IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO. 1 OF 2019

BETWEEN

WHITEHORSE INVESTMENTS LTD.....APPELLANT

AND

NAIROBI CITY COUNTY.....RESPONDENT

(Being an appeal from the judgment and Decree of the Environment and Land Court at Nairobi (Eboso, J.) dated 11*th* December, 2018 in Environment and Land Court JR. No 12 of 2008)

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JUDGMENT OF THE COURT

1. At the centre of this appeal is the question of whether jurisdiction in respect of a dispute over issuance of an Enforcement Notice under the **Physical Planning Act** by the Nairobi City County against the appellant's construction of a proposed hotel fell within the *Environment and Land Court* (ELC) or before the Liaison Committee created under the **Physical Planning Act**. Put differently, whether a dispute concerning an Enforcement notice requiring the appellant to stop a development and to remove a building within the City of Nairobi is an abuse of power actionable before the ELC vide judicial review proceedings or is it a statutory undertaking subject to the administrative appeals committees that is created under the **Physical Planning Act**. Also whether the Judge erred by declining to exercise the court's jurisdiction to grant judicial review orders which in the appellant's view were suitable in the circumstances of the matter; were most efficacious as against the respondent who had allegedly acted with impunity, arbitrarily, irregularly, unfairly, unreasonably or out rightly illegally and thereby their actions were amenable to judicial review remedies.

2. The brief background giving rise to the instant appeal is as follows.

Enforcement Notice No. 6208 was issued by the ***Nairobi City County*** (respondent) on 14th December, 2017 to ***Whitehorse Investments Ltd***, (appellant) requiring the appellant to not only stop an ongoing construction but also to remove the structures within seven (7) days of the Notice. The appellant is the registered proprietor of **L.R No. NAIROBI /BLOCK 91/293** (suit property) situate along the United Nations Drive, off Limuru Road as per the certificate of lease issued on the 29th May, 2006. The appellant has erected on the suit property a 5storey building known as **"The Grand Manor Hotel"** (hotel) which at the time of filing suit was yet to be completed. Unfortunately, as at the time this appeal came up for hearing, we were informed that the respondent had already effected the notice by demolishing the subject development. The demolition evidence is contained in the supplementary record of appeal.

3. The appellant contended that the construction was carried out with the approval of the respondent that was issued vide approval No. CPF 437. The appellant carried on with the construction of the said hotel up to the 5th floor and on 10th October, 2016 it applied for inspection of the ongoing construction and paid the respondent Ksh. 2,976,600 as approval fees for the construction of a guard house. The appellant had also entered into elaborate contracts with third parties and financiers to carry on the subject construction in excess of Ksh. 350,000,000. To demonstrate the highhandedness of the respondent, the appellant posited that it had also obtained the requisite approvals from the other institutions such as the NEMA. All that notwithstanding, the respondent did not only demand that the appellant should halt the construction, but it also threated that failure to comply with the said notice, the respondent would to demolish the said hotel.

4. The appellant being dissatisfied with the said notice, on 2nd March, 2018 moved the court seeking leave before the Environment and Land Court (ELC) to file judicial review proceedings to, *inter alia*, quash by an order of *certiorari*, the said enforcement notice issued by the respondent. Leave was granted and the appellant filed a substantive motion on 12th March, 2018. Immediately the respondent was served with the order granting leave, it contemporaneously filed a replying affidavit and a notice of motion dated 11th September, 2018 seeking to

set aside the order granting leave on the grounds that the High Court lacked jurisdiction; that the judicial review proceedings are fatally defective in view of the mandatory provisions of ***Sections 15*** and ***38*** of the **Physical Planning Act** ; that the High Court was divested of jurisdiction by the Constitution, and the said Act to hear complaints about the enforcement notice and the court's jurisdiction is limited to hearing appeals emanating from the decisions of the National Liaison Committee and not to entertain original proceedings.

5. On the part of the appellant, it was argued that, the subject development was undertaken in full compliance with all the legal and regulatory requirements. First the respondent approved the drawing plans on 26th July, 2016. Then on 12th August, 2016 the appellant was issued with an approval of change of user from a residential to a commercial (shops and hotel suites) for the subject plot. The appellant began construction of the proposed residential hotel and made all the requisite payments to the respondent towards statutory inspections. On 4th December, 2015 the appellant paid the respondent a whopping sum of Ksh. 2,976,600 and obtained a construction permit invoice and inspection of construction receipts. That notwithstanding, the respondent neglected and failed to undertake the statutory duties of inspection. The appellant specifically wrote to the respondent on the 10th October, 2016 requesting the respondent to send inspectors to make regular visits for purposes of supervising the subject project. Further requests were made but rebuffed by the respondent through their letters of 4th April, 2018 and 13th March, 2018. The straw that broke the camel's back was the enforcement notice No. 6208 issued by the respondent and dated 14th December, 2017 requesting the appellant to halt any further construction and remove the structures within seven (7) days of that date.

6. The suit was resisted by the respondent vide a replying affidavit by ***J. M Kathenge***, sworn on 10th May, 2018, it was admitted that indeed the enforcement notice was issued pursuant to the provisions of ***Section 30 (i)*** of the **Physical Planning Act** and the Nairobi Building by-laws. This was done as a way of ensuring compliance with the statutory requirements in order to contain and control development within the city of Nairobi. That if the appellant was aggrieved by the said notice it ought to have appealed to the Liaison Committee under the provisions of the **Physical Planning Act**. It was also stated that the court was divested of jurisdiction by the Constitution, **Fair Administrative Actions Act** and the **Physical Planning Act** to hear complaints about an enforcement notice; that the judicial review proceedings by the appellant were incompetent as it failed to invoke or exhaust the dispute resolution mechanisms prescribed under ***Sections 15 & 38*** of the **Physical Planning Act**; there were no justifiable reasons why the appellant should have been exempted from following the laid down procedure under the provisions of ***Section 9(3)*** of the **Fair Administrative Actions Act**. In the circumstances of this matter, the court could only hear appeals emanating from the decisions of the National Liaison Committee as provided under ***Section 15(4)*** of the **Physical Planning Act**. Lastly the court's jurisdiction is circumscribed under ***Article 165 (6)***, and ***(7)*** of the Constitution and cannot by way of judicial craft or otherwise abrogate the law.

7. The matter fell for hearing before Eboso, J., and in a judgment delivered on the 11th December, 2018 the motion was dismissed. In the said judgment, the learned Judge principally held that the judicial review proceedings were initiated prematurely and in violation of the provisions of the **Physical Planning Act** and **Fair Administrative Actions Act**. The Judge also found there was allegedly a suit in respect of the same subject matter i.e. **Petition Number 133 of 2017** and therefore found the judicial review proceedings were an abuse of the court process; that there were allegations from persons claiming to be neighbours to the suit property; that there had not been public participation in the issuance of approvals for the said construction and that the respondent has received complaints from the Chief of Staff and the Head of Public Service alleging that there had been complaints raised by the embassies of the United States of America, Botswana, Morocco and the office of the United Nations, contending that the subject development is a threat to security of the said Embassies as well as the United Nations offices at Gigiri and the same poses a "potential affront to the provisions of the Vienna Convention on Diplomatic Relations.

8. The learned Judge pronounced himself as follows;

> **"In the present suit, no attempt has been made to seek exemption or to satisfy the "interest of justice" criteria. The court's findings therefore is that the present judicial review proceedings were initiated prematurely and in the violation of the provisions of the Physical Planning Act and the Fair Administrative Action Act. Consequently, the judicial review orders sought are not available at this point. The notice of motion dated 12/3/2019 fails on that ground.**
>
> **The second issue relates to the validity of the impugned enforcement notice. My view is that, should the applicant pursue the statutory mechanism provided by Parliament under the Physical Planning Act as read together with the Fair Administrative Action Act, this court may ultimately be seized of questions relating to the validity of the said notice. Having rejected the motion on the ground that it is premature, it would be inappropriate and prejudicial to make pronouncements on the second issue.**
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> **In light of the above reasons, the notice of motion dated 12/3/2018 is declined. The respondent shall have costs of the application"**

9. This is the decision which is the subject matter of the instant appeal. The memorandum of appeal has raised some 15 grounds of appeal which can be summarized thus; the learned Judge erred in law:-

> **i. By misapprehending the effect of granting leave to commence judicial review proceedings was to place the dispute over the enforcement order before court.**
>
> and in:
>
> **ii. Failing to find the respondent has acquiesced to the jurisdiction of the court by defending the process and the Judge therefore erred in holding that the appellant was precluded from moving the court.**
>
> **iii. Revisiting the process of obtaining leave and holding that the appellant was obliged to seek an exemption under the Fair**

Administrative Action Act.

iv. Failing to appreciate judicial review remedies are concerned with the process and by delving into the merits of the impugned notice and holding erroneously that the proceedings were brought prematurely.

v. Failing to find that the respondent having approved the development on the suit property was estopped from issuing the said enforcement notice which were amenable to issuance of prerogative orders sought.

vi. Failing to find that the threat to the appellant's constitutional right to property and quiet enjoyment thereof constituted exceptional circumstances which could not be appropriately litigated before the Liaison Committee under the Physical Planning Act.

vii. Failing to consider and pronounce himself on the validity of the enforcement order and to issue the prayers sought thereby derogating the appellant's rights under Article 40 and 47 of the Constitution.

viii. Failing to uphold the substantive law and rendering a decision that was unsound in law.

10. During the plenary hearing, ***Mr. Muite SC*** appeared with ***Mr. Marete*** for the appellant. They relied on their written submissions and made some oral highlights. Rising to argue the appeal, ***Mr. Muite*** implored us to understand the extent of damage and injustice visited on their client who constructed a hotel with the approvals given by the respondent; the respondent waited until the hotel was 90-95% complete and then issued an enforcement notice claiming the development was an unauthorized structure. It is on this basis the appellant filed the judicial review application challenging the respondent's abuse of power and unreasonableness in the circumstances of the matter. Counsel for the appellant went on to fault the Judge for misapprehending the jurisdiction of the High court and ELC under the Constitution to check excess of power by public bodies and for failing to grant the most efficacious remedy notwithstanding the provisions of the Physical Planning Act.

11. According to counsel, the exercise of power by all public bodies must comply with the Constitution and the doctrine of legality thus the enforcement notice was amenable to judicial review. Counsel cited a South Africa case of **Pharmaceutical Manufacturers Association of South Africa and Anor. Ex. Parte the President of South Africa** and the ***Kenya Revenue Authority & 2 Others v.s Darasa Investments Limited (2018) eKLR*** to amplify the point that judicial review process is about the decision making process not the merit of the decision itself and the role of the court is supervisory.

12. Combining several grounds of appeal, counsel for the appellant emphasized that the essence of granting leave in this matter that operated as stay of the implementation of the enforcement notice was indicative that the appellant had a prima facie case. The appellant was able to demonstrate that the decision communicated in the enforcement notice was illegal, unfair and irrational. The fact that the Judge was convinced at the stage of granting leave is a clear demonstration that he erred in law by misapprehending the effect of the order granting leave to commence judicial review proceedings and for re-evaluating the same. Counsel also challenged the holding that the appellant was obliged to seek an exemption under the **Fair Administrative Actions Act** and yet he had obtained leave. The Judge was also faulted for failing to appreciate the court's jurisdiction to issue prerogative orders and the appellant's constitutional right to property; failing to hold that the respondent had in any event acquiesced to jurisdiction by defending the process; for delving into the merits of the Enforcement Notice rather than examining its impropriety which was amenable to judicial review; failing to appreciate there was an approved development on the suit land issued by the respondent who was estopped by their own conduct from issuing the enforcement notice and for failing to exercise judicial discretion as per the dictates of the Constitution and other laws.

13. Moving on to the grounds dealing with the principles of impropriety, unlawfulness, legitimate expectation and other related matters, counsel submitted that the enforcement notice was vitiated by impropriety, breach of legitimate expectation, unlawfulness and Wednesbury's unreasonableness. For instance, counsel pointed out that the Judge failed to consider that the appellant had relied on the approvals to start the construction and also the respondent had received the inspection fees and was expected to carry out the inspection but not to demolish the building. This unreasonableness clothed the ELC Judge with jurisdiction to supervise the excess of power exercised by the respondent. Counsel cited the case of; ***R vs. National Environment Management Authority (2011) eKLR*** in which this Court carefully articulated the context within which a matter can be suitable for statutory appeal process. In the instant case there were exceptional circumstances that necessitated the appellant to seek judicial review remedies as opposed to statutory remedies which would not have been efficacious in view of the threat of destruction of property that was presented by the enforcement notice. The Judge was also faulted for failing to consider that the appellant was faced with an imminent danger of losing property and suffering irreparable loss through demolition.

14. Counsel for the appellant went on to submit that the Judge failed to consider that there has been a shift in judicial review proceedings since the coming into force of the Constitution of Kenya 2010. Judicial review is now a constitutional right and not a matter of common law innovation and a party cannot be denied a right without cogent reasons which were absent in the impugned judgment where the appellant was found not to have exhausted the statutory remedies. The Judge had a duty to investigate whether the alternative remedies were the only ones and the most efficacious in the circumstances of the matter. Counsel pointed out that the Liaison Committee created under the **Physical Planning Act** predated the 2010 Constitution which did away with certain offices such as the Provincial commissioner. Moreover, the respondent has already demolished the suit property which matter is not suitable for the Liaison Committee but an exercise of judicial power for the appellant to see how the building that has been demolished can be salvaged. A demolition cannot be taken to the Liaison Committee. Counsel made reference to a supplementary record of appeal that contained photographs of the building on the suit premises that was demolished.

15. Opposing the appeal **Mr. *Kinyanjui*** learned counsel for the respondent, relied on his written submissions and list of authorities. He begun by arguing that jurisdiction of a court is everything and where it lacks it is imperative that a court downs its tools. The impugned

enforcement notice was issued pursuant to the **Physical Planning Act** and if there were any grievances arising therefrom, the forum for resolution of disputes is the Liaison Committee as provided for in the Act. The said Act is complete with its own procedures that provides for stay orders while the matter is under consideration and an appeal process before the High Court. Nonetheless, the appellant ignored that procedure as there was not a single letter addressed to the Director of Physical Planning as provided under ***Section 69*** although the receipt of the notice was not denied. The appellant was merely forum shopping by deciding to the mechanism of appeal which they did at their own peril.

16. Counsel made reference to the provisions of the ***Section 9 (3)*** of the **Fair Administrative Actions Act** which provides that the High Court will not entertain an application without first obtaining leave of the court to deviate from the set procedure of first following and exhausting the laid down appeal procedure before filing the judicial review. The judicial review application was brought under the provisions of ***Section 8*** of the **Law Reform Act**, and ***Order 53*** of the **Civil Procedure Rules**. Thus, the Judge cannot be faulted for finding, as he did, that the appellant was supposed to follow the appeal mechanism. According to counsel, the doctrine of exhaustion, that largely informed the impugned decision has been upheld in the persuasive authority of the High Court in the case of ***Mui Coal Basin Local Community & 15 Others vs. The Permanent Secretary Ministry of Energy & 17 Others [2015] eKLR*** which case involved the question of whether a dispute regarding the concessioning of mining of coal in ***Mui Coal Basin*** could be heard in the High Court. The court held that the best dispute resolution forum is the one provided for in the statute. Commenting on the provisions of ***Article 159*** of the Constitution counsel was of the view that the Judiciary is not the panacea of every social, economic or financial problems; that the Constitution creates preferences for other mechanisms for dispute resolution including statutory regimes. He cited the cases of ***Speaker of National Assembly vs. Karume*****, [1992]** ***eKLR 21*****; *Geoffrey Muthinja Kabiru & 2 others vs. Samuel Munga Henry & 176 Others [2015] eKLR*** which dealt with the same principle of exhaustion of a dispute resolution mechanism which is established by Statute before invoking the jurisdiction of the courts.

17. Counsel for the respondent further referred to paragraph 92 of the replying affidavit sworn by one ***Peter Kariuki*** on 11th September, 2018 which in the first place denied that the appellant is the registered proprietor of the suit premises which he contended was in the name of ***Peter Oloo Okaka*** since 1984 and attached a copy of the current rates demand; that the property was created under a development plan for residential use and that the respondent did not have records of the change of ownership or change of user as the suit property falls within a residential area. Several sections of the Act were cited to demonstrate the procedure of obtaining change of user which required it to be published in the Gazette or in any other expedient manner and to be served on every owner or occupier of the adjacent property and there were no minutes exhibited to show the process adopted for the alleged change of user. Moreover, according to Mr. Kinyanjui, there was no evidence that ***Section 58*** (1) and ***(2)*** of the Environmental Management and Co-ordination Act had been complied with in regard to public participation. Counsel also pointed out that apart from the change of user that was lacking, there was no approval from the Public Health Officer, and the Director of Planning disassociated herself with the document purportedly signed by her. Thus the appellant was accused of flouting all the regulations under the Act and the prevailing by-laws.

18. For the aforesaid reasons counsel submitted that the all process and the proposed building and the appellant's claim was based on an illegality and by operation of the doctrine of *ex turpi causa oritur actio*, for non-compliance with the Physical Planning Act; the purported "approvals" to develop the suit property were issued without public participation as demonstrated by protest letters from the neighbours such as the Gigiri Village Association, United Nations office in Nairobi, the United States Embassy, the Botswana and the Morocco embassies all complained about the dangers posed by the high rise building. It is also stated the so called approvals of plans which were irregularly obtained were revoked and they attached communication addressed to the appellant dated 2nd May, 2018 and therefore pursuant to ***Section 38 (1)*** of the Act, the appellant was supposed to file an appeal. In brief there were many allegations of irregularities raised by the respondent which were not suitable for determination in a judicial review application. Counsel urged us to dismiss the appeal as the orders of judicial review were already overtaken by events the enforcement notice having been effected.

19. By way of a brief rejoinder, ***Mr. Marete*** for the appellant pointed out that ***Article 47*** of the Constitution is the foundation for the **Fair Administrative Actions Act** and ***Section 10*** thereto provides that matters should be discharged without regard to technicality. Counsel distinguished the authorities that were cited on the grounds that in the instant case the Judge had given leave which operated as stay which was an indication that he was satisfied there was a *prima facie* basis for such a grant. He also referred to a detailed 2nd supplementary affidavit by ***Praful Savia*** sworn on 9th October, 2018 by which he responded to all the issues of jurisdiction which is a constitutional right available for any party to check excesses of power by public bodies. The liaison committee only exists in the statute but is not practically realizable as the office of the provincial commissioner as chairman does not exist, therefore the claim that there exists other remedies is illusionary. Lastly counsel stated that the issue of the proposed hotel posing a security to the residents was not included in the enforcement notice. Counsel urged us to allow the appeal and grant the orders sought.

20. We have considered the entire record of appeal and we have also attempted to set out the brief overview of the dispute, the submissions and authorities cited in order to place this matter in perspective. The main issue for our determination is whether or not the ELC was seized of jurisdiction to hear this matter. It is apt to refer to the well-established principles that guide the court such as the case of the case of ***Motor Vessel "SS Lillian", [1989] KLR 1*** in which this Court succinctly set out the principles and context for determination of jurisdiction. Nyarangi, JA stated, *inter alia*:

> **"Jurisdiction is everything. Without it, a court has no power to make one more step. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".**

This principle was restated by the Supreme Court ***In the Matter of Advisory*** **Opinions of the Supreme Court under Article 163(3) of the Constitution,** Constitutional Application No. 2 of 2011: where the Court stated:-

> **"The Lillian 'S' case [1989] KLR 1] establishes that jurisdiction flows from the law, and the recipient-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 endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity".

21. There were very strong submissions that the appellant's case as pleaded should have been considered within the strictures of the Constitution and the Fair Administrative Action Act that has expanded the scope of Judicial review beyond the four corners of merely examining the process of decision making and not looking at the merits of the matters in question. Looking at the notice of motion that was the subject matter of the dispute, it was filed purely under the **Law Reform Act** and ***Order 53 Rule 3(1)***, and ***4*** of the **Civil Procedure Rules**. These being the principle orders that were sought in the said application;-

> **"1. That an Order of Certiorari be and is hereby issued to remove into this Honorable court and quash/set-aside the decision of the Nairobi City County to discontinue further development of the construction of a 5 level Hotel on Plot L.R. No Nairobi/Block 91/239 along United Nations Avenue, Off Limuru Road.**
>
> **2. That an order of prohibition be and is hereby issued directed at the Nairobi City County prohibiting the said Nairobi City County from entering the applicant's premises and implementing and/or giving effect to its threat to demolish the 5 level hotel on Plot L.R Nairobi/Block 91/239 along United Nations Avenue, Off Limuru Road."**

22. There is a distinct paradigm shift in judicial review matters following the coming into force of the Constitution of Kenya 2010, which as both learned counsel herein agree, has expanded the ambit of judicial review. **Article *47*** of the ***Constitution*** and the **Fair Administrative Action Act of 2015** by dint of which judicial review is now a recognized remedy. Under Common law, and the prevailing practice that was based on the **Law Reform Act** and ***Rule 53*** of the **Civil Procedure Act,** judicial review is an administrative remedy to curb or control abuse of power by public or administrative bodies based on illegalities, irrationalities or unreasonableness and procedural improprieties. The matter before the ELC was filed under the **Law Reform Act** and ***Rule 53*** of the **Civil Procedure Act** which would ordinarily invoke the common law principles in determining whether the appellant was entitled to the relieves sought.

23. During the oral highlights by counsel and also as it is discernable from the submissions, parties seemed to oscillate between the Constitution, the **Fair Administrative Actions Act** and relegated Common Law as espoused under the **Law Reform Act** to oblivion. Be that as it may, we will address those issues that boil down to whether the Judge erred by failing to grant the orders sought while taking into consideration both perspectives.

24. The remedy of judicial review under the **Law Reform Act** was not concerned with reviewing the merits of the decision on which the application is made but the decision making process itself. The essence being to ensure that an applicant is given fair treatment by the authority or public body whose decision is being challenged. However, the Constitution of Kenya and the **Fair Administrative Actions Act** seems to have expanded this scope to factor in the values in the Constitution such as proportionality, expeditious disposal of cases and fairness among others. This is as was held by this Court in ***Suchan Investments Ltd v Mininstry of National Heritage & Culture & 3 others*** **[2016] eKLR** that;-

> **"*Article 47* of the Constitution as read with the provisions of *Section 5 (2)* of the Fair Administrative Action Act establishes a non-exclusive approach to challenge of administrative action. The section permits bifurcation or a split approach for remedies. One approach is by way of statutory judicial review under the Act; the other is through proceedings for any other remedies as may be available under the Constitution or any written law. Subject to *Section 9 (2),* and *(4)* of the Fair Administrative Action Act, the two approaches are not mutually exclusive. The bifurcated and non-exclusive nature of proceedings for remedies must be read in the context of *Article 47* of the *Constitution* and *Section 12* of the Fair Administrative Action Act. The common law principles of administrative review have now been subsumed under *Article 47* Constitution and *Section 7* of the Fair Administrative Action 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 Action Act and *Article 47* of the Constitution.**
>
> **The law on judicial review of administrative action is now to be found not exclusively in common law but in the principles of *Article 47* of *Constitution* as read with the Fair Administrative Action Act of 2015. The Act establishes statutory judicial review with jurisdictional error in *Section 2* (a) as the centre piece of statutory review. The Act provides a constitutionally underpinned irreducible minimum standard of judicial review; the Act is built on the values of expeditious, efficient, lawful, reasonable, impartial, transparent and accountable decision making process in *Articles 47* and *10 (2)* (c) of the *Constitution*. The extent to which the common law principles remain relevant to administrative review will have to be developed on a case-by-case basis as the courts interpret and apply the provisions of the Fair Administrative Action Act and the Constitution. As correctly stated by the High Court in Martin Nyaga Wambora vs. Speaker of the Senate [2014] e KLR it is clear that they - *Articles 47* and *50(1)*- have elevated the rules of natural justice and the duty to act fairly when making administrative, judicial or quasi-judicial decisions into constitutional rights capable of enforcement by an aggrieved party in appropriate cases"**

25. A determination of whether the appellant was entitled to the orders sought, involved a careful consideration of whether the issuance of the Enforcement Notice was irrational, illegal, and unreasonable among others. The said notice was issued pursuant to the **Physical Planning Act**, and it indicated that if the appellant was dissatisfied with the enforcement notice it should follow the appeal procedure set out in the said Act. From the pleadings and submissions made on behalf of the appellant, it had a dim view of the appellate procedure provided in the said Act which it argued some of the provisions and offices created thereunder were overtaken by the provisions of the Constitution. It is for this reason the appellant chose to file the matter before the ELC. The jurisdiction of ELC is circumscribed in ***Article 162 (2) (b)*** of the Constitution and ***Section 13*** of the **Environment and Land Court Act** ***Section 1*3** of the **Environment and Land Court Act** which

provides that:-

> **"(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.**
>
> **3. 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 a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.**
>
> **4. In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.**
>
> **7. In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—**
>
> **a. Interim or permanent preservation orders including injunctions;**
>
> **b. Prerogative orders;**
>
> **c. Award of damages;**
>
> **d. Compensation;**
>
> **e. Specific performance;**
>
> **g. Restitution;**
>
> **h. Declaration; or**
>
> **i. Costs"**

26. Upon filing the application, the appellant was duly granted leave which operated as a stay of the Enforcement Notice. Counsel for the appellant made heavy weather of the fact that the appellant was granted the said leave which was taken as an indication that the appellant had made a *prima facie* case. To reinforce this argument the persuasive case of ***R vs. Kenyatta University Exparte Ochieng Orwa Dominic & 7 Others*** **[2018] eKLR** was cited. In that case ***Mativo, J***. discussed at length the doctrine of exhaustion of laid down statutory mechanism of settling disputes as well as what constitutes the threshold for granting leave to operate as a stay. That in his view and we quote;-

> **"Thus at the leave stage, the applicant has the burden of demonstrating that the decision is illegal, unfair and irrational. The applicant must persuade the court that the application raises a serious issue. This is a low threshold. A serious issue is demonstrated if the judge believes that the applicant has raised an arguable issue that can only be resolved by a full hearing of the judicial review application. If the court is not persuaded as aforesaid, leave will be denied and the matter proceeds no further"**

27. Our view on this issue of leave granted to operate as a stay is that when a court grants it, at a preliminary stage the court was convinced without hearing the other side that there was need to maintain the *status quo* or protect the right that was threatened until the matter was heard inter parties. This is more or less like an *exparte* interim order of injunction that is granted before both parties are heard on a matter. These are orders that are granted in exceptional circumstances to preserve a property in dispute that is threatened with waste or destruction, until the legal rights of the conflicting parties are established. This is how we view the order of leave that was to operate as stay. The issue of jurisdiction had not been raised in the first instance and the learned Judge had not therefore addressed his mind to the same. It was only after

hearing both parties that the court had opportunity to consider the issues raised before it. Having done so, the learned Judge found the judicial review remedy was not available to the appellant who had to exhaust the internal review and appeal mechanisms that are provided under the **Physical Planning Act**.

28. The appellant's contention is that the enforcement notice that required it to "*stop further development – remove the said structure*" within a period of seven (7) days from the date the notice was an infringement of fundamental rights actionable under the Constitution and the **Physical Planning Act** was subservient thereto and the Judge was therefore wrong to decline to issue judicial review remedies. To understand the full significance of the said notice, it is important to reproduce it here verbatim. This is how it was worded…

> **"NAIROBI CITY COUNCIL PHYSICAL PLANNING ACT (CAP 286 LAWS OF KENYA) NAIROBU CITY COUNTY BY-LAWS ENFORCEMENT NOTICE**
>
> Owner/Developer/Occupier
>
> PWT LR No Nairobi/block 91/239
>
> UN Avenue - Gigiri Estate
>
> **The development described has been carried out without the grant of permission and/or the following conditions required on that behalf under Part V of the Physical Planning Act Building Code/Others (specify).**
>
> P.F. Act Cap 286 Section 30(1) Nairobi County Building Laws.
>
> **Subject to which permission for the development as described hereunder was granted in respect thereof under Part V of the physical Planning Act Building Core. Other By-laws has/have not been complied with.**
>
> **(Description of development)**
>
> - Construction of a hotel 5 levels without statutory inspections.
> - Construction of a guard house on 6m building live.
>
> **You are hereby required to (describe steps to be undertaken)**
>
> - Construction of a 2.4m high boundary wall.
> - Stop further development.
> - Remove the said structure
>
> **Within a period of:** Seven days **from the date of this notice failing which the Nairobi City County may enter on the said land and execute the requirement as outlined herein above and may recover as a civil debt in any court of competent jurisdiction any related expense.**
>
> **This notice shall take effect on the** *14th day of 12 of 2017.*
>
> **If you are aggrieved by this notice you may appeal to Liaison Committee as the Case may be under provisions of**
>
> **Part I of the act before the aforesaid** *21st day of 10 of .2017.***in which case the operation of this notice shall be suspended pending the final determination or withdrawal of the appeal.**
>
> **Any person who uses or causes or permits to be used the land to which this notice relates or carries out or causes or permits to be carried out operations or the said land in contravention of this notice shall be guilty of an offence provided for in Section 30 of the Act.**
>
> **SIGNED:** *For D.P.C.E*
>
> **Dated this** *14th day of 12 of 2017.*
>
> **SERVED ON:** *Site*
>
> **Date:** *14th – 12 – 2017.*
>
> **SERVED BY:** *MR. KETHENGE*"

29. The notice clearly directed the appellant to file an appeal to the Liaison Committee that is created under the Act. Under ***Section 10 (2) (a)*** of the

Physical Planning Act *inter alia* is:

> "a) **To inquire into and determine complaints made against the Director in exercise of his functions under this Act or local authorities in the exercise of his functions under this Act or local authorities in the exercise of their functions under the Act.**
>
> **b. To enquire into and determine conflicting claims made in respect of applications for development permission**
>
> **c. …"**

It is not disputed that the appellant did not move the ELC for judicial review until the time given to seek reprieve under Physical Planning Act had long expired. No explanation was given for the delay. We note further that even on the face of the application there is no invocation or reference to either **Article 47** of the Constitution or the Fair Administrative Actions Act. The court was not therefore moved to determine whether exceptional circumstances existed that warranted the appellant to be heard by way of judicial review before exhausting the mechanism set out in the Physical Planning Act.

30. The appellant did not justify its choice of institution to resolve its grievance or explain why it chose to move to the ELC before it even responded to the Enforcement Notice, 3 months after service of the notice. It is now settled that where exceptional circumstances exist, a party cannot be barred from seeking the more efficacious and expeditious remedy. This was succinctly expressed in ***Republic vs. National Environmental Management Authority*** **Civil Appeal No 84 of 2010** as follows;

> **"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.."** (Emphasis supplied)

See also the case of***;*** **The Speaker of the National Assembly vs. Karume [2008] 1 KLR (EP) 425** where it was held that, where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament that procedure should be strictly followed. The gist of the said decisions being that, where there is an alternative remedy and especially where Parliament has 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.

31. 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.

32. The issue at hand in this matter was about physical planning and execution of building plans that the appellant argued were duly approved by the respondent, the plans were executed nearly to completion but the respondent declined or neglected to carry out an inspection of the same despite the appellant having paid the inspection fees. No doubt these are matters that fall squarely under the **Physical Planning Act** and in particular ***Section 38 (1)*** which provides;-

> **"(1) When it comes to the notice of a local authority that the development of land has been or is being carried out after the commencement of this Act without the required development permission having been obtained, or that any of the conditions of a development permission granted under this Act has not been complied with, the Local authority may serve an enforcement notice on the owner**
>
> **2. 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."**

33. The issues in dispute were purely matters of building planning and the ensuing development of a hotel within the County of Nairobi that are entirely covered under the **Physical Planning Act**. There was no good reason given as why the appellant failed to pursue that avenue. The appellant was apprehensive that this procedure was not efficacious nor was it available as the office of the District Commissioner was abolished. This is not an entirely correct position because the same office was re-designated as County Commissioner. Moreover, the appellant did not produce any evidence to show that the office of the Director of City Planning and Architecture being the secretariat of the Liaison Committee under **Section 8 (2) (b)** of the Act were not operational. There was no indication that the appellant lodged any dispute with the director. We understand the appellant to say that they needed an immediate relief; but the Act goes on to provide under **Section 38 (7)** that;-

> **"Any development affecting any land to which an enforcement notice relates shall be discontinued and execution of the enforcement notice shall be stayed pending determination of an appeal made under subsection (4), (5) or (6)…"**

In other words the Act has protection mechanism inbuilt within it to protect the property from any adverse actions envisaged by the enforcement notice. The appellant failed to demonstrate that his property was in imminent danger of demolition particularly when it failed to respond to the Notice and only moved to court for judicial review 3 months after the impugned notice. This in our view qualifies as unreasonable delay under as envisaged under Section 9(1) of the Fair Administrative Actions Act.

34. The Judge was also faced with the interpretation of ***Article 50 (1)*** of Constitution on the right to have any dispute that can be resolved by the application of law decided in fair and public hearing before a court or, if appropriate another impartial tribunal or body. The Judge found that the appellant ought to have invoked the jurisdiction of the body created under the **Physical Planning Act**. We cannot fault the Judge in the conclusions he made in this case.

35. The only other germane issue we need to address for purposes of this matter and others that may fall in this category is whether a party who desires to be heard by a court on judicial review needs to make a stand-alone application to establish "exceptional circumstances" as posited by Mr Kinyanjui. Section 9 (2) of the Fair Administrative Actions Act provides as follows:-

> **4. Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.**

The above provision does not state that a separate application needs to be filed seeking certification, as it were, that exceptional circumstances exist for the requirements of the above provision to be met. An applicant can demonstrate existence of exceptional circumstances orally before the Judge. Indeed, the court itself is not precluded from finding that "exceptional circumstances" exist or that "the interests of justice" criteria has been satisfied from the material placed before it, even without being expressly moved to so find. This is so because a party may have a very good case for judicial review but may be unaware of these stringent requirements.

36. Having answered, the issue of whether the High Court had original jurisdiction in this matter in the negative as demonstrated by the above analysis and findings and given that the learned Judge did not interrogate the matter further than the issue of jurisdiction, we do not want to delve into issues that were not determined as that may touch on merit which we have no jurisdiction to determine.

37. We think we have said enough to demonstrate that the learned Judge cannot be faulted for arriving at the decision that is challenged in this appeal.

Accordingly, we find no merit in this appeal which we dismiss with costs to the respondent.

Dated and delivered at Nairobi this 6*th* day of December, 2019.

E. M. GITHINJI

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

M. K. KOOME

……..……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR