IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, SICHALE & KANTAI, JJ.A)

CIVIL APPEAL NO. 77 OF 2015

BETWEEN

KWENCH LIMITED.....APPELLANT

AND

NAIROBI CITY COUNTY.....1ST RESPONDENT

INTERIM SECRETARY

NAIROBI CITY COUNTY.....2ND RESPONDENT

MEDICAL OFFICER OF HEALTH

NAIROBI CITY COUNTY.....3RD RESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya (G.V. Odunga, J.) dated 31st March 2014

in

JR Misc. Appl. No. 231 of 2013)

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JUDGEMENT OF THE COURT

[1] What triggered the dispute, the subject matter of this appeal was a Notice issued under the **Public Health Act** on or about June, 2013 by the ***Nairobi City County*** (1st respondent). The said notice required ***Kwench Ltd*** (appellant) to drain water flooding on **LR Nos 14970/233 and 235** (suit premises); to provide infrastructure and permanently drain the said water. The appellant was aggrieved by the said notice and challenged it through a judicial review application that was filed in the High Court by way of a notice of motion dated 4th July 2013.

[2] In the application, the appellant sought orders of prohibition and *certiorari* on the grounds that it was the responsibility of the respondent to provide and maintain county public works; services including storm water management systems in built up areas; water and sanitation services. That it was a breach of the constitutional duty by the respondents to neglect their duty for them to require the appellant a private entity that was not in possession of the suit premises to drain rain water flooding on the suit property when the property did not belong to them. Moreover, they claimed that they became *funtus officio* of the matter when the 1st respondent approved the subdivision scheme in a letter dated 19th April, 2011 to the Commissioner of Lands which stated;

> ***"The developer has complied with the imposed subdivision conditions to my satisfaction. I therefore, recommend that you accord final approval to the scheme."***

[3] That the appellants obtained and complied with all the conditions in subdividing the suit premises from the original title which was **LR No. 5989/13, 18** and **19** Kiambu Road and upon compliance, the Commissioner of Lands approved the subdivision scheme which gave rise to many plots which have been transferred to different purchasers. That the said purchasers are in possession and control of the suit premises. That the flooding occurred after the properties were transferred and as such it is the 1st respondent who should deal with the problem.

[4] In response, the 1st respondent filed grounds of opposition and written submissions dated 12th November, 2013 in which it was contended that by issuing the notice dated 14th June, 2013, the respondents were exercising their statutory mandate which is to maintain public health and sanitation within its jurisdiction for the public good; that the appellant was the original proprietor of the premises and it was its duty to comply with the notice and that the appellant had refused to comply with the directive and/or carried out improvements in a careless fashion causing the flooding to occur. It was further argued that if the court granted the orders to quash the notice dated 14th June, 2013, it would defeat the respondents' mandate to enforce and maintain measures towards public health and sanitation and that judicial review orders as sought by the appellant were inappropriate as they would hamper the respondent's mandate to enforce and maintain measures towards public health and sanitation, thus the notice was incapable of being quashed.

[5] The matter fell for hearing before Odunga, J. and in his judgment dated 31st March, 2014 the subject matter of this appeal, the Judge dismissed the motion. In doing so he stated that the purpose of judicial review remedy is to ensure that the individual is given fair treatment by the authority to which he has been subjected; and it is not to substitute the opinion of the Judge for that of the authority mandated by law to decide the matter in question. Regarding the appellant's contention that it was no longer the owner of the suit property, the Judge made reference to ***Section 118(2)*** of the **Public Health Act**, which states that the author of a nuisance is any person by whose act, default or sufferance, the nuisance is caused, exists or is continued regardless of whether or not he/ she occupies or owns the property.

[6] The Judge further stated that under ***Section 119*** of the Act authorizes the Medical Officer of Health to notify the author of the nuisance to remedy it.

Further, under ***Section 120,*** if the author of the nuisance fails to comply with the notice within the stipulated period, the Medical Officer of Health shall file suit before the Magistrate's Court which shall determine questions such as the one forming the basis of the application; whether the nuisance was committed by the person against whom the charge is laid. In conclusion, the learned Judge held that the issue of whether the appellant was the author of the nuisance was prematurely before the High Court as the procedure to follow was provided in the **Public Health Act**. The application was dismissed with costs to the respondents.

[7] Dissatisfied with the aforesaid judgment, the appellant filed the instant appeal on the grounds that the learned Judge erred by: -

> ***(a) Holding that apart from the issue of whether a person other than that the owner or occupier of premises can be held to have caused a nuisance under the Public Health Act, the rest of the issues raised by the ex-parte applicant in the entire suit were prematurely before the superior court;***
>
> ***(b) Failing to determine whether in the circumstances of the case, a nuisance was committed and whether the ex-parte applicant was the author of the nuisance if any;***
>
> ***(c) Holding that the ex-parte applicant had failed to meet or fully satisfy the terms and conditions of the subdivision scheme while there was evidence that the 1st respondent had approved the subdivision scheme;***
>
> ***(d) Failing to find that the ex-parte applicant's evidence before him was unchallenged by the respondents thus misdirecting himself on whether or not the ex-parte applicant had met all the subdivision scheme terms and conditions;***
>
> ***(e) Failing to consider the applicable law, evidence produced and the submissions filed by the ex-parte applicant;***
>
> ***(f) Dismissing the ex-parte applicant's notice of motion dated 4th July 2013 and awarding costs to the respondents; and***
>
> ***(g) Failing to find that the actions of the respondents were unreasonable, unfair and amounted to an error of law.***

[8] These grounds were nonetheless compressed into two in the written submissions which were orally highlighted by ***Mr. Thuku*** who appeared for the appellant during the plenary hearing. On the first issue of whether the notice was fairly issued to the appellant, learned Counsel argued that the appellant had fully complied with the respondents' directions to reconstruct the drainage system on the suit premises to the satisfaction of the City Engineer; that once the subdivision was approved and titles were issued, it became the county government's duty to maintain and repair the public works and the infrastructure thereto as provided under part 2 of the Fourth Schedule of the Constitution; that it was the duty of the trial Judge to determine whether it was the 1st respondent's duty to maintain the drainage system under the law.

[9] On the second issue of whether the appellant was the author of the nuisance, learned counsel argued that the flooding was caused by heavy rains which is an act of God; that the Public Health Act does not classify rain water as a nuisance and that the appellant could not legally enter the two properties to fix the drainage system as they were private property. Consequently, counsel maintained that, the application for orders of prohibition and certiorari was necessary in order to prevent injustice and/or abuse of power by the respondents.

[10] The respondents were not represented at the hearing of the appeal and did not file any written submissions. Nonetheless that does not lessen our mandate as the first appellate court as set out in ***Rule 29(1)*** of this Court's Rules namely to re-appraise the evidence and to draw inferences of fact. **(**See **Selle & Another v. Associated Motor Boat Co. Limited [1973] EA 123)**. From the foregoing summary, we have distilled one main issue which we think fall for our determination in this appeal, that is whether the Judge erred in the exercise of his judicial discretion by declining to grant the reliefs sought.

[11] Whenever this Court is called upon to interfere with the exercise of judicial discretion, as in this case, it is necessary to remind ourselves of the principles enunciated in **Coffee Board of Kenya vs. Thika Coffee Mills Limited & 2 Others [2014] eKLR**. We cannot to interfere with the exercise of such discretion unless we are satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned

injustice. See also this Court's decision in **Mbogo vs. Shah [1968] E.A. 93**:

> ***"…..A Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising this discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and as a result there has been injustice."***

[12] The judicial review application was predicated under the provisions of ***Section 120*** of the **Public Health Act** which states as follows: -

> **"120. Procedure if owner fails to comply with notice**
>
> **(1) If the person on whom a notice to remove a nuisance has been served as aforesaid fails to comply with any of the requirements thereof within the time specified, the medical officer of health shall cause a complaint relating to such nuisance to be made before a magistrate, and such magistrate shall thereupon issue a summons requiring the person on whom the notice was served to appear before his court.**
>
> **(2) If the court is satisfied that the alleged nuisance exists, the court shall make an order on the author thereof, or the occupier or owner of the dwelling or premises, as the case may be, requiring him to comply with all or any of the requirements of the notice or otherwise to remove the nuisance within a time specified in the order and to do any works necessary for that purpose."**

[13] In other words the Judge was being asked to make an enquiry on whether there existed a nuisance and to make issue judicial review orders of prohibition and *certiorari* thereto. The plain reading of the **Public Health Act** clearly vests the jurisdiction of making an inquiry, visiting the premises to inspect the nuisance complained about upon the Magistrate's Court. That is the proper court to make an inquiry as to the existence of a nuisance and whether the nuisance was committed by the person against whom the charge is laid. We appreciate that judicial review, is a jurisdiction given to the High Court now by the Constitution and the **Fair Administrative Actions Act** to issue orders of *mandamus*, prohibition and *certiorari* as the remedies against acts or omissions by public entities. This is as was held by this Court in **Suchan Investments Ltd vs. Ministry of National Heritage & Culture & 3 others [2016] eKLR** that:-

> ***"…The common law principles of administrative review have now been subsumed under Article 47 of the Constitution and Section 7 of the Fair Administrative Actions Act. In this regard, there are no two systems of law regulating administrative action - the common law and the Constitution - but only one system grounded in the Constitution. The courts power to statutorily review administrative action no longer flows directly from the common law, but inter alia from the constitutionally mandated Fair Administrative Actions Act and Article 47 of the Constitution."***

[14] In this instance, the court refused to grant the orders because the issue in question was whether or not the notice to remove the storm water was merited; those are matters that fell within the Magistrate Court's jurisdiction. Ideally, where there is an alternative remedy, judicial review ought to be sought as a matter of last resort and where there are exceptional circumstances. If an alternative dispute resolution mechanism exists, the High Court will not entertain judicial review before those alternative mechanisms are exhausted. Were there exceptional circumstances in this matter to warrant the granting of orders which by the High Court ought to have been issued in the first instance by a Magistrate's Court? Just like the trial Judge, we are not satisfied that there existed any exceptional circumstances. This was an ordinary case of water flooding on people's property and if the appellant's were objecting to the notice requiring them to remedy the situation, the matter called for an inquiry to establish the source or cause of the nuisance and a determination of who was to carry out the remedy. These are contested matters that are not appropriate for judicial review orders. This Court in setting out the criteria for determining such exceptional circumstances in **Republic vs. National Environmental Management Authority [2011] eKLR** held:-

> ***"The principle running through these cases 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.."***

[15] In a recent decision of this Court in the case of **Whitehorse Investments Ltd vs. Nairobi City County [2019] eKLR** the matter in issue was whether the High Court erred by holding that the appellant who was aggrieved by an issuance of enforcement notice requiring the appellant to demolish some structures was first supposed to refer the matter to the Liaison Committee established under the **Physical Planning Act** and not to seek remedies under judicial review regime. This is what this Court stated in a pertinent paragraph of its judgment which we think is relevant to this matter: -

> ***"The impugned enforcement notice clearly spelt out what the appellant was supposed to do and if it had a grievance regarding the said notice, it also indicated that it was at liberty to appeal to the Liaison Committee. The dispute is about a development of hotel within the County of Nairobi which is wholly governed by the said Act. It is that Act that makes provisions on development plans; applications for development; permission and approval of development among others. The learned trial Judge heavily relied on the provisions of Section 9(2) of the Fair Administrative Actions Act that enjoins courts not to review an administrative action or decision unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. Subsection (4) of the same Act provides consideration of special circumstances that would entitle an applicant an exemption from an obligation to exhaust those internal mechanisms."***

[16] The above case is on all fours with this appeal even though it was brought under the **Physical Planning Act**. The **Public Health Act** has also set out a procedure that deals with issues of nuisance and the we think we have said enough to demonstrate that the learned Judge

appreciated the nature of the judicial review proceedings before him and the role of the court in the first instance. We find that he exercised his discretion correctly by declining to issue the orders of prohibition and *certiorari*, preferring the matter to proceed before the subordinate court which has jurisdiction to hear the matters under the **Public Health Act**.

[17] Accordingly, the appeal herein lacks merit and is hereby dismissed with costs.

Dated and delivered at Nairobi this 6th day of March, 2020.

M. K. KOOME

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR