificates of subdivision in respect of LR No 1160/451 and that the owners thereof have been denied access to their parcels of land due to the fact that the 2nd to 8th respondents have used force to erect barriers, as well as used underhand canvassing and lobbying to influence planning offices and thwarted the conditions of the subdivision.
22. Mr Wamalwa further submitted that the 1st appellant is unable to complete the subdivision in respect of LR No 1160/451 despite having paid for it, unless he gets written authorization from the 2nd to 8th respondents permitting the use of LR No 1160/452/1 as a right of way to access the respective plots as a condition to issuing the certificate of subdivision. Counsel submitted that this situation has been created by the 1st respondent who has acted contrary to its duty. In the 1st appellant's view, the Planning Committee of the now defunct Nairobi City Council had the power to hear and determine applications and to impose conditions for sub-division of schemes, but the 1st respondent, who had the mandate to oversee implementation of decisions of the Nairobi City Council, did not have the power or discretion to vary decisions already made by the Planning Committee.
23. Counsel submitted further that the planning approval was given by both the Commissioner of Lands, the Nairobi City Council and the 1st respondent and faulted the trial court for misapplying Regulation 17 of the Physical Planning Regulations since a scheme carried out into effect in compliance with the subdivision scheme could not be cancelled; that the decision to grant the 1st appellant



subdivision and development permission could not be reversed because the 1st respondent, acting in an individual capacity cannot reverse the decision of the Planning Committee. For these reasons, the 1st appellant submitted that the 1st respondent acted arbitrarily in cancelling the 1st appellant's development permission as well as in the manner in which it entertained the complaint by the 2nd to 8th respondents.

24. Mr Morara, submitted that while the disputed road on LR No 1160/452/1 has frontal access to the 2nd appellant's two (2) properties, she has no access to her properties because of the barrier erected by the 2nd to 8th respondents – an authorization that was granted in 2010 - long after she had completed construction of her home. Counsel faulted the trial court for failing to address the 2nd appellant's submissions, since the trial court only dealt with the 2nd to 8th respondents who had not obtained titles or developed their properties.
25. The 2nd to 8th respondents opposed the appeal. In sum, learned counsel, Mr. Bundotich, submitted that the 2nd to 8th respondents lodged a complaint to the 1st respondent as soon as they discovered that LR No 1160/452/1 was to be used as an access road, which in their view ought not to be the case, as the road on LR No 1160/452/1 was to have been used as a *cul-de-sac* only to access their respective properties.
26. Counsel questioned the standing of the 2nd appellant, urging us to find that she was improperly before this Court as she had been listed as an interested party in the trial court, and should therefore have filed a cross-appeal, instead of being joined in the instant appeal as an appellant.
27. On the substance of the appeal, counsel urged us to consider the meaning of the term *cul-de-sac* as used in the *Physical Planning Act*, since the approval that was granted to the Kenya Re-Insurance Corporation when LR No 1160/452 was subdivided was only for a *cul-de-sac* road, only intended for use to access the 2nd to 8th respondents' properties and not to open the area to other members of the public.
28. Counsel further submitted that the certificate of subdivision in respect of LR No 1160/451 could not be granted by the 1st respondent as there was already authority granted to the 2nd to 8th respondents to erect a road, described as a *cul-de-sac*.
29. Counsel further submitted that instead of the 1st appellant appealing to the Liaison Committee, he proceeded to file judicial review proceedings which could not be entertained. Counsel urged us to find that the appellants' recourse lay in the 1st respondent's Liaison Committee and not in judicial review proceedings, or to require the 2nd to 8th respondents to give access to the appellants. Counsel reiterated that the 2nd to 8th respondents' position is that the trial court did not err in finding that the 1st respondent has the discretion to grant or not to grant permission to any party to erect a road barrier on a private road. Further, that the high court would exceed its jurisdiction if it were to direct the 1st respondent how to discharge its mandate.

Determination

30. We have considered the rival positions of the parties herein respective submissions, the authorities cited and the law in line with our duty to reappraise the evidence tendered and draw our own conclusions as outlined in the long line of authorities such as *Selle & another v Associated Motor Boat Company & others* [1968] EA 123 where this Court stated:

“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."

31. The principles that guide a court to grant orders of judicial review were set out by this Court in *Kingdom Kenya 01 Limited v the District Land Registrar, Narok & Fifteen (15) others* [2018] eKLR wherein this Court aptly summarized them as follows:

"Judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. ...The purpose of JR is to ensure that the individual is given fair treatment by the Authority to which he has been subjected... [Judicial Review] being a discretionary remedy, it demands that whoever seeks to avail himself/himself/herself of this remedy has to act with candour or virtue and temperance. [Judicial Review] as a remedy may also be invoked where the issues in controversy as between the parties are contested. The remedy of judicial review is only available where an issue of a public law nature is involved. Further, that a person seeking mandamus must show that he has a legal right to the performance of a legal duty by a party against whom the mandamus order is sought or alternatively, that he has a substantial personal interest and that the duty must not be permissive but imperative and must be of a public nature rather than of a private nature."

32. As guided by the authority above, when determining whether the trial court exercised its discretion judiciously when it dismissed the application before it, we reiterate that we can only interfere with the exercise of that discretion if we are satisfied that the learned Judge misdirected himself in law, misapprehended the facts, took account of considerations which he should not have taken into account, failed to take into account a consideration which he should have taken into account, or that his decision, albeit a discretionary one, is plainly wrong.

33. We find that the issues that fall for our determination are as follows:

- a) Whether or not the 1st respondent has powers to direct a party to amend a planning permission; and
- b) Whether or not the orders of mandamus ought to issue.

34. On the question whether the 1st respondent has powers to amend planning permission granted by the City Planning Committee, the trial court on this issue stated as follows:

"Although the parties herein filed lengthy affidavits to make the facts of this matter appear contentious, I must state that the facts are straight forward. The applicants and the 8th Interested Party seek to use a road carved out of plot No 1160/452 which is the mother title for the plots of the 1st to 7th interested parties. The applicants argue that the said road is a public road and they are entitled to use it to access their plots. On their part the 1st to 7th interested parties argue that the road in question was only meant to be used to access their plots."



35. The letter dated June 15, 2011 from the City Council of Nairobi to counsel for the 1st appellant is instructive. It provides in part as follows:

“... from a development planning and policy perspective any further subdivision of LR Nos 1160/450 and 1160/452 to minimum plot sizes, would require provision of an internal road network to serve its subplots planned from Ndege and Kwarara road that are through and/or structure plan roads. Whereas, further subdivision of LR No 1160/451 to minimum zoned plot size of 0.4 ha would be limited to accessibility vide the earlier approved 9 meter access-neck, which would act as cul- de-sac from Kwarara road to serve the resultant properties.

Nonetheless, it appears that further subdivision of LR No 1160/451 was preceded by subdivision of adjacent LR No 1160/452 with provision of a 12 meter cul-de-sac to serve its 9 No subplots namely LR Nos 1160/605 to LR No 1160/613, all inclusive. In principle, the said 12m cul-de-sac was surrendered as a public road reserve and developed to adoptive standards to serve the foregoing 9 No plots.

From a planning policy and/or traffic and transportation planning perspective; a cul-de-sac primarily functions as a non-through road. In the event that it is derived from a public road reserve then in normative terms it has a limited length and its use is particularly restricted to accessing the properties for which it is planned as a ‘dead-end road’.

Therefore, LR 1160/965 to 1160/969 have to be served vide a cul-de-sac road originating from the access-neck approved in 1979 to serve the original LR No 1160/451; plus its subsequent subplots.

Accordingly, this is to reiterate the earlier position in our letter ref. CPD/PIS/002045/1160/451 of 11/3/2011, stating that LR Nos 1160/967, 965 and 1160/969 have to be served through the originally planned access-neck LR No 1160/451. You should appreciate that the subdivision approval of LR No 1160/451 granted on 21/7/2008, inadvertently permitted the above subdivision scheme to be erroneously accessed through a cul-de-sac meant for a ‘gated community’ property, whereby a through road cannot be achieved.

This therefore is to advise you to either seek an amendment to the yet to be finalized subdivision scheme of the said plot to use the originally planned access-neck to serve the same or consider the feasibility of establishing a ‘right of way’ vide the cul-de-sac serving LR Nos 1160/605 to 1160/613, all inclusive.” [Emphasis supplied].

36. The jurisdiction and mandate of the 1st respondent in granting development permission and subdivision authority is pertinent in the determination of this appeal. We will therefore consider the relevant legal provisions and case law.
37. The jurisdiction of the 1st respondent in granting development permission is spelt out in section 29 of the Act in the following terms:-

“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.”

38. Under section 30 of the *Act*, no development of land can take place without the grant of development permission by a local authority. Section 30 provides as follows:

- “(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.
- (2) Any person who contravenes subsection (1) shall be guilty of an offence and shall be liable to a fine not exceeding one hundred thousand shillings or to an imprisonment not exceeding five years or to both.

39. Further, Section 41 of the *Act* provides for subdivision of land in the following terms:

“ 41.

1. No private land within the area of authority of a local authority may be subdivided except in accordance with the requirements of a local physical development plan approved in relation to that area under this *Act* and upon application made in the form prescribed in the Fourth Schedule to the local authority.
2. The subdivision and land use plans in relation to any private land shall be prepared by a registered physical planner and such plans shall be subject to the approval of the Director...
5. A local authority may approve with or without such modifications and subject to such conditions as it may deem fit, or refuse to approve, an application made under subsection (1).
6. Any person aggrieved by a decision of the local authority under subsection (5) may appeal against such decision to the respective liaison committee:

Provided that if such person is aggrieved by a decision of the liaison committee he may appeal against such decision to the National Liaison Committee in writing stating the grounds of his appeal:

Provided further that the 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.” [Emphasis supplied].

40. The *Physical Planning (subdivision) Regulations, 1998* (the Regulations) deal with subdivision of land in urban areas. Regulation 17 thereof provides as follows:-

“A local authority may on the recommendations of the Director of Physical Planning or representative authorities cancel the whole or any scheme of division or subdivision which has not been carried into effect provided reasons thereof are given to the affected party.” [Emphasis supplied].

41. Regulation 17 therefore provides that a local authority has the power to reverse a decision to grant development permission. Accordingly, the 1st respondent did not exceed his jurisdiction by directing the 1st appellant to amend his subdivision scheme in respect of LR 1160/451.

42. It is clear from the above provisions that the 1st respondent had the mandate to grant development permission. Further, that no private land within the area of the Nairobi City Council can be subdivided without the approval of the 1st respondent. It is also clear that the 1st respondent has the power to approve with or without modifications and subject to such conditions any subdivision as it may deem fit, or to reject an application for sub-division.

43. Section 13(1) of the *Act* provides as follows:

“13(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.”

44. Section 10 of the *Act* provides as follows:

“Functions of Liaison Committees

1. The functions of the National Physical Planning Liaison Committee shall be—
 - (a) to hear and determine appeals lodged by a person or local authority aggrieved by the decision of any other liaison committee;
 - (b) to determine and resolve physical planning matters referred to it by any of the other liaison committees;
 - (c) to advise the Minister on broad physical planning policies, planning standards and economic viability of any proposed subdivision of urban or agricultural land; and
 - (d) to study and give guidance and recommendations on issues relating to physical planning which transcend more than one local authority for purposes of co-ordination and integration of physical development.
2. The functions of other liaison committees shall be—



- (a) to inquire into and determine complaints made against the Director in the exercise of his functions under this Act or local authorities in the exercise of his functions under this Act or local authorities in the exercise of their functions under this Act;
- (b) to enquire into and determine conflicting claims made in respect of applications for development permission; ...
- (c) to hear appeals lodged by persons aggrieved by decisions made by the Director or local authorities under this Act.”

45. It is clear from the above stated provisions that the 1st appellant had clear avenues to redress any grievance against the decision of the City Council of Nairobi. Under section 13(1) of the Act, the 1st appellant had the option of appealing to the local Liaison Committee against the decision of the 1st respondent.

46. This Court in the case of Speaker of the National Assembly v Karume [2008] 1 KLR (EP) 425 stated that where a specific grievance redress mechanism is stipulated under the Constitution or statute, the same must be strictly adhered to. The Court observed as follows:

“In our view, there is considerable merit in the submission that where there is 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.”

47. Accordingly, the 1st respondent had the mandate to reverse its decision after discovering that permission was erroneously granted to the 1st appellant to subdivide his land. The local authority asked the 1st appellant to amend his plan before his application could be considered. The 1st appellant elected to institute Judicial Review proceedings.

48. In the circumstances, we find that the learned Judge did not err in finding that the 1st respondent acted within the law and the option open to the 1st appellant was to file an appeal before the local Liaison Committee. From the record, the reasons for denying the 1st appellant permission were given to him in writing and the rules of natural justice were therefore complied with. Further, the 1st appellant cannot complain of having been subjected to an unfair procedure or that natural justice was not followed.

49. On the question whether or not the orders of mandamus ought to issue, the 1st appellant sought remedy through judicial review proceedings in the High Court.

50. The principle that guides the High Court when dealing with the scope and efficacy of an order of mandamus was aptly stated by this Court in Kenya National Examinations Council v Republic Ex parte Geoffrey Gatbenji Njoroge & 9 others [1997] eKLR in the following terms:

“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.”



51. The *Court* further stated that:

“... the party against whom the application is made must be 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.” [Emphasis supplied].

52. Further, this Court in *Republic v National Environmental Management Authority*, [2011] eKLR, stated as follows:

“The principle ... is where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, 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...”

53. The 1st respondent’s statutory duty to grant approval for sub-division as granted by section 41 of the *Act* is discretionary. “It may approve with or without such modifications and subject to such conditions as it may deem fit, or refuse to approve, an application made...” [Emphasis supplied].

In *Halsbury’s Laws of England* 4th Edition Volume 1 paragraph 89, the editors illuminate the point that:

“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.” [Emphasis supplied].

54. By parity of reasoning, the remedy of an order of mandamus is not available to a party where the statutory duty entails the exercise of discretion on the part of a body on whom the discretion is conferred by statute.

55. In the circumstances, the 1st respondent had the discretion to grant or not to grant permission to the sub-division scheme or to erect a road barrier. The learned Judge did not therefore err in holding that the court would exceed its jurisdiction if it directed the 1st respondent on how to discharge its mandate. Further, the appellants had clear avenues for redress if aggrieved by the decision of the 1st respondent.

56. The upshot is that this appeal has no merit and is dismissed. The appellants and the 2nd to 8th respondents being neighbours, we make no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF MARCH, 2023

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

JAMILA MOHAMMED



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JUDGE OF APPEAL

H. OMONDI

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JUDGE OF APPEAL

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I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

