IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MAKHANDIA & MURGOR, JJ.A)

CIVIL APPEAL NO. 274 OF 2017

BETWEEN

NDIARA ENTERPRISES LTD.....APPELLANT

AND

NAIROBI CITY COUNTY GOVERNMENT.....RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court

of Kenya at Nairobi (R. E. Aburili, J.) dated 3rd May, 2017

in

H.C. Misc. Civil Application No. 91 of 2016)

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JUDGMENT OF THE COURT

This appeal emanates from the judgment and decree of the High Court sitting as a Judicial Review Division. The judgment was itself the outcome of judicial review proceedings initiated by **Ndiara Enterprises Ltd** "*the appellant*", as the *ex parte* applicant against **Nairobi City County Government** "*the respondent*". In the proceedings the appellant sought orders of mandamus directed at the respondent compelling it within 14 days of the order being made to demolish the illegal structures erected on all that piece or parcel of land known as 209/9613 (Grant Number IR 44980) "*the suit property*" and evict the illegal occupants therein and a further order of mandamus to compel the respondent, within the same period to approve the appellant's plans for the construction of a perimeter wall around the suit property.

Through its pleadings, the appellant averred that it was the registered proprietor of the suit property evidenced by a copy of the certificate of lease it exhibited. It asserted that it had diligently carried out its obligations, such as payment of land rates, in respect of the suit property. Despite being the registered proprietor of the suit property, unknown third parties had trespassed thereon and built illegal structures and the respondent had failed, refused and or neglected to demolish the said illegal structures and evict the trespassers there from despite several entreaties from the appellant, both verbal and in writing. The appellant alleged that the structures were built without the respondent's approval and that the respondent had in fact issued notices to those trespassers to stop developments and demolish the structures. That, however, the respondent had failed to follow up or act on the said notices. The record indeed reflects two notices that were to take effect on 26th March 2013 and 23rd October 2014 respectively but they were never enforced or complied with compelling to the appellant to file the proceedings leading to this appeal.

The appellant's contention is that the omission or refusal by the respondent to follow up or enforce the notices by demolishing the illegal structures and or evicting the trespassers was unfair, oppressive, unreasonable and prejudicial to it and was in breach of Article 47 of the Constitution, sections **4** and **7** of the Fair Administrative Action Act (FAA Act), sections **29** and **30** of the Physical Planning Act (PPA) and against its legitimate expectation that it would be treated fairly and reasonably in accordance with the law. On that premise, the appellant sought that the respondent be compelled to comply with its public duty and demolish the illegal structures and evict the trespassers as well as approve its plans for the construction of the perimeter wall.

In its defence, the respondent took the view that the proceedings were totally defective and brought pursuant to wrong provisions of the law. That judicial review proceedings were concerned with the decision making process or procedure and not with such allegations as had been made in the application which the respondent alleged disclosed no course of action against it. Further, that the proceedings were premature as no complaint had ever been lodged with the Liaison Committee as per the provisions of the PPA. According to the respondent, a judicial

review order of mandamus was neither an order of course nor an order of right but should only be issued in cases where the duty was of a public nature and specifically affects the rights of the appellant. That mandamus could only issue where there was no better remedy unlike in the present case where an order of demolition from the ELC would have sufficed. The respondent argued that a mandamus order ought to be issued only in the clearest of cases that did not require viva voce evidence to be taken to establish facts. The respondent accused the appellant of not having followed the proper or the due process to have its plans for the perimeter wall approved by the respondent. The respondent also opposed the application on the basis that the orders sought would be enforced against third parties who had not been enjoined in the proceedings and the orders sought would be granted in vain since the alleged trespassers might still want to establish that they were legally on the suit property. It alleged that the appellant was guilty of misrepresentation and did not deserve the orders sought as they were equitable in nature.

In her determination, **Aburili, J.** found the judicial review proceedings to be incompetent, misplaced and or misconceived; the court being devoid of requisite jurisdiction to hear and determine the proceedings and ultimately unable to grant the review orders sought listen to her:-

> ***"87. This court on the whole finds that the judicial review proceedings herein are incompetent. The Court is devoid of jurisdiction to hear and determine the proceedings as filed and moreso, there is no merit in the prayers sought in the sense that the applicant does not require orders of this court compelling the respondent to evict illegal squatters from the applicant's property if at the end of the day it is shown that they are occupying the property illegally or without colour of right, unless it is demonstrated that the said trespassers had expressed or implied authority of the respondent to occupy the land; in which case then the respondents would only be enjoined to such proceedings before the Environment and Land Court.***
>
> ***88……***
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> ***89. In the end, I find that this is not a proper case where judicial review orders of mandamus would issue. I find the application misplaced and misconceived and proceed to dismiss the notice of motion dated 10th May 2016 with costs to the respondent."***

Dissatisfied with the said findings, the appellant is now before this Court by way of an appeal against the whole decision based on the grounds contained in its memorandum of appeal in which the appellant complains that the High Court erred in law by holding that the court had no jurisdiction to determine the issues presented to it by the appellant; in failing to grant the orders sought since the duty to demolish illegal structures was imposed on the respondent by statute, specifically section **29** and **30** of the Physical Planning Act; holding that the dispute relating to the performance of the respondent's duties ought to have been canvassed in the ELC yet the ownership of the suit property was not in issue; failing to appreciate that even if there was an alternative procedure for redress, the same was less convenient, beneficial and effective to the appellant; failing to consider that the respondent had refused to take any steps to address its grievances thus necessitating the judicial review proceedings; failing to find that though the respondent had issued notices that the structures on the suit property be demolished, the respondent had failed to act and or enforce the said notices thus necessitating the proceedings; failing to find and hold that there is no internal mechanism to resolve the issue of demolition of illegal structures thereby necessitating the proceedings; failed to consider the evidence before her so as to arrive at a just and fair determination and lastly, that, based on the evidence placed before her, the learned Judge arrived at a wrong decision.

During the case management conference, only counsel for the appellant appeared and urged that the appeal be canvassed by way of written submissions. There was no appearance on behalf of the respondent though served with the appropriate notice. Subsequently no submissions were filed on its behalf.

In its submissions, the appellant claims that in 2009 it had notified the respondent of illegal invasion of the suit property by unknown persons. It stated that though the respondent had previously issued two notices to the trespassers to stop the construction of illegal structures, the respondent had not enforced the notices. That it continued to pay land rates to the respondent upon notification or as demanded. On the question of jurisdiction, it challenged the High Court's finding that this matter would have best been handled by the ELC as opposed to the judicial review court. In the appellant's view, the dispute did not fall under the category of the disputes referred to under Article **162 (2)** of the Constitution and section **13** of the ELC Act. It claimed that the gist or essence of its case before the High Court was that its right to fair administrative action as per Article 47 of the Constitution had been impinged by the respondent's failure to comply with sections 29 and 30 of the PPA as well as sections 4 and 7 of the FAA Act. That it had also alleged breach of its legitimate expectation to be treated fairly and reasonably in accordance with the law.

According to the appellant, the procedure for challenging an administrative action was provided for under sections 7 and 9 of the FAA Act. Read together, those provisions allow a person aggrieved by an administrative action to, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article **22 of** the Constitution. The appellant contended that prior to the enactment of the current Constitution, the grounds for judicial review were derived from common law and the basis was administrative decisions or actions which were *ultra vires*, illegal, irrational and unreasonable. That however, in the post 2010 Constitutional order, applications for judicial review were based on constitutional provisions, common law and statute. That as such, under section 7 (2) of the FAA, a court or tribunal may review an administrative action or decision if the person who made the decision, *inter alia*, denied the person to whom the administrative action or decision relates; where a mandatory and material procedure or condition prescribed by an empowering provision was not complied with; where the administrative action or decision violates the legitimate expectations of the persons to whom it relates or where the administrative action or decision is unfair.

The appellant further submitted that the respondent was duty bound under sections **29** and **30** of the PPA to control development. That the respondent had issued notices to the trespassers in acknowledgment of its duty under the aforementioned provisions and of the fact that an offence had been committed on the suit property. The appellant alleged it had legitimate expectation that the respondent would remove the illegal structures upon being notified of their presence. It cited section **11** of the FAA Act which empowers a judicial review court to grant any just and equitable order to, *inter alia*, compel the performance by an administrator of a public duty owed in law and in respect of which the appellant has a legally enforceable right. Further that in judicial review proceedings, the court had power to direct a party to do or to refrain from doing any act or thing which the doing or the refraining from doing, of which court or tribunal considers necessary to do justice between the parties. Based on those provisions, the appellant was of the view that the High Court had the requisite jurisdiction to direct the respondent to act according to its enforcement notices and that where the action by the respondent would affect the rights of other persons, it

was the respondent's duty to issue appropriate notices to such persons and to observe their fundamental rights and freedoms.

The appellant denied that there was alternative remedy available to it on matters relating to fair administrative action as per Article 47 of the Constitution. It reiterated its position that the alleged failure by the respondent to act according to the law had violated its legitimate expectations. It cited the case of **Town Council of Kikuyu v The NSSF & Ors; Judicial Review No. 81 of 2013** where **Odunga, J**. held that legitimate expectation would arise where a member of the public, as a result of a promise or other conduct expects, that he will be treated in one way and the public body wishes to treat him or her in a different way. That frustration of such legitimate expectation by a public body would amount to abuse of power. It also cited the case of **Republic v KNEC ex parte Gathenji & Others, Civil appeal No. 266 of 1996 where this Court set out the circumstances under which an order of mandamus would issue.**

In conclusion, the appellant submitted that the question before the High Court was whether there existed a duty on the respondent's part to demolish the illegal structures on the suit property, evict the trespassers and whether failure to demolish the said structures in accordance with its enforcement notices amounted to breach of the right to fair administrative action. It remained categorical that it appropriately sought for an order of mandamus to compel the respondent to act in accordance with the provisions of the Physical Planning Act. Lastly, that Article 23 of the Constitution grants the High Court power to enforce the Bill of Rights by granting the appropriate relief which include an order of judicial review. It maintained that it had a right to fair administrative action under Article 47 of the Constitution and its case was fit for judicial review by the High court since it had supervisory jurisdiction over subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function. Since according to it, the respondent was such a body, it argued that its actions, decisions or omissions to act according to the law were amenable to judicial review. The same agreements were of course advanced in favour of mandamus to compel approval of the plans for the construction of the perimeter wall by the respondent.

During the plenary hearing of the appeal, only counsel for the appellant appeared. Once again neither the respondent nor its counsel appeared to oppose the appeal though served with the hearing notice. Learned counsel, **Ms. Elizabeth Ngonde** and reiterated the gist of the appellant's case. Counsel maintained that the High Court had jurisdiction to entertain the proceedings as per the provisions of the PPA and FAA Act. That since notices had been issued under the PPA, the respondent should have enforced them.

The issues arising for determination in our view are, whether the High Court was the proper forum or had the requisite jurisdiction to hear and determine the judicial review application and whether an order of mandamus was available to the appellant in the circumstances of this case. The appellant has impugned the High Court's finding that it lacked jurisdiction to determine its application. The appellant claimed that a public duty was imposed on the respondent by virtue of sections 29 and 30 of the PPA to comply with the appellant's demands. The said provisions provide as follows:

> ***"29. Powers of local authorities Subject to the provisions of this Act, each local authority shall have the power-***
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> ***(a) To prohibit or control the use and development of land and buildings in the interests of proper and orderly development of its area;***
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> ***(b) To control or prohibit the subdivision of land or existing plots into smaller areas;***
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> ***(c) To consider and approve all development applications and grant all development permissions;***
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> ***(d) To ensure the proper execution and implementation of approved physical development plans;***
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> ***(e) To formulate by-laws to regulate zoning in respect of use and density of development; and***
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> ***(f) To reserve and maintain all the land planned for open spaces, parks, urban forests and green belts in accordance with the approval physical development plan.***
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> ***30. Development permission***
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> ***(1) No person shall carry out development within the areas of a local authority without a development permission granted by the local authority under section 33."***

Where development approval is denied, section 33 of the Act gives a clear procedure for redress to an aggrieved person. The said section provides as follows:

> ***"(3) Any person who is aggrieved by the decision of the local authority refusing his applications for development permission may appeal against such decision of the relevant liaison committee under section 13.***
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> ***(4) Any person who is aggrieved by a decision of the liaison committee may appeal against such decision to the National Liaison Committee under section 15.***
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> ***(5) An appeal against a decision of the National Liaison Committee may be made to the High Court in accordance with the rules of procedure for the time being applicable to the High Court."***

Cognizant of the clear procedure for redress provided under the Act, the learned Judge refused to admit jurisdiction in determining the application on the basis that where a clear and specific procedure for redress of a grievance is provided, then that procedure should be strictly followed. The Judge cited the cases of **The speaker of The National Assembly v Njenga Karume (2008) 1 KLR 425, Mutanga Tea &**

Coffee Company Ltd v Shikara Ltd & Anor (2015) eKLR for that proposition.

The appellant also alleged that the respondent's refusal or failure to demolish the illegal structures or to approve its plan for a perimeter wall infringed on its constitutional right to fair administrative action. It invoked sections 4, 7, 8, 9 and 11 of the FAA as the basis for which it sought the order of mandamus. However, the Judge noted that the High Court was expressly prohibited by section **9 (2)** of the Act from reviewing "*an administrative action or decision under the Act unless the mechanisms for appeal or review and all remedies available under any other written law are first exhausted*."The Act however gives the High Court power to exempt a person from the obligation to exhaust any remedy if the court considers such exception to be in the interest of justice. Faced with that scenario, the learned Judge delivered herself as follows;

> ***"In addition under Section 9(2) of the Fair Administrative Action Act No. 4 of 2015, (1) the High Court or a subordinate court under Subsection (1) is expressly prohibited from and "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.***
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> ***(3) The High Court or a subordinate court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under suction (1)***
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> ***(4) Notwithstanding Subsection (3) the High Court or 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 exception to be in the interest of justice …***
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> ***64. From the above provisions of the law and decided cases, it is clear that even the Fair Administrative Action Act which the exparte applicant in this case claims has been violated mandates an applicant to show that they have exhausted the alternative remedies available under any other written law or avenue before resorting to court by way of judicial review. However, the onus is on the applicant to demonstrate to the court that there exist exceptional circumstances to warrant his or her exemption from resorting to the available remedies; and on application for such exemption.***
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> ***65. In this case, no doubt, the applicant had an avenue for ventilating its grievances where the respondent refuses to approve the building plans. There is no evidence that the applicant lodged any such complaint or appeal to the Liaison Committee, the National Liaison Committee and or to the High Court. The Physical Planning Act provides elaborate mechanisms for resolution of disputes relating to approval of development plans and therefore no party is permitted to bypass those mechanisms and jump into a judicial review Court to obtain orders which are discretionary."***

We see no reason to warrant interference with those findings as in our view they are based on sound law and evidence. The record does not reflect any attempt by the appellant to first resolve its grievances against the respondent under the procedure provided for redress under PPA or FAA. There is no evidence that the appellant made any complaints in the nature of the respondent's refusal to approve its plans for construction of a perimeter wall to the liaison committee under section 13 of the PPA. It's clear that the appellant could only approach the High Court on appeal against the decision of the National Liaison Committee. Though the High Court can exempt a party from following such clear laid procedures for redress of grievances before approaching it in the noble interests of justice, the learned Judge rightly found that the appellant had failed to prove there were exceptional circumstances in its case to warrant such exemption. Indeed, there are no apparent exceptional circumstances to justify such exception and which exception was also not sought. The High Court's power to exercise its jurisdiction under Article 165 of the Constitution was therefore limited or restricted by statute in this instance as found by the Judge. The appellant had complained before this Court that the learned Judge erred in failing to appreciate that though there exists an alternative procedure for redress, the same was less convenient, beneficial and effective in its circumstances. However, that argument must be taken as an afterthought. The same was never raised or pursued before the High Court thus denying the respondent the opportunity for rebuttal and denying this Court the benefit of the reasoning of the High Court on the same issue.

The Judge had another reason why she held that the court lacked jurisdiction to determine the proceedings. The Judge observed that ELC was the best suited court to deal with the issues raised in the proceedings. The reason, being that granting the orders sought would mean interfering with the rights, if any, of the third parties who were in occupation of the suit property. This is despite the fact that such third parties had not been enjoined in the suit. The interest of justice would dictate that the rights of such parties be ascertained first by being given a chance to ventilate any claims they may have in the suit property before orders of eviction and demolition were issued. It therefore becomes apparent that such issues as to ownership and eviction from the suit property would be best canvassed before the court that is expressly clothed with the jurisdiction to entertain such matters, the ELC. Established pursuant to Article 162(2) of the Constitution, the ELC's jurisdiction is to hear and determine disputes relating to *inter alia*, title, use and occupation of land. Furthermore, section 13 of the ELC Act gives that court the jurisdiction to entertain such matters as relate to administration and management of land or any dispute, for that matter, relating to environment and land. The ELC is thus clothed with the requisite jurisdiction and ability to allow the different claims by the parties in the suit property to be ventilated through *viva voce* evidence and thus allow the court to make an informed decision on any competing claims especially due to the finality nature of eviction and demolition. Due to its intrinsic nature where evidence is mainly adduced through affidavits, judicial review has also been held not to be the right forum to resolve disputed matters of evidence and fact. Furthermore, the High Court is expressly prohibited by dint of **Article 165(5)(b**) from entertaining matters falling within the jurisdiction of the courts established pursuant to **Article 162(2)** of the Constitution. The High Court's Judicial Review Division thus lacked the jurisdiction to entertain the issues raised in the fact of such clear legal provisions.

On the authority of **Owners of the Motor Vehicle "Lilian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1,** which the Judge had in mind and cited, the High Court was bound to lay down its tools the moment it held that it lacked jurisdiction. We concur with its finding that it lacked jurisdiction to entertain and determine the proceedings.

Though the High Court could have left it at that, it went further to consider why the order of mandamus to compel the respondent to approve its plans for the construction of a perimeter wall could not be granted to the appellant in the instant case. An order of mandamus is intended

to compel the performance of statutory or public duties in cases of omission to the detriment of an aggrieved party. It must also be borne in mind that judicial review proceedings is mainly concerned with the decision making process rather than the merits or demerits of the decision taken by a public body or person. See ***Republic vs. Kenya Revenue Authority*** *Ex parte Yaya Towers Limited* **[2008] eKLR**. According to the appellant, it sought the order of mandamus to compel the respondent to approve its plans for the construction of a perimeter wall around the suit property. In its determination, the High Court noted that the respondent's City Planning Department had approved the appellant's plans of building a perimeter wall vide a letter of approval dated 17th May 2013 but subject to the appellant meeting certain conditions. Here is how the Judge delivered herself:

> ***"Commencing with the second prayer of mandamus, the court notes that annexure WN1 attached to the supplementary affidavit is a letter of approval of the erection of a boundary wall by the exparte applicant which approval was granted on 17/05/2013 by the respondent's City Planning Department. The construction was however subject to certain conditions among others:***
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> ***(a) Submission of satisfactory structural details including lintels; and trusses;***
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> ***(b) Submission of certificate as to workmanship;***
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> ***(c) Satisfactory ground soakage septic tank installation at owner's risk;***
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> ***58. From the grounds and the depositions and annextures, there is no evidence that the applicant complied with all the requirements stipulated in the approval above. The building plan itself is not even annexed to the application herein. The respondent having approved the building subject to the set conditions, the respondent had refused to allow it to commence construction of the perimeter wall as per the building plan in order for this court to find that the applicant is entitled to the order of mandamus to compel performances of that specific statutory public duty. In the absence of such evidence, the view of this court is that the second prayer for mandamus is a nonstarter and unavailable to the ex-parte applicant as there is no evidence that the respondent has unreasonably withheld the approval of the building plan for the construction of the perimeter wall around the said land reference number/property."***

As found by the Judge, there is no averment or evidence by the appellant to the effect that despite it complying with the conditions set by the respondent, the latter still failed to approve its plans thus necessitating the judicial review proceedings. The appellant should not be heard to complain when the ball was entirely on its side. It could only have been successful, if it had shown compliance with the conditions set and established that the respondent's refusal or failure to approve the plans was pursuant or reached through a flawed process. In the absence of compliance, it could not allege failure or refusal by the respondent to approve its plans and it cannot say any public duty is owed to it since the duty had not crystallized.

Ultimately, we agree with the findings of the learned Judge that the orders sought by the appellant were untenable in the circumstances.

This appeal must therefore fail as it is without merit. It is accordingly dismissed with costs to the respondent.

Dated and delivered at Nairobi this 16th day of February , 2018.

P. N. WAKI

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR