



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA, KOOME, J.J.A.)

CIVIL APPEAL NO. 98 OF 2018

BETWEEN

**THE DIRECTOR OF PLANNING & ARCHITECTURE,
COUNTY GOVERNMENT OF MOMBASA.....APPELLANT**

AND

MAKUPA TRANSIT SHADE LIMITED.....RESPONDENT

(Being an appeal from the Ruling and decision of the Land & Environment Court at Mombasa (Komingoi, J.) given on the 24th July, 2017

in

Misc Civil Application No. 11 of 2017)

JUDGMENT OF KOOME, JA

[1] This is an appeal against a Ruling by **Komingoi, J.**, delivered on 24th July, 2017. A glimpse of the background information shows that Makupa Transit Shade Ltd, (respondent) was engaged in the business of a Container Freight Station at Makupa in Mombasa County. It resolved to expand its cargo handling facility and to that end, it sought and obtained several development approvals from the necessary government agencies between the year 2012 and 2013. In particular, it obtained approval for the reclamation of a portion of 9 acres from the Indian Ocean to facilitate its expansion from the National Environment Management Authority and the County Government of Mombasa on 17th December, 2012 and 14th January, 2013 respectively.

[2] Just as the respondent was about to commence the reclamation, the Director of Planning & Architecture, Mombasa County, (appellant) vide a letter dated 27th October, 2016 suspended the approval earlier issued on the ground that the respondent had failed to comply with some of the conditions of the approval. All the respondent's efforts to get the appellant lift the suspension came to naught. This culminated with the respondent filing a suit before the Environment and Land Court (ELC) being **E.L.C No. 391 of 2016** seeking several declaratory orders and an injunction against the aforesaid suspension. However, the respondent withdrew the said suit on 9th February, 2017 after the applicant raised a preliminary objection regarding the jurisdiction of the court to entertain the suit under **Section 38** of the **Physical Planning Act**.

[3] Immediately thereafter, the respondent filed **Misc. Cause No. 11 of 2017** still at the ELC, this time seeking leave to apply for judicial review remedies of *certiorari* and *prohibition* to remove to the High court for purposes of quashing, a suspension of approval for the proposed land reclamation and construction of yard on plot No. 4106/VI/MN dated 27th October, 2016. The respondent alleged that the appellant's decision to suspend its approval was not only made in bad faith but contrary to the rules of natural justice. On 10th February, 2017 (**Omollo, J.**) granted the leave sought *ex parte* and directed that the said leave to operate as stay of the suspension in question. The *ex parte* order was in the following terms:-

“The leave so granted does operate as a stay of the implementation of the respondent's suspension of approval for proposed land reclamation and construction of yard on plot No. 4106/VI/MN dated 27th October, 2016 SUBJECT to the applicant filing the substantive motion within 21 days of this order.”

[4] The above order seems not to have gone well with the Mombasa County Government who had earlier objected to the suit which was withdrawn and instead a judicial review application was filed. This time round they filed a notice of motion on 20th February, 2017 seeking

to set aside or discharge forthwith the above order of leave issued to operate as a stay of the suspension letter in question. The motion fell for hearing before Komingoi, J., and by a ruling given on 24th July, 2017 she dismissed the appellant's application and ordered that the leave so granted to subsist. This is the ruling that has precipitated the present appeal that is centred on some 17 grounds of appeal. The said grounds are prolix, repetitive and contain what amounts to narrative or arguments best left to submissions. **Rule 86(1)** states as follows;

“A memorandum of appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the Court to make.”

[5] That said, the appellant faults the aforesaid ruling for failing to find the High court had no jurisdiction in the first instance as the respondent was supposed to first appeal against the decision of the director of physical planning to the local Liaison Committee as provided under Section 38 (4) and (5) of the Physical Planning Act; misapprehending the provisions of Articles 50, 47 and 258 of the Constitution and Section 9 (2) of the Fair Administrative Action Act; the director having pointed out the specific breaches of the approval as conditions Nos. (a) (c), (e), (f) and (g), the Judge erred by stating that the enforcement notice did not specify the development being carried out without permission; failing to find the Director of planning & Architecture was wrongly sued in his personal capacity.

[6] During the plenary hearing **Mr Buti**, learned counsel for the appellant, relied on his written submissions and made some oral highlights to bolster the above grounds of appeal. Counsel submitted that the whole proceedings was centred on the development permission granted to the respondent on 25th May, 2016 for the proposed reclamation of the Indian Ocean, and thereafter construction of a Yard on what would have been reclaimed to form part of land known as LR No. 4106/VI/MN. That approval was suspended on the 27th October, 2016 by the appellant for what the appellant termed as breaches of the key conditions of the approval. This was pursuant to powers given to the appellant vide the provisions of Sections 30 and 33 (1) (a) of the Physical Planning Act to suspend, revoke or cancel such permission as per Section 38 (1) of the same Act. According to counsel any dispute that may arise regarding either suspension, revocation or cancellation of development permission must first be resolved in the manner provided in the Physical Planning Act by filing the dispute with the Liaison Committee.

[7] On jurisdiction Mr Buti submitted that the High court can only deal with an appeal from the Liaison Committee and it lacks original jurisdiction as per Section 38 (6) of the Act. He cited the case of **Sammuel Kamau Macharia vs. Kenya Commercial Bank [2012] eKLR** where the Supreme Court held that a court's jurisdiction flows from either the Constitution or legislation or both. Also a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. This much was also held in the case of **Edward Mzee Karezi vs. Senior Registrar of Titles & Others, Civil Appeal No 161 of 2009** where the same principle was espoused. Thus counsel went on to submit that a party must exhaust any existing dispute resolution mechanism before resorting to a court for judicial review remedies. Where a court is given appellate jurisdiction, it cannot turn itself into a trial court. Under **Section 9** of the Fair Administrative Action Act, a person who is aggrieved by an administrative action may, apply for judicial review but the High court shall not review an administrative act or decision unless the mechanisms including internal mechanism for appeal or review and all remedies available under any written law are first exhausted.

[8] On the issue of Article 50 of the Constitution which guarantees every person a right to fair and public hearing before a court of law or independent body or impartial tribunal or body. Counsel was of the view that the local Liaison committee and the National Liaison Committee established under Section 38 (4) and 38 (5) of the Physical Planning Act respectively are such bodies therein envisaged. Regarding the enforcement notice, counsel argued it was issued according to Section 38 (2) the Physical planning Act. There were breaches that went against the approval. This was the mandate of the Physical planning department of the appellant and if there was any unfairness or infractions in regard to the enforcement notice, it should have been resolved first by the Liaison Committee. Counsel urged the appeal be allowed by setting aside the orders of 24th July, 2017 and substituting thereto with orders setting aside the leave granted.

[9] Opposing this appeal was **Mr Mugambi** learned counsel for the respondent. Similarly he relied on his written submissions and made some oral highlights. On the issue of jurisdiction counsel submitted that there was no valid enforcement notice as contemplated under Section 38 (1) of the Physical Planning Act for it to invite the respondent to the provisions of Sections 38 (4) and (5). The letter dated 27th October, 2016 fell short of what is envisaged by the Act. Counsel cited the case of **Republic vs. Nairobi City County Ex-parte Gurcharn Singh Sihra & 4 Others [2014] eKLR**. A matter with striking similarities with this one in which **Odunga, J.**, held that:-

“Without a valid notice having been given pursuant to section 38 (1) of the Act, the provisions of section 38 (4) cannot be said to have been triggered.”

According to counsel for the respondent, for a valid enforcement notice to issue, the respondent should have been invited for a hearing; the notice should caption that it was an enforcement notice on the face of it; it must indicate it was issued pursuant to Section 38 (1) of the Act; specify the conditions of the development permission alleged to have been contravened; measures required to be taken by the developer in order to secure compliance with the contravened conditions and the period for compliance and finally inform the developer of his right of appeal to the relevant liaison committee.

[10] On the alternative remedy, counsel agreed with the rationale given by the learned Judge that it was not a convenient, beneficial and effective remedy. This is because the respondent was not accorded a hearing prior to the issuance of the suspension of approval. Quoting yet another judgment by Odunga J., in **John Fitzgerald Kennedy Omanga vs The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No 997 of 2003** where it was emphasized that where a party has not been heard, to contend that the party could appeal the decision was to miss the point by a wide margin. Finally counsel submitted that although leave granted ex parte can be set aside on an application, that is a very limited jurisdiction that is exercised sparingly and on very clear cases. In this case the appellant failed to demonstrate that this was a clear case where the appellant acted contrary to the principles of natural justice by arriving at a decision that was tainted with malice and bad faith. Moreover the respondent filed a substantive motion on 27th February, 2017 which should be allowed to proceed. Counsel urged us to dismiss the appeal with costs to the respondent.

[11] This is a first appeal albeit arising out of an interlocutory Ruling where the substantive application had not been heard. In simple terms

it was a Ruling on whether to set aside an order granting leave to operate as a stay of a suspension notice dated 27th October, 2016 pending the filing, hearing and determination of judicial review proceedings. This Court differently constituted in *Aga Khan Educational Services Ltd vs. Attorney General and 3 Others [2004] eKLR* said:-

“.....again by their own nature, ex parte orders are provisional and can be set aside by the judge who has granted it, of course, if the judge who granted it is still available to do so. We think that if the judge who granted leave cannot sit, for one reason or the other, then another judge would perfectly be entitled to hear an application to set aside the grant of leave, for jurisdiction is available to all judges of the Superior Court.

a “We would, however, caution practitioners that even though leave granted ex parte can be set aside on an application that is a very limited jurisdiction and will obviously be exercised very sparingly and on very clear-cut cases, unless it be contended that judges of the superior court grants leave as a matter of course. We do not think that is correct. Unless the case is an obvious one, such as where an order of certiorari is being sought and it is clear to the court that the decision sought to be quashed was made more than six months prior to the applicant coming to court, and there is, therefore, no prospects at all of success, we would ourselves discourage practitioners from routinely following the grant of leave with applications to set leave aside. Fortunately such applications are rare and like the judges in the United Kingdom, we would also point out that the mere fact that an applicant may in the end have great difficulties in proving his case is no basis for setting aside leave already granted.”
(Emphasize provided.)

[12] Another important aspect of this matter is that in granting the ex parte order of leave to operate as a stay, the Judge was exercising discretionary powers. As held by the Court of Appeal in the case of *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.”*

Thus the parameters to be brought to bear before setting aside an order of leave granted ex parte are as set out above; that is whether the Judge was wrong in exercising discretion by misdirecting herself and arriving at a wrong conclusion.

[13] I have considered the rival submissions, the record of appeal and the authorities cited. Three issues are discernible for determination that is whether there was a valid enforcement notice issued pursuant to the provisions of Section 38 (1) of the Physical Planning Act to trigger the alternative process provided thereunder; was the respondent entitled to be heard before the enforcement notice was issued; did the High court have original jurisdiction in face of the alternative mechanism provided under Section 38 (4) of the Physical Planning Act. As stated earlier, and even as I attempt to answer the above issues I am cautious that this is an interlocutory appeal, the substantive matter has not been heard therefore I must refrain from making certain determinations that may embarrass the court or body that will eventually deal with them.

[14] The letter of 27th October, 2016 by one Paul Manyala, the County Director of Planning and Architecture was as follows;

“RE; SUSPENSION OF APPROVAL FOR PROPOSED LAND RECLAMATION AND CONSTRUCTION OF YARD ON PLOT NO. 4106/V1/MN

Your application Ref. No P/2016/238 dated 27th April, 2016 refers.

Please note that the approval was considered within the boundaries of Plot No 4106/V1/MN and must keep away from the highest water mark which is riparian area and consequently a Public Land. This goes against our condition of approval number (f) not constituting part of disputed public or private land or public utility land. Other than the aforementioned condition, other conditions such as (a), (c), (e), and (g).

In the above respect, you are ordered to stop the development forthwith, remove the machinery and labor. Failure to which the County Government will enforce and take legal action against you without further notice.

Paul Manyala

County Director of Planning and Architecture.

Mombasa”

[15] The respondent contended that the above letter is vague, is not compliant with the provisions of Section 38 (1) of the Physical Planning Act and therefore was not an enforcement notice and the dispute thereto did not fall under the Liaison Committee. My own conclusion or understanding of the above notice is that it was meant to suspend the approval for the proposed land reclamation and construction of Yard on Plot No. 4106/V1/MN. It was alleged the respondent went against the conditions of approval named as (a), (c), (e), (f), and (g). In particular **Section 38 (2)** provides:-

“An enforcement notice shall specify the development alleged to have been carried out without development permission, or the conditions of development permission alleged to have been contravened and such measures as may be required to be taken within the period specified in the notice to restore the land to its original condition before the development took place, or for securing compliance with those conditions, as the case may be, and in particular such enforcement notice may require the demolition or alteration of any building or works, or the discontinuance of any use of land or the construction of any building or the carrying

out of any other activities.”

[16] Although the impugned letter in my view was not elegantly drawn, nonetheless the contents therein clearly points to some breaches in specifically of the named conditions. No wonder when the respondent was served with the said notice, they filed suit being ELC No. 391 of 2016 against the County Government of Mombasa specifically complaining about the said letter in the following pleading:-

“That vide a letter dated the 27th October, 2016 the defendant’s county director of planning and architecture wrote to the plaintiff purporting to suspend the approval of the yard on plot no 4106/MN/ 1V purporting to suspend the approval of the yard on plot no 4106/MN/1V purportedly for going against a condition that the approval as granted confined development within the confines of plot no 4106/MN/1V.”

[17] In my own analysis of the matter, if the respondent was able to construe that the contents of the said letter amounted to a dispute that was filed in court, I see no reason why the respondent could not have referred the matter to the Liaison Committee first as provided for the Physical Planning Act. **Section 13(1)** of the said **Act** provides that;

“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...”

Counsel for the respondent argued most eloquently that the appellant should have advised them to file the matter before the Liaison Committee. With tremendous respect, I do not think that it was a duty or obligation of the appellant to inform a party where to file their disputes. The fact that the respondent understood the gravity of the letter of suspension as amounting to a dispute is proof of their knowledge of the law and ability to look out for the provisions of the relevant law. After all there is the old maxim that says ignorance of the law is no defence.

[18] To demonstrate further that the respondent was well aware that the notice amounted to a dispute and they needed to seek remedies as per the law, is that when the suit aforementioned was objected to by the appellant, the respondent immediately withdrew it and filed another suit by way of judicial review wherein they obtained an ex parte order granting leave to operate as stay of the notice suspending the approval of land reclamation. As stated elsewhere in this judgment, jurisdiction is given either by the statute or the Constitution. See **Republic vs. National Environmental Management Authority Civil Appeal No 84 of 2010;**

“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.”

The gist of the said decision is that, where there is 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 a matter is exceptional, it is necessary for the court to examine carefully the suitability of the statutory tribunal in the context of the particular case and ask itself whether the statutory body had the powers to determine the issue at hand. It is common ground that the issue at hand in this matter was about physical planning and execution of a development plan regarding land reclamation. The issues were purely matters of land reclamation, planning and development that are covered under the Physical Planning Act. For the aforesaid reasons, I am persuaded that the respondent ought to have followed and exhausted the alternative mechanism provided by Parliament under the Physical Planning Act before engaging the High court.

[19] The next issue of whether the High court had original jurisdiction in this matter has been answered in the negative by the above analysis and findings. The other issue of whether the respondent was entitled to a hearing by the director of physical planning before the issuance of the suspension notice are matters that should appropriately be raised before the Liaison Committee as I do not want to delve deep into issues that were not determined. Moreover the respondent did not identify any specific provision in the Act that required the Director to summon the respondent for a hearing before issuing the notice.

[20] For the aforesaid reasons, I find merit in this appeal which I allow by setting aside the orders of 24th July, 2017. The appellant shall have the costs of this appeal in any event.

Dated and delivered in Mombasa this 4th day of April, 2019.

M.K. KOOME

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

JUDGMENT OF VISRAM, JA.

I have had the advantage of reading in draft the judgment of Koome, JA. I respectfully agree with it and I have nothing useful to add. I, like, Koome, JA, would allow the appeal with costs. Accordingly, the orders dated 24th July, 2017 are hereby set aside and substituted with an order allowing the appellant's Notice of Motion filed in the Environment and Land Court on 20th February, 2017 with costs.

Dated and delivered in Mombasa this 4th day of April, 2019.

ALNASHIR VISRAM

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

DISSENTING JUDGMENT OF W. KARANJA, JA

1. The primary question in this appeal is whether original jurisdiction over matters falling within **Section 38** of the Physical Planning Act lies exclusively with the Physical Planning Liaison Committee (*hereinafter 'the liaison committee'*) and by extension, whether the Environment and Land Court (*ELC*) can entertain such matters.

2. The respondent is the beneficial owner of land described as Plot No. 4106 and Plot No. 3910/ Mainland North/ Section VI (*the suit land*), situate at the Kipevu area, off the Makupa causeway in Mombasa. Desirous of expanding its business operations, the respondent initiated a development project involving the construction of an overpass across the Makupa Creek. The overpass was designed to link the respondent's container freight station to the Kibarani Highway and was to run across the suit land. Prior to commencement of the project, the respondent sought all the necessary approvals, including *inter alia*, approvals from the National Environment Management Authority (NEMA) as well as the County Government of Mombasa; all of which were duly issued and construction works began in earnest.

3. However, midway through the process, the respondent received a letter dated 27th October, 2016 which was authored by the appellant and which purported to suspend the approval hitherto issued by the County Government of Mombasa. The letter directed the respondent to cease all construction works forthwith; citing contravention of certain pre conditions that had been set by the County Government at the time of approval.

4. Convinced that the suspension of approval was malicious and in bad faith, the respondent moved the Environment and Land Court (*ELC*) vide an *ex parte* Chamber Summons dated 9th February, 2017; brought under the provisions of Order 53 rules 1(1), (2) and (4) of the Civil Procedure Rules and sections 8 and 9 of the Law Reform Act. In that application, the respondent craved leave of court to institute Judicial Review proceedings to quash the suspension of approval by the appellant and to prohibit the appellant from interfering with the project or enforcing the suspension. By a ruling delivered on 10th February, 2017, leave was granted and the same was to operate as a stay of the respondent's impugned letter. Before the appellant could file the main Notice of Motion, the appellant being aggrieved by that ruling filed a motion on notice, dated 20th February, 2017; in which it sought the following orders:

b) Spent

c) Order no 2 of the order of this court made and issued on 10th February 2017 in these proceedings and drawn in these terms;

"That leave so granted does operate as a stay of the implementation of the Respondent's suspension of Approval of a proposed land reclamation construction of yard on plot No. 4106/vi/MN dated 27th October, SUBJECT to the Applicant filing the substantive motion within twenty one (21) days of this order" be vacated, set aside and/or unconditionally discharged forthwith.

d) *The leave granted to the alleged "INTENDED APPLICANT" or any such Applicant to apply for the orders of certiorai ad prohibition given and issued the same day be similarly set aside, and or discharged.*

d) *The ex parte chamber summons application dated 9th February 2017 and filed in court on the 10th February 2017 under certificate of urgency be struck out and/or alternatively, be dismissed with costs.*

e) *Further to prayer (d) above any Notice of Motion filed herein pursuant to the leave granted by the court on the 10th February be similarly struck out and/or in the alternative be dismissed with costs.*

f) *The costs of this litigation be awarded to the Respondent/Applicant in this motion.*

5. The application was based on grounds that the ELC lacks jurisdiction to entertain, hear and determine the Judicial Review proceedings. It was the appellant's case that the said proceedings concerned the suspension of approval by the letter of 27th October, 2016 which purported to suspend the Development permission issued under section 33 (i) (a) of the Physical Planning Act and in accordance with the fifth schedule of that Act. Similarly, the appellant argued, the action of the county government of Mombasa to suspend the Approval permission previously given was done pursuant to powers conferred under it by section 38 (1) of the Act.

6. Based on the foregoing, the appellant contended that any grievances as to the suspension of approval ought to have been resolved in accordance with Section 38 of the Physical Planning Act, which provides for referral of such disputes to the Liaison Committee. Consequently, that the ELC lacked original jurisdiction over the matter; since the respondent had failed to comply with the statutorily provided mechanism as required by Section 9 (2) of the Fair Administrative Action Act, 2015 in so far as the same apply wholly to these proceedings. It was further contended that the leave sought by the respondent was for institution of judicial review proceedings against an individual person employee (the appellant) and not against a public body as required by law.

7. The application was opposed vide a replying affidavit sworn by David Killoran, the respondent's Chief Executive Officer on the 9th March, 2017 as well as grounds of opposition dated 24th February, 2017. On her part, the respondent asserted that the letter dated 27th October, 2017 sent by the appellant to the respondent was not an "enforcement notice" as contemplated under Section 38(1) of the Physical Planning Act. As such, that the respondent could not invoke the dispute resolution mechanism provided under section 38. Further, that prior to the issuance of such 'notice', the respondent was never accorded an opportunity to be heard and therefore, no appeal could arise as contemplated by Section 38.

8. As to the capacity in which the appellant was sued, the respondent contended that Judicial review proceedings are proceedings brought against public officials acting in exercise of their official powers where they act un procedurally and unfairly; and are designed to grant relief to those affected by the actions or inactions of those public officials. Consequently, the appellant was properly impleaded herein, in his official capacity as the county director of Planning and Architecture. In conclusion, the respondent stated that leave granted *ex parte* can only be set aside in very clear cut and obvious cases for instance, where it is crystal clear that the intended Notice of Motion has no prospects of success at all. In this case however, the respondent's case was arguable with very good chances of success. On that note, the respondent urged the dismissal of the appellant's application with costs.

9. In a reserved ruling delivered on 24th day of July, 2017, the learned trial Judge (Komingoi J.) found that the appellant was properly sued; further, that the letter appellant's letter dated 27th October, 2017 did not constitute an enforcement notice and therefore, the grievance resolution mechanism contemplated under Section 38 was inapplicable in this case.

In addition, that the ELC had original jurisdiction to entertain the matter as filed. Consequently, it was held that the application dated 20th February, 2017 was devoid of merit and the same was dismissed with costs. That ruling has in turn provoked this appeal.

10. In some prolix and argumentative grounds of appeal, the appellant in a nutshell contends that the learned trial judge erred by:

Holding that the Environment and Land Court had jurisdiction to entertain the Judicial Review proceedings notwithstanding the provisions of section 38 (4) and (5) of the Physical Planning Act as well as section 9(2) of the Fair Administrative Action Act 2015; and that nothing prevents any party from invoking the jurisdiction of the court in the first instance;

Making a determination on the jurisdiction of the Environmental and Land Court as a derivative of the Constitution and the Environment and Land Court Act; yet this was not an issue raised or canvassed before her;

Finding that Article 50 of the Constitution allowed the respondent to institute proceedings before the Environment and Land Court in its original jurisdiction instead of going through the appellate procedures laid out under section 38 (6) of the Physical Planning Act that allow the respondent to only invoke the Environment and Land Court's appellate jurisdiction;

Despite finding that the letter dated 27th October 2016 suspended the proposed land reclamation and construction of a yard on the suit land on account of breach of approval conditions; the learned Judge nonetheless erroneously held that the enforcement notice failed to specify the unauthorized development, the conditions thereby contravened and the measures thereby taken;

Failing to appreciate that the notice required the respondent to take further measures of removing the machinery and labour from the land; all which was in accordance with section 38 of the Physical Planning Act;

Failure to interpret the true application of section 38 of the Physical Planning Act vis a vis the provisions of Articles 47 and Article 258 of the Constitution;

Holding that the appellant's letter of 27th October, 2016 did not comply with the provisions of section 38 (2) of the Physical Planning Act;

Failure to appreciate that in any event, non-compliance with the provisions of section 38 (2) of the Physical Planning Act required an aggrieved person to strictly seek remedy through the mechanisms provided under section 38 (4), (5) and (6) of the Physical Planning Act and not elsewhere;

Finding that the mechanism outlined under section 38 (4),

(5) & (6) was not beneficial, convenient or effective remedy;

Failure to evaluate and apply the applicable law as set out in Article 47 of the Constitution as read with section 9

(2) of the Fair Administrative Action Act; which bar the respondent from instituting Judicial Review proceedings without seeking and obtaining prior exemption from the court;

Failure to find that the respondent's failure to secure exemption as aforesaid vitiated the Judicial Review proceedings so instituted;

Failure to evaluate the provisions of the County Government Act No. 17 of 2017;

Failure to address the germane issue raised in the Notice of Motion application dated 20th February, 2017 to wit; that the Environment and Land Court lacked original jurisdiction over the Judicial Review proceedings instituted by the respondent herein.

11. The appeal was ventilated through written submissions with oral highlights at the plenary hearing. Appearing for the appellant, learned Counsel Mr. Buti began by saying that the genesis of the respondent's complaint before the trial court was suspension of the development approval granted to it under section 30 and 33 (1) (a) of the Physical Planning Act. Consequently, that the appellant was well within his rights to suspend, revoke or cancel such permission under section 38 (1) of the Act. Counsel argued that it therefore follows, that any dispute regarding the suspension of such approval must be resolved in the manner provided for under the Act. In this case, he said, the respondent should have referred the matter to the relevant Liaison Committee under section 38 (4) and section 13 (1) of the Act. He added that it is only after the mechanism provided for under section 38 has been exhausted that a grievant may move to court and even then, it would be the High court in its appellate jurisdiction. Citing the case of **Samuel Kamau Macharia v. Kenya Commercial Bank Limited**, [2012] eKLR, counsel reiterated that the ELC had no jurisdiction whatsoever over the matter as neither statute nor the Constitution have conferred such jurisdiction upon it.

12. In addition, it was submitted that under the law, a litigant is required to first exhaust all the dispute resolution mechanisms as may have been availed under statute before moving to court. In this regard, this court was referred to its own decision in the case of **Edward Mzee Karezi v. The Registrar of Titles and others, Civil Appeal No. 161 of 2009**. It was thus argued that by side stepping the clear provisions of section 38 of the Physical Planning Act, the learned Judge erred in law and thereby arrived at a wrong conclusion on the matter. Turning to the Judge's findings as to the veracity of the enforcement notice, counsel submitted that the letter dated 27th October, 2016 clearly defined the development in respect of which approval was being suspended and left no doubt as to what was to be satisfied by the respondent and it was wrong for the learned Judge to conclude that the same did not constitute an enforcement notice. He added that there is no specific format required for an enforcement notice and that the said letter in this case satisfied all the ingredients of a valid enforcement notice. All in all, that the learned Judge misapprehended the provisions of Section 9 of the Fair Administrative Action Act as well as Section 38 of the Physical Planning Act.

13. Opposing the appeal, **Mr Mugambi** learned counsel for the respondent, submitted that the issue for determination herein is whether the ELC had jurisdiction over the Judicial Review proceedings. Counsel pointed out that the letter dated 27th October, 2016 was not an enforcement notice and is not even titled as such notice. Consequently, that the respondent's understanding was that it was simply a letter directing the suspension of the project for undisclosed reasons. While conceding that there is no specified format for an enforcement notice under the Act, counsel stated that section 38 (2) specifies the contents of an enforcement notice; to wit, that the notice must specify the nature of the development, the conditions that have been contravened, the measures the developer is required to put in place to rectify the position and the period within which the measures are to be put in place. In this case, he said, all that the letter stated was that the construction should stop 'forthwith'; which in ordinary parlance means the action should be stopped immediately.

14. Counsel emphasized that under section 38 (4), time is of the essence, given that the notice takes effect upon the expiry of the time frame stated in the notice. It was further submitted that this case is distinguishable from that of **Edward Mzee Karezi** (*supra*). He urged this Court to find that where an Act of parliament expressly provides for a procedure to be followed and where there is failure to follow such procedure, that failure has an adverse effect on the party's accrued rights. In this case, the failure by the appellant to issue a proper enforcement notice adversely affected the appellant's rights. Further, that without the issuance of a valid enforcement notice, the provisions of Section 38 cannot be said to have been triggered. In this regard, counsel urged this court to be persuaded by the authority in the case of **Republic v. Nairobi City County ex parte Gurchan Singh Sihra & 4 others (2014) eKLR**. In conclusion, this court was urged to make definitive findings demystifying the notice of enforcement envisioned under Section 38 and to also find that the respondent had an arguable case before the trial court and to uphold the findings of the learned trial Judge.

15. This is a first appeal. In the case of **Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates** [2013] eKLR this Court stated as follows regarding the duty of first appellate court:-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kusthon (Kenya) Limited 2000 2EA 212 wherein the Court of Appeal held, inter alia, that:-

“On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

That said, the issue for determination herein is whether the ELC had original jurisdiction over the Judicial review proceedings in view of the provisions of Section 38 of the Physical Planning Act and Section 9 of the Fair Administrative Action Act. Section 9 (2) of the Fair

Administrative Action Act provides as follows:-

‘The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted’

In line with this provision, it has been held time and again that where specific grievance redress mechanism is stipulated under statute, the same must be strictly adhered to (See **Speaker of the National Assembly vs Njenga Karume (1990-1994)EA 546**, and also **R vs**

National Environment Management Authority Exparte Sound Equipment Ltd CA 84/2010 (2011) eKLR). In this case, the appellant has vigorously contended that the ELC lacked original jurisdiction over the matter because under Section 38 of the Physical Planning Act, the dispute ought to have been referred at first instance to the relevant Liaison Committee. Indeed, under Section 13 (1) of the Act, 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.

16. In this case, it is without doubt that these proceedings were triggered by the appellant’s letter dated 27th October, 2016; which suspended the construction works and directed the respondent to stop the development forthwith. The respondent chose to contest that decision through Judicial review proceedings.

It is common ground that the Mombasa County Government had granted the relevant development approval in respect of the respondent’s project. It also undisputed that by a letter dated 27th October, 2016, the appellant purported to suspend that approval to the detriment of the respondent. Under Section 38 (1) of the Physical Planning Act, if it comes to the notice of a local authority that the development of land has been or is being carried out without the required development permission having been obtained, or that any of the conditions of a development permission granted has not been complied with, the local authority may serve an enforcement notice on the owner, occupier or developer of the land.

17. What constitutes an enforcement Notice? In my view, an enforcement Notice must be in conformity with Section 38 (2) which requires that:

‘An enforcement notice shall specify the development alleged to have been carried out without development permission, or the conditions of the development permission alleged to have been contravened and such measures as may be required to be taken within the period specified in the notice to restore the land to its original condition before the development took place, or for securing compliance with those conditions, as the case may be, and in particular such enforcement notice may require the demolition or alteration of any building or works or the discontinuance of any use of land or the construction of any building or the carrying out of any other activities.’ (Emphasis added)

A person aggrieved by an enforcement notice issued as aforesaid may seek resolution of the dispute by the liaison committee. Under section 38 (4) it is provided as follows:-

‘If a person on whom an enforcement notice has been served under subsection (1) is aggrieved by the notice he may within the period specified in the notice appeal to the relevant liaison committee under section 13.’

(Emphasis added)

It has been the appellant’s contention that the respondent ought to have forwarded it’s grievance to the Liaison Committee and that by moving court as it did, the respondent’s application was premature as the court lacked the jurisdiction to entertain the application at that stage. On her part, the respondent simply argued that the letter written by the appellant did not constitute an enforcement notice and could thus not trigger the operation of Section 38 aforesaid. Section 2 of the Physical Planning Act defines an “**enforcement notice**” as a

‘notice served by a local authority under section 38 on the owner, occupier or developer of the land requiring that owner, occupier or developer to comply with provisions of that section;’

The letter dated 27th October, 2016 read as follows:

“TO: Makupa Transit Shade Limited

P.O Box 90302- 80100

Mombasa.

RE: SUSPENSION OF APPROVAL FOR PROPOSED LAND RECLAMATION AND CONSTRUCTION OF YARD ON PLOT NO. 4106/VI/MN

Your application Ref No. P/2016/238 dated 27th April, 2016 refers.

Please note that the approval was considered within the boundaries of plot No. 4106/ VI/ MN and must keep away from the highest water mark which is riparian area and consequently, a public land. This goes against our condition for approval number (f) Not constituting part of disputed public or private land or public utility land. Other than the aforementioned condition, other conditions such as (a), (c), (e) and (g). (sic)

In the above respect, you are ordered to stop the development forthwith, remove the machinery and labor. Failure to which the County Government will enforce and take legal action against you without further notice.

Signed,

Paul Manyala

County Director of Planning and Architecture.

MOMBASA.”

18. If we juxtapose this letter to Section 38(2) (*supra*), would it pass muster? As stated earlier, while no specific format for an enforcement notice has been given under the Act, Section 38 (2) is specific that such notice must:-

- a) *specify the development alleged to have been carried out without development permission, or*
- b) *the conditions of the development permission alleged to have been contravened and*
- c) *such measures as may be required to be taken within the period specified in the notice to restore the land to its original condition before the development took place, or for securing compliance with those conditions, as the case may be;*

From a reading of the said letter, other than reference to the high water mark, there is no mention of whether the appellant had constructed beyond the high water mark; if so by how many meters etc. Had the appellant constructed a wall outside the agreed area, had it dumped building materials? If so, what steps was the respondent required to take to remedy the situation and within what timelines?

19. My understanding of Section 38 is that the approval giver (in this case the respondent) must first identify the breach or violation of specific conditions of the approval. Such violations will be notified to the violator; there will be a demand to rectify and/or comply with the terms of the approval and there must be a specified timeframe for the said compliance. If there is no compliance within the specified time frame, then it would be in order for the violator to be ordered to remove the machinery and labour forthwith as was the case here. Such is the procedure anticipated in all fair administrative actions. In my view, that is the procedure envisaged under the relevant provisions of the Physical Planning Act. If that had been done, but ultimately the decision to remove machinery and labour had been arrived at, then the respondent would have been accorded opportunity to seek recourse through the mechanism provided under Section 38 of the Act within the 60 days provided for under Section 38 of the Act.

In this case, the appellant did not specify the measures he demanded the respondent to take; nor did the respondent specify the time within which such compliance was to be done. In my view, the Notice envisaged under the Act, is one that satisfies all the above components. The document termed as an ‘enforcement Notice’ by the appellant was nothing more than a threat laced letter from a party wielding all the power to the weaker party who did not even deserve a hearing, or opportunity to rectify whatever would have been done wrong.

20. As a result, as rightly submitted by the respondent, the appellant having failed to serve a proper ‘enforcement Notice’ on the respondent, failed to set in motion the process set out under section 38 (4). In such a case, is a party left without recourse? Certainly not. The provisions of section 38 are permissive as can be noted from the repeated use of the word ‘may’.

As such, while the aggrieved party may refer a dispute under the section to the liaison committee, the provision does not oust the jurisdiction of the courts particularly where the administrative body in question fails to issue a proper enforcement notice. This is because, a proper enforcement notice is a condition precedent to the operation of the grievance resolution mechanism under section 38; failure to which the mechanism fails to take off *ab initio*.

21. Does the availability of an alternative remedy *ipso facto* oust the High court’s jurisdiction to grant orders of judicial review? Ideally where there is an alternative remedy, judicial review ought to be sought as a last resort and where there are exceptional circumstances. If there are, the High Court as the vanguard of justice will entertain judicial review before alternative remedies are exhausted. This Court set out criteria for determining such exceptional circumstances in **Republic –vs- National Environmental Management Authority, Civil Appeal No 84 of 2010** where, this Court stated:

“?The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal 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...”

That position was amplified by this Court in **Kenya Revenue Authority and 5 others vs. Keroche Industries CIVIL APPEAL NO. 2 OF 2008** where this Court endorsing the finding of Odunga J on the issue of jurisdiction stated as follows:-

“As far as the issuance of a single demand notice of various taxes, the period of demand and mode of transmission was concerned, we are persuaded there was an error. The issue of jurisdiction occupied a lot of space in this appeal. On closer review of the matters that were raised in this appeal especially the lumping of all taxes together and the generalized attack that was made against public bodies who abuse their power, against the backdrop of the powers and authority of the court to arrest any injustices, we would not fault the trial court for overruling the issue of jurisdiction notwithstanding the parallel jurisdiction given to the tribunals. The learned Judge was obviously fully aware of situations where a party should invoke alternative remedies when he stated the following in a pertinent portion of the judgment;-

?In Agriculture Training Board v Alyesbury Mushrooms Ltd, it was held that where parliament has laid a procedure which should be followed before a body can exercise its powers; the body will be acting ultra vires of it if it does not follow their procedure. The letter of 29th November 2006 was ultra vires the powers of the respondent on the ground and again the court is entitled to intervene because the 14 days notice was clearly intended to be a substitute for the periods of objection of each tax regime because the actual demands were never received with the actual assessments stipulating the period for internal objections. The notice was by fax until finally demanded only a few days before the expiry of the 14 days notice ...

The act of lumping together assessments whereas the statute provides for separate notices of assessments to be issued and giving 14 days notice initially without the separate assessments was an act aimed at ambushing the applicant and causing panic. In short it was a malicious act which the respondents were not legally entitled to do-what the respondents were authorized to do as in SOMERSET is only what is within statutory powers. And in the face of this, the respondents still have the courage to fault the applicant in seeking judicial review. I say no...”

22. In the matter before us, as stated earlier, no proper Enforcement Notice was served on the respondent in accordance with the relevant law. No time frame was given to enable the respondent even figure out how to pursue any available alternative remedies. The letter served on the respondent stated that the equipment and labour etc was to be removed from the site forthwith. The word forthwith denotes some measure of urgency. It means, instantly, immediately, post-haste, here and now ... to mention but a few synonyms. The Act gives an aggrieved party 60 days within which to move the Liaison Committee. The very use of the word ‘forthwith’ in my view smacked of arbitrariness and capriciousness and these would definitely beckon the jurisdiction of ELC sitting on judicial review.

23. The long and short of this analysis is that I am not persuaded that the ELC was bereft of jurisdiction to entertain the respondent’s complaint on Judicial Review. I would dismiss this appeal with costs to the respondent.

Dated and delivered at Mombasa this 4th day of April, 2019.

W. KARANJA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR