



Maina v Nairobi City County; Muthaiga North Resident's Association (Interested Party) (Judicial Review Application E001 of 2023) [2024] KEELC 4022 (KLR) (30 April 2024) (Judgment)

Neutral citation: [2024] KEELC 4022 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
JUDICIAL REVIEW APPLICATION E001 OF 2023**

EK WABWOTO, J

APRIL 30, 2024

IN THE MATTER OF: AN APPLICATION BY THE APPICANT, JANE NJERI MAINA FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY WAY OF ORDERS OF CERTIORARI AND PROHIBITION DIRECTED TO THE RESPONDENT.

AND

IN THE MATTER OF: THE CONSTITUION OF KENYA 2010, THE PHYSICAL AND LAND USE PLANNING ACT 2019, THE NAIROBI CITY COUNTY PUBLIC PARTICIPATION ACT 2015, AND THE FAIR ADMINISTRATIVE ACTIONS ACT 2015

BETWEEN

JANE NJERI MAINA EXPARTE APPLICANT

AND

NAIROBI CITY COUNTY RESPONDENT

AND

MUTHAIGA NORTH RESIDENT'S ASSOCIATION INTERESTED PARTY

JUDGMENT

1. By a Notice of Motion dated 16th January 2023, the Exparte Applicant herein seeks the following reliefs:
 1. The Honourable court be pleased to issue an order of certiorari to remove to this court and quash the respondents' decision communicated vide the letter Ref:- UP/ UD & P/ Vol. 1/03/2023 dated 11th January 2023 cancelling and or withdrawing the development permission granted by the applicant.
 2. Costs of the application be provided for.



2. The Application is based on the grounds set out in the statement of facts, the affidavit of the Exparte Applicant dated 13th January 2023 and a supplementary Affidavit of Exparte Applicant 25th October 2023.
3. The Application was opposed by the Respondent and the Interested party. The Respondent filed a Notice of Preliminary objection dated 20th February 2023 and a Replying Affidavit sworn on 22nd August 2023 by Wilfred Masinde Wanyonyi its Ag. Deputy Director while the Interested Party filed a Replying Affidavit sworn on 23rd June 2023 by Antony Mwangi its Chairman.
4. The application was canvassed by way of written submissions. The Exparte Applicant filed her written submission dated 25th October 2023. The Respondent filed written submission dated 10th November 2023 and the Interested Party filed its written submission dated 17th November 2023.
5. It was the Exparte Applicant case that vide a letter dated 5th January 2023 she applied for development permission from the Respondent to construct a temporary office block on her property known as L.R No.14861/18 within Muthaiga North off Kiambu Road since the user of the property is both residential and commercial purposes.
6. It was averred that the Respondent upon consideration of her application and after being satisfied that all the conditions set out in the *Physical and Land use Planning Act*, 2019 and related regulations and by-laws had been complied with by the Exparte Applicant granted the development permission to her vide the letter dated 6th January 2023. It was also averred that a sum of Ksh.660,000/- had been paid prior to the issuance of the development permission which was to be completed within 3 months.
7. The Exparte Applicant averred that later the Respondent without any prior notice or hearing arbitrarily and without justification vide a letter dated 11th January 2023 communicated the purported cancellation and or withdrawal of the development permission that had been issued after she had spent colossal sums of money in purchasing construction materials engaged contractors and commenced the intended development on the strength of the development permission that was granted to her.
8. It was contended that the Respondent's action of cancelling and or withdrawing the Applicant development permission was not only arbitrary, unprocedural, unjustified, irrational and or unreasonable but is equally malicious and or motivated by ulterior motives as the Applicant duly complied with all the conditions for grant of the development permission including the publication in the Standard and Daily Nation newspapers on 20th December 2022 in furtherance of the legal requirement for public participation. It was also averred that no objection was raised by any person.
9. The Exparte Applicant contended that the impugned decision to arbitrarily, unreasonably, unjustly and unprocedurally cancel the development lawfully issued without prior notice or according the Applicant an opportunity to be heard is not only in breach of the Applicants right to fair and lawful administrative action under Article 47 of *the Constitution* as well as Section 4(3) of the FAA Act 2015 but it is also blatant breach of the Exparte Applicant's legitimate expectation that upon receipt of the development permission her development works were to proceed uninterrupted unless for a lawful cause. It was also averred that there exist exception circumstances to warrant admission of this suit by the Court under Section 9 (4) of the FAA Act, 2015.
10. In her written submissions, the Exparte Applicant submitted on the following issues; whether the Court has jurisdiction to entertain this application, whether the Application was merited and who should bear the cost of application.
11. The Exparte Applicant in response to the Respondent's Notice of Preliminary objection submitted that the Respondent's contention that Sections 61 (3) & (4) of the *Physical and Land Use Planning*



- Act, 2019 outs the jurisdiction of the Court to hear and determine the present application is untenable. It was argued that Section 61 (3) of the does not vest the Liaison Committee with jurisdiction to entertain an appeal against a decision of a County Executive Committee member to cancel an already granted development permission and neither does this section confer on a party who is aggrieved by a decision cancelling her development permission to appeal to the Liaison Committee. It was also submitted that the said decision was not made by the County Executive committee member but County Chief Officer.
12. In support of the aforementioned position the Exparte Applicant made reference to several cases including the case of Anisminic Limited vs Foreign Compensation & Another [1969] A.C 147 and Republic vs Municipal Council of Mombasa Exparte Mazrui & 2 Others [2000] eKLR and stated that a statute that purports to outs jurisdiction of the Court to review an administrative decision must be construed strictly.
 13. Relying on the case of Republic vs County Government of Kwale Exparte Leisure Lodges (2018) eKLR it was argued that the Applicant was not issued with any notice before making of the decision in the letter dated 11th January 2023. The Exparte Applicant reiterated that the right to appeal to the Liaison committee, under section 72 of the Act accrues upon service of a valid notice held in the aforementioned case.
 14. While urging this court to find that doctrine exhaustion should not be applied in this case, Counsel submitted that the appellate mechanism under section 61 and 73 of the physical and Land Use Planning Act, 2019 was not only inefficient but insufficient to address her grievance that included applying for and obtaining an order for stay of the impugned decision.
 15. It was also argued that the Exparte Applicant has challenged the decision of the Respondent on the basis that it violates her rights to fair administrative action under Article 47 of the Constitution and therefore null and void for procedural impropriety. The cases of John Kamau Mburu vs Kenya Accreditation Service [2021] eKLR, Japheth Kithi Chenga (Suing on his own behalf and as the registered officials of Active Environment Team) vs Kenya Forest Service & 10 Others [2022] eKLR and Whitehorse Investment Ltd vs Nairobi City County [2019] eKLR
 16. On whether the judicial review application is merited, it was argued that the issuance of an enforcement notice it an administrative action that must comply with the dictates of Article 47 of the Constitution and rules of natural justice. It was argued that the issuance of the permission to construct temporary office block on the land by the Respondent to the Applicant was an administrative action and the Respondent had a duty to ensure that its actions were lawful, fair and reasonable as envisaged under Article 47 of the constitution.
 17. The court was urged to allow the application with costs.
 18. The Respondent filed written submissions dated 10th November 2023 and submitted on the following issues; whether the Court has jurisdiction to hear and determine the application, whether the Honourable Court should grant the judicial review orders sought and who should bear the costs of the suit.
 19. The Respondent raised a preliminary objection and submitted that the court lacks jurisdiction to hear and determine the application by dint of Sections 61 (3) and 61 (4) of the Physical and Land Use Planning Act, 2019. It was further submitted that the Applicant had prematurely moved to this Court without exhausting the available alternative dispute resolution mechanism, the Respondent relied on the following cases to support its position; Republic vs National Environment Management Authority



Exparte Sound Equipment [2011] eKLR, Issa Ahmed & 15 Others vs Mohamed Al – Sawae [2021] eKLR and Kenneth Nguni Mwaura & Another vs Rubis Energy Kenya & 2 Others [2021] eKLR.

20. On whether the Court should grant the reliefs sought, it was argued that the Exparte Applicant did not comply with the provision of Section 58 (7) of the *Physical and Land Use Planning Act* and hence the Respondent had no reason but to cancel the approval. The Court was urged to dismiss the application with costs.
21. The interested party submitted on the following two issues; whether the Court has jurisdiction and whether the Exparte Applicant is entitled to the orders sought.
22. It was argued that the issues raised by the Exparte Applicant squarely falls within Section 61 (3) of the *Physical and Land Use Planning Act* for existence of an alternative dispute resolution mechanism. As to whether or not the Exparte Applicant was entitled to the orders sought, the Interested Party submitted that the development permission was obtained without compliance with the *Physical and Land Use Planning Act*, the zonal regulation and the Environment Management and Coordination Act. Hence therefore the reliefs sought in the application ought to be declined.
23. The court has considered the application and submission filed by the parties and is of the view that the following are the salient issues for consideration herein:-
 - I. Whether this Court has jurisdiction to hear and determine the application.
 - II. Whether the Exparte Applicant was denied an opportunity to be heard.
 - III. Whether the Exparte applicant is entitled to the order of certiorari sought herein.
24. The Respondent objected to the jurisdiction of this court for the reasons that the Exparte Applicant had not exhausted the existing alternative dispute resolution mechanism as provided for under Section 61 (3) and 61 (4) of the *Physical and land use Planning Act*, 2019. The said position was supported by the Interested party.
25. The Exparte Applicant on the other hand maintained that this court had jurisdiction to hear and determine this matter for the reasons that Section 61 (3) and 61(4) of the Physical Planning Act are silent to situations where a cancellation of an approval/development permission has been done and specifically where no notice prior to the said decision was issued.
26. The issue of jurisdiction having been raised by a party should be determined at the earliest possible opportunity. This is because jurisdiction is the lifeline of a case and without jurisdiction, a Court ought to down its tools. See Owners of the Motor Vessel "Lillian SS" vs Caltex Oil Kenya Limited (1989) KLR 1. A Court's jurisdiction flows from either *the Constitution* or legislation or both. The Supreme Court in The Matter of the Interim Independent Electoral Commission Constitutional Application No. 2 of 2011 discussed the issue of jurisdiction in the following manner:

“Assumption of jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*; by statute law, and by principles laid out in judicial precedent.... the Lillian "SS" case establishes that jurisdiction flows from the law, and the recipient, the Court, is to apply the same with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation or by way of endeavours to discern or interpret the intentions of Parliament where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court their respective jurisdiction is donated by *the Constitution*".



27. In the words of Chief Justice Marshall of the U.S. Supreme Court in *Cohens vs. Virginia* 19 U.S. 264 (1821):-

“It is most true that this Court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of *the Constitution*. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to *the Constitution*. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is exercise our best judgment, and conscientiously perform our duty.”

28. Article 162(2)(b) of *the Constitution* states that this Court shall have jurisdiction over disputes relating to the environment and the use and occupation of and title to land. In addition, Section 13 of the *Environment and Land Court Act* expounds on the jurisdiction of this Court as follows:

- “(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
- (2) In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes—
 - (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (b) relating to compulsory acquisition of land;
 - (c) relating to land administration and management;
 - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - (e) any other dispute relating to environment and land.”

29. While the court’s jurisprudential policy is to encourage parties to exhaust and honour alternative forums of dispute resolution where they are provided for by statute, the exhaustion doctrine is only applicable where the alternative forum is accessible, affordable, timely and effective. Thus, in the case of *Dawda K. Jawara vs Gambia* ACmHPR 147/95-149/96-A decision of the African Commission of Human and Peoples’ Rights it was held that:

“A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint [in its totality]...the Governments assertion of non exhaustion of local remedies will therefore be looked at in this light ...a remedy is considered available only if the applicant can make use of it in the circumstances of his case.”



30. Parliament enacted the Environment and Land Act 2011, (No. 19 of 2011) and by Section 4 thereof established the ELC. Its jurisdiction is as provided for in Section 13 with Section 13 (1) specifically outlining that the court ‘shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution’. Section 13(2) then grants express and original jurisdiction in matters;
- (a) relating to environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (b) relating to compulsory acquisition of land;
 - (c) relating to land administration and management;
 - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - (e) any other dispute relating to environment and land.

It further provides; “Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to the environment and land under Articles 42, 69 and 70 of the Constitution.” The Supreme Court in the case of Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) (Petition E007 of 2023) [2023] KESC 113 (KLR) (28 December 2023) (Judgment) stated that there is nothing that precludes the adoption of a nuanced approach, that safeguards a litigant’s right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms can offer. That is also why Section 9(4) of the Fair Administrative Action Act creates the exception that exhaustion of administrative remedies may be exempted by a court in the interest of justice upon application by an aggrieved party.

31. In the case of R. vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others Ex Parte The National Super Alliance (NASA) Kenya [2017]eKLR after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the Court held:-

“(46) What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case, the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it.

[47]. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake.”

30. In the instant case, the Exparte Applicant has argued that the provisions of section 61 (3) are only limited to hearing appeals that arise from the decision on an application for development permission. The decisions being challenged herein was a cancellation of the already granted development



permission which action was made by the Respondent without notice to the Exparte Applicant. The Exparte Applicant also has also averred a violation of her rights to fair administrative action as set out under Article 47 of *the Constitution* upon which she seeks the order of certiorari.

31. In considering the foregoing, this Court agrees with the reasoning of the the Supreme Court of Kenya in the case of *Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties)* (supra) where it was held that the availability of an alternative remedy does not necessarily bar an individual from seeking constitutional relief. This is because the act of seeking constitutional relief is contingent upon the adequacy of an existing alternative means of redress. If the alternative remedy is deemed inadequate in addressing the issue at hand, then the court is not restrained from providing constitutional relief. But there is also a need to emphasize the need for the court to scrutinize the purpose for which a party is seeking relief, in determining whether the granting of such constitutional reliefs is appropriate in the given circumstances. This means that a nuanced approach to the relationship between constitutional reliefs for violation of rights and alternative means of redress, while also considering the specific circumstances of each case to determine the appropriateness of seeking such constitutional reliefs, is a necessary prerequisite on the part of any superior court.
32. In view of the foregoing, it is the finding of this Court that the Exparte Applicant's application is properly before this Court and this Court has jurisdiction to hear and determine the same.
33. On the applicability of the provisions to fair administrative action and the Exparte Applicant's right to be heard.

Article 47 of *the Constitution* stipulates as follows: -

Article 47

- “(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.”

36. Fair administrative action, as per Article 47 of *the Constitution* of Kenya, broadly refers to administrative justice in public administration and is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations and the right to a fair administrative action. Article 47 of *the Constitution* codifies every person's right to fair administrative, action that is expeditious, efficient, lawful, reasonable and procedurally fair and the right to be given reasons for any person who has been or is likely to be adversely affected by administrative action. Equally a right to a fair hearing and due process of the law is enshrined in our Constitution under Article 50.
37. In the instant case the applicant was not granted any opportunity to be heard before the issuance of the letter dated 11th January 2023. No evidence was adduced to the contrary and as such her right to fair administrative action was violated.



38. On whether or not the Exparte Applicant is entitled to the reliefs sought, the scope of such orders was discussed by the Court of Appeal in the case of Kenya National Examination Council v Republic Ex-Parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR as follows:

“... only an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons”

39. It is evident that this court having found that the Respondent violated the Exparte Applicant’s right to be heard and right to fair administrative action, this court is satisfied that the Exparte Applicant has made out a case for grant of the order sought and she is entitled to the same.

40. In respect to costs of the suit, although costs of an action or proceedings are at the discretion of the court, the general rule is that costs shall follow the event. A successful party should ordinarily be awarded costs of an action unless the court directs otherwise. In the instant case, I will direct each party to bear own costs of the application

41. In the end the application dated 16th January 2023 is allowed in terms of prayer 1 with an order that each party bears own cost of the application. Those shall be the final orders of this Court.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 30TH DAY OF APRIL 2024.

E.K. WABWOTO

JUDGE

In the presence of: -

Mr. Rapando for the Exparte Applicant.

Mr. Dayib for the Respondent.

Ms. Kinoti for the Interested Party.

Court Assistant; Caroline Nafuna.

