IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, KIAGE & SICHALE, JJ.A)

CIVIL APPEAL NO. 231 OF 2013

BETWEEN

SIGMA FEEDS LIMITED.....APPELLANT

AND

DIRECTOR NAIROBI CITY PLANNING DEPARTMENT....1ST RESPONDENT

TOWN CLERK, CITY COUNCIL OF NAIROBI..... 2ND RESPONDENT

MESSRS METCOURT HOSTELS LTD.....3RD RESPONDENT

(An appeal from the judgment and order of the High Court of Kenya at Nairobi (Gacheche, J.) dated 1st April, 2010

in

Jr. Misc. Civil Appln. No. 28 of 2009)

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JUDGMENT OF THE COURT

By this appeal the appellant **Sigma Feeds Limited**, (Sigma) seeks a reversal of the judgment (sic) and order of the High Court at Nairobi (Gacheche, J.) delivered on 1st April, 2010 rejecting its application for the judicial review orders of *certiorari*, prohibition and *mandamus.* It concerned an enforcement notice issued on 9th January, 2009 by the defunct City Council of Nairobi appearing in these proceedings as the Director of City Planning and the Town Clerk, who are the 1st and 2nd respondents, respectively (hereinafter „the Council?). The notice was directed at "**METCOURT HOSTELS/OWNER/OCCUPIER"** of LR 2259/66-BOGANI ROAD KAREN. It stated that developments had been carried out without the Council?s permission as required by Part V, **section 3(1)** of the **Physical Planning Act**, **Cap 286** and its by-laws. The exact violations included illegal conversion or change of use from agriculture to factory and offices, as well as illegal construction of a building structure and occupation of the same. It required the addressee to stop further illegal development forthwith and return the land to its original use within 48 hours, failing which the council might enter upon the said land and execute the requirements outlined.

In its statement of facts Sigma set out a history dealings, disputes and litigation between itself and one Ideal Farm Limited which was its landlord at the subject property before it sold it to Messrs Metcourt Hostels Limited (Metcourt) which was later joined as an interested party in the judicial review proceedings. It filed HCCC NO. 420 of 2008 in which it sought and obtained injunctive orders against Metcourt prohibiting it from taking possession of the disputed property or interfering with Sigma?s tenancy and occupation thereof. It had previously filed Tribunal Case No. 556 of 2008 against Metcourt. Sigma complained, of the enforcement notice, that;

> ***"(a) The said notice was and has not to date been served on the applicant.***
>
> ***(b) The said notice was issued allegedly pursuant to section 30(1) of The Physical Planning Act, Cap 286, Laws of Kenya and unspecified City Council by-laws, and required compliance within 48 hours of service.***

(c) The aforesaid notice is fatally defective and null and void for, amongst others;

(d) Not served on the occupier which occupier was to be prejudiced and to be adversely affected by the threatened demolition of its go downs, warehouses, factory, sales offices and business premises, plant equipment.

(e) The applicant has not been heard and/or afforded an opportunity of being heard before the issuance and/or after the lapse of the time provided in the said Notice.

(f) The said notice has been contrived with the sole purpose of circumventing the existing court order issued on 14th day of October, 2008 and hence issued in contempt of the court.

(g) The time provided in the notice for compliance and/or filing an appeal and/or application to the High Court has, harshly, unreasonably, and fraudulently been abridged to a mere 48 hours, which were calculated to lapse on a weekend, thereby vitiating any otherwise validity of the said notice."

It also complained that the notice contravened the law for being issued at the instigation of Metcourt for its benefit; being for only 48 hours, thus oppressive and unreasonable; and for denying Sigma the right to be heard.

Both the Council and Metcourt denied the allegations leveled against them. One **P.M. Kibunda** the Council?s Director of City Planning swore a replying affidavit on 30th April, 2009 and beyond stating that Sigma?s judicial review application was incompetent went on to state that the Council was neither privy to nor aware of any previous or pending litigation between Sigma and Metcourt or any other parties; affirmed the Council?s statutory obligation to ensure compliance with its regulations by issuance of enforcement notices; Sigma had not denied the violations that led to the enforcement notice; it enforced its statutory obligations without malice; Metcourt were duly served with the enforcement notice and had filed an appeal to the relevant Liaison Committee; it had no obligation to first hear a party before issuance of a notice such hearing being available on appeal to challenge the notice; the Physical Planning Committee had elaborate procedures to secure fair hearing; the prayers sought were calculated to grant Sigma a blanket immunity from enforcement of the Council?s regulations; the law did not prescribe time and the 48 hours given in the notice were in the circumstances reasonable; the notice was not abridged to expire on, nor was it enforced on a Sunday; an alternative remedy did exist by way of appeal to the relevant Physical Planning Liaison Committee with wide powers including to injunct or stop forthwith the operation of the notice; it is only if the Liaison Committee failed to dispense justice that judicial review could be preferred against its decision which was not the case. He therefore prayed that the judicial review application be dismissed.

For Metcourt, its Managing Director one **James Gacheru** swore a replying affidavit on 4th May, 2009 in which he admitted the existence of an injunction order issued by the High Court in **ELC Civil Case No. 420 of 2008** pending the determination of **Business Premises Reference No. 536 of 2008;** the suit property was agricultural land and Sigma had not demonstrated compliance with the law and any development permission to build offices; the judicial review application was an abuse of process as Sigma?s recourse lay to the relevant Committee under the Physical Planning Act; the grounds relied on in the statement of facts dated 16th January, 2009 were different from those in the notice of motion dated 10th February, 2009 and the notice of motion had affidavits and annextures attached contrary to the Provision of Order LIII of the **Civil Procedure Rules.** The application was therefore fatally defective, bad in law and for dismissal.

After hearing the parties? submissions and considering the authorities cited before her, the learned Judge found that the judicial review application was defective and incompetent but, nonetheless, decided it on the merits as well and dismissed it. Sigma in this appeal complains that the learned Judge erred by:

- ***Not considering that there was no personal service of the enforcement notice yet the respondent proceeded to demolish the subject property.***
- ***Not considering that the notice gave 48 hours notice contrary to section 30 of the Physical Planning Act.***
- ***Not considering that Sigma was not given a hearing prior to the demolition.***
- ***Not considering that the council had given it relevant permits and licences to conduct business on the property for over 10 years.***
- ***Not considering that the council acted*** *ultra vires* ***and in bad faith in issuing the enforcement notice.***
- ***Finding that the respondents were never served with injunctive orders.***
- ***Stating that the orders sought in the notice of motion were not the same as sought in the statutory statement***
- ***Stating that filing the judicial review application and an appeal to the Nairobi Province/City Physical Planning Liaison Committee amounted to abuse of process.***
- ***Awarding the respondents costs.***

Sigma?s advocates, M/s C.N. Kihara & Co. Advocates filed submissions on the appeal on 26th November, 2018 which learned counsel **Miss Njuguna** relied on. We noted that in those submissions there was reference to **Articles 50** and **47** of the **2010 Constitution** for the contention that Sigma?s rights to fair hearing and fair administrative action had been violated by the enforcement notice. When we asked counsel whether the 2010 Constitution applied to the case herein where the events complained of predated it, she was dubious on the point and did not seem to give a clear response.

The advocates for the Council and Metcourt neither filed submissions nor appeared at the hearing. Our surmise is that they had probably moved on, the demolition having long occurred, and the prayers sought in the memorandum of appeal being such as would not overly concern them.

When a Judge of the High Court makes a decision in a judicial review application, it involves an exercise of discretion and as such, we, as an appellate Court, will not lightly interfere with such exercise of discretion. The discretion belongs to the first instant judge, and not to the appellate court which would not be entitled to interfere merely because were it the one considering the matter, it would probably have arrived at a different decision. When a judge?s discretion is wide and unfettered, it will be respected and upheld on appeal unless it be shown that it was not exercised judiciously, in accordance with principle or was otherwise plainly wrong. In the oft-cited decision of the predecessor of this Court in ***MBOGO & ANOR vs. SHAH [1968] EA 93***, Sir Clement De Lestang V.P set down the parameters for interference as follows, at p94;

> ***"I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has acted on matters on which it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."***

Sir Charles Newbold P; agreeing with him, expressed himself as follows at p 96;

> ***"We come now to the second matter which arises on this appeal, and that is the circumstances in which this court should upset the exercise of a discretion of a trial judge where his discretion, as in this case, was completely unfettered. There are different ways to enunciating the principles which have been followed in this court, although I think they all more or less arrive at the same ultimate result. For myself I like to put it in the words that 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 his 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 that as a result there has been misjustice."***

See also, ***NJOROGE vs. KURIA [2005] 1KLR 782***.

That remains the law which has been consistently followed in this country. The burden to show that a judge erred, misdirected himself or otherwise improperly exercised his discretion falls on the party seeking to set aside the discretionary orders of the judge.

In the present case, as we have indicated, the learned Judge first found that the application before her was incompetent for procedural infirmities but nonetheless proceeded to hear the same on merit. That being the case, we think that it would add little value for us to pronounce ourselves on the procedural aspects although the learned Judge appears to have been right in the conclusions she made thereon.

As to the merits, the learned Judge was first not impressed with Sigma?s lack of candour on the question of whether or not it was served with the enforcement notice. Whereas it complained before the learned Judge, and before us as well, that it had not been served, the learned Judge referred to paragraph 21 of the statement of facts in which was stated that;

> ***"While awaiting for the court registry to allocate hearing dates, the applicant on 9th January, 2009 at 4.55pm through its advocates on record hereof delivered (sic) a copy of an Enforcement Notice issued on 9th January 2009***."

The learned Judge on that basis expressed herself that service having been effected on Sigma?s advocates, its claim that it was never served could not lie. With respect, we cannot see how the learned Judge can be faulted for such an observation. Sigma was not caught by surprise. It was not ignorant of the notice. It was aware of it right from the date it was issued and its claim not to have been served was clearly a case of truth-economy, and a judge would be entitled to reject an application for judicial review where it appears that an applicant has been less than honest, has failed the test of candour, and has thus not come to equity with clean hands.

Next, the learned Judge addressed Sigma?s apparent pursuit of a plurality of processes and delivered herself as follows;

> ***"Be that as it may, the respondents gave Sigma a right to appeal to the Liaison committee or the alternative the High Court. Sigma did not have an option to move the court and the committee at the same time. In my view Sigma should have either one but not both, yet Sigma readily concedes that though it filed an appeal before the Nairobi Province/City Physical Planning Liaison Committee on 12/1/2009, it nevertheless commenced these proceedings in what it says was a move meant to protect its interest, yet section 33 (5) below provides that „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.? In my view, Sigma?s action is an abuse of the process."***

It seems to us, with respect, that the learned Judge?s reasoning on this point is without fault. The statute having provided for two possible ways of challenging the issuance of the enforcement notice or other actions of the Council, it behoved Sigma to elect which it was to adopt. For it to have filed an appeal to the Liaison Committee meant that he ought to have proceeded with the matter at that forum to conclusion with appeals to the National Committee, and

ultimately to the High Court. We do not see how it conduces to the doing of justice for a party who has set in motion one procedure to contemporaneously file a judicial review application before the High Court while the appeal?s process was still extant.

Such a plurality of invocation has the effect of potentially embarrassing the respondents and the forums so-approached and does amount to an abuse of the process of the court as the learned judge found. This is not a conclusion deriving from the principle of exhaustion of alternative remedies as such, though it could arguably be invoked as well, but more precisely a necessary bulwark against abuse of process and the spectre of forum- shopping where a party, by filing more than one proceeding at different fora hopes to spread the risk of failure and perchance obtain a favourable outcome.

Having taken that view of the matter, we inevitably come to the conclusion that the learned Judge did not commit any of the errors that would entitle us to interfere with her exercise of discretion in rejecting

Sigma?s judicial review application. She did have a solid basis for rejecting it and this appeal against her decision, even were it live and not merely academic having been overtaken by events as appears from the appellant?s own memorandum of appeal, the enforcement having been effected a decade or so ago, is devoid of merit and fit only for dismissal. This Court never acts in vain and no amount of appellate innovation can give Sigma?s case a better fate.

The appeal is accordingly dismissed but with no order as to costs as the respondents did not appear or in any way participate in it.

Dated and delivered at Nairobi this 8th day of March, 2019.

H. M. OKWENGU

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR