



Republic v County Executive Committee Member Nakuru County, Department of Land, Physical Planning, Housing & Urban Development; Njoka & 3 others (Interested Parties); Njoka (Exparte) (Environment and Land Judicial Review Case 1 of 2024) [2024] KEELC 4423 (KLR) (30 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4423 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 1 OF 2024**

A OMBWAYO, J

MAY 30, 2024

**IN THE MATTER OF AN APPLICATION BY
ELIZABETH NJOKA FOR AN ORDER OF MANDAMUS**

AND

**IN THE MATTER OF SECTIONS 57 AND 72 OF THE
PHYSICAL AND LAND USE PLANNING ACT, 201**

BETWEEN

REPUBLIC APPLICANT

AND

**COUNTY EXECUTIVE COMMITTEE MEMBER NAKURU COUNTY,
DEPARTMENT OF LAND, PHYSICAL PLANNING, HOUSING & URBAN
DEVELOPMENT RESPONDENT**

AND

JOSEPH NJUGUNA NJOKA INTERESTED PARTY

TERESIA NJERI INTERESTED PARTY

MARGARET DAMAT INTERESTED PARTY

LUCY WANJIRU INTERESTED PARTY

AND

ELIZABETH WANJIKU NJOKA EXPARTE



JUDGMENT

1. On 18th January, 2024, the court granted leave to the Ex parte applicant, Elizabeth Wanjiku Njoka to apply for Mandamus orders in this matter. This was done pursuant to the Ex Parte applicant's application by way of Chamber Summons dated 17th January, 2024 brought under Order 53 Rule 1 (2) and (3) of the [Civil Procedure Rules](#) and Section 8 and 9 of the [Law Reform Act](#), Cap 26 of the Laws of Kenya.
2. Given the foregoing, on 19th January, 2024, the Ex-parte Applicant filed a motion on notice dated 19th January, 2024 (the application herein) for the following orders:
 1. That an order of mandamus do issue to compel The Executive Committee Member, Nakuru County Department of Land, Physical Planning Housing & Urban Development to:
 - a. Issue to/against the Interested party/parties, under section 72 of the Physical Planning and User Act, an enforcement notice requiring the interested party/parties to forthwith, stop the ongoing construction of the house on Njoro/Ngata/Block 1/65.
 - b. Issue to/against the interested party/parties, an enforcement notice requiring him/them to demolish within thirty (30) days, the house he/them has/have constructed on Njoro/Ngata/Block 1/65 without a development permission issued under section 57 of the said Physical Planning and User Act failing which, the respondent himself shall demolish the same and recover the costs of the demolish (sic) from the interested party/parties:
 - c. to cause the interested party/parties to be charged with the offence created by section 57 (2) of the Physical Planning and User Act namely; to commence a development without permission.
 2. That the costs of the application be provided for.

The application is anchored upon a statutory statement including grounds (a) to (r) as set out on its face.

3. By a twenty-two (22) paragraphed replying affidavit sworn on 20th February, 2024 and duly filed in court on 21st February, 2024, the Respondent termed the application incompetent and frivolous. The Respondent deposed that the Ex-parte applicant's application as premature since the [Physical & Land Use Planning Act](#), 2019 clearly stipulates the procedure to be followed by it in the event that development permission has not been sought. The Respondent deposed that it has not failed or neglected to discharge its mandate as required by the [Physical and Land Use Planning Act](#), 2019. The Respondent opposed the substantive motion and prayed that it be dismissed with costs.
4. By a twenty-three (23) paragraphed replying affidavit sworn on 20th February, 2024 and duly filed on 21st February, 2024, the 1st Interested party deposed that the Ex-Parte applicant is forum shopping and filing various applications in different courts with the hope of getting favourable orders. The 1st Interested party deposed that it is strange for the Ex-Parte applicant to discriminate against him when there were no orders made restraining him from accessing, developing the land and or enjoying any benefits from the estate.
4. By a thirteen (13) paragraphed replying affidavit sworn on 27th February, 2024 and duly filed on 28th February, 2024, the 2nd Interested party deposed that the suit is bad in law and an abuse of court process.



She deposed that the present judicial review application is sub judice and this court is specifically barred from entertaining or hearing this suit by section 6 of the *Civil Procedure Act*. She deposed that the instant suit should be dismissed or struck out with costs.

5. By a forty-six (46) paragraphed further affidavit sworn on 8th April, 2024 and duly filed on an even date, the Applicant opposed the 1st Interested party's replying affidavit sworn on 20th February, 2024. She deposed that the 1st to 4th Interested parties have grabbed the properties which yield rent of both estates, live in luxury, while everybody lives in want. She deposed that the 2nd Interested party has admitted this in an affidavit which she swore on 12th June, 2020 in Nakuru High Court Succession Cause No 497 of 2013 in the matter of the estate of Philip Njoka Kamau.

Ex-parte Applicant's Submissions

6. The Ex-Parte Applicant filed submissions on 22nd April, 2024. She submits that the remedy of mandamus has Constitutional underpinning contained in the 1688 Bill of Rights and in the written Constitutions. Reliance is placed in the judicial decision of *Fitzgerald V Muldoon* 1976 NZLR 615 and she submits that the court declared illegal, null and void the suspension of the operation of an act of Parliament which the Prime Minister had vowed to have repealed but purported to ignore before the repeal had taken place. She submits that the Respondent is behaving in an identical manner to that of the Prime Minister of New Zealand. The Ex-Parte Applicant submits that on 10th December, 15th December and 22nd December, 2023, she demanded that the Respondent enforces sections 57 and 72 (sic) against the 1st Interested Party but he has refused to do so.
7. The Ex-Parte Applicant submits that the Respondent is a state officer within the meaning of Article 10 of *the Constitution* which embodies the provisions of 1688 Bill of Rights by requiring that the laws of the land be not suspended and this is by making adherence to the rule of law which is a national value.
8. The Ex-Parte Applicant submits that in this case, a person sets out to construct a building without development permission, the Respondent has no choice but to stop that development but also to require that person to restore the land to its original position. She also submits that he also has no choice but to enforce any notice issued under Section 72 of the same act where the order is ignored.
9. The Ex-Parte Applicant submits that she has explained in her verifying affidavit that a junior officer, Mr Kibet, verbally ordered the 1st Interested party to stop the construction but he was ignored and the Respondent also decided to ignore the her request therefore creating a situation where there was anarchy in the Physical Development reigns.
10. Reliance is placed on Article 10 of *the Constitution* of Kenya and the judicial decision of William Marbury v James Madison 5 U.S 137. The Applicant submits that she has come to this court because it has jurisdiction to grant the remedy that she needs. The Applicant submits that she is seeking a declaration in Family Division Misc Suit No 33 of 2016 *Elizabeth Wanjiku Njoka v Juma Kiplenge & 12 others* (a part heard suit) that at the time her father died on 1st May, 2012, he held the suit property upon trust for her mother in the ratio of 95%: 5%.
11. The Ex-Parte Applicant submits that the interested parties who are the 8th and the 2nd to the 4th Defendants have completed a residential building contrary to the law. The Ex-Parte Applicant submits that jurisdiction to grant the order of Mandamus is conferred by Section 8 of the *Law Reform Act*.
12. The Applicant submits that by its nature, the order of Mandamus compels a Public Authority to discharge an obligation imposed by *the Constitution*, a statute or the common law. Reliance is placed on the judicial decision of Prabhulal Gulabchand Shah v A.G & Another Civil Appeal No 24 of 1985.



13. The Ex-Parte Applicant submits that the Respondent is the person vested with the power to ensure that in the City of Nakuru, no buildings will be constructed without development permission and if it becomes aware that it is happening, he must take appropriate action to enforce the law according to Section 57 (3) and (4) and 72 of the *Physical and Land Use Planning Act*, 2019. Reliance is placed on the judicial decision of *Kenya National Examinations Council v Republic, ex-parte Geoffrey Gathinji Njoroge*, Court of Appeal at Nairobi, Civil Appeal No. 266 of 1996.
14. The Ex-Parte Applicant submits that the object of the *Physical Planning and User Act* is to ensure that buildings meet certain standards and to ensure that it happens. She submits that *the act* has imposed upon the Respondent the duty of stopping development or construction and where some development has taken place, to demolish the structure which has been build.
15. The Ex-Parte Applicant submits that in its replying affidavit sworn on 20th February, 2024 by Patrick K Mwai, the Respondent has shown that it is vigilant and has set out to undo the damage which the 1st Interested Party has done through issuing of a stay order on 27th November, 2023 and an enforcement notice dated 25th January, 2024. The Ex-Parte Applicant submits that what it has singularly failed to do is to apply to this Honourable Court for an injunction to stop the 1st Interested Party from building the residential house.
16. The Ex-Parte Applicant submits that it should have requested the Attorney General for permission to apply for an injunction to stop the construction and this is what is done in democracies. The Ex-Parte Applicant submits that in Volume 46 of Halsbury’s Laws of England paragraph 93 at page 112 the position is described as follows: “In appropriate cases, an injunction may be granted at the relation of the Attorney General to secure the enforcement of planning control.”
17. The Ex-Parte Applicant submits that under *the Constitution*, the Attorney General represents the national government in Courts. She submits that the County Governments are legal persons with defined areas of competence. She submits that since the Attorney General is charged with the responsibility of enforcing rule of law, he has the function of considering applications for permission of the County Government to file a suit against an owner of land who contravenes the Physical Planning and User Act. Reliance is placed on Article 156 of *the Constitution*.
18. The Ex-Parte Applicant relies on the judicial decision of *Macfoy v United Africa Company* [1961] 3 All ER 1179 and the 10th Edition of *Administrative Law by Professors Wade and Christopher Forsyth*. The Applicant urges the court to allow the application dated 19th October, 2021.

Respondent’s Submissions

19. The Respondent filed submissions on 8th March, 2024. It identified the following issues for determination:
 - a. Whether the Applicant’s application warrants an order of Mandamus?
 - b. Who should bear the cost of the suit?
20. The Respondent submits that in arriving at its decision, the Honourable court must satisfy itself that the Ex-Parte Applicant has demonstrated that it’s action was marred with illegality, irrationality and procedural impropriety. Reliance is placed on the judicial decisions of Council of Civil Servants Union v Minister for the Civil Service [1985] 2AC and *Kenya National Examination Council v Republic Ex Parte Geoffrey Gathinji Njoroge & 9 others* [1997] eKLR.



21. The Respondent further relies on Section 57 and 72 (1) of the *Physical and Land Use Planning Act*. It submits that it already began the enforcement process. The Respondent submits that the *Physical and Land Use Planning Act* does not give it timelines within which it is expected to complete the enforcement process. The Respondent further submits that the orders the Applicant is seeking should not and cannot issue against it since the act imposes a duty of enforcement upon it. The Respondent submits that mandamus cannot be issued for it to act immediately.
22. The Respondent relies on the judicial decision of *Republic v Jomo Kenyatta University of Agriculture and Technology Ex Parte Elijah Kamau Mwangi* [2021] eKLR and submits that it has not failed to perform its duty and it is still doing the same as can be seen from the annexures in its response.
23. The Respondent submits that it is trite law that judicial review is concerned not with the merits of the decision in question but with the decision making process. Reliance is placed on the judicial decision of *Municipal Council of Mombasa v Republic & Another* [2002] eKLR. The Respondent submits that the Applicant has not placed any material evidence before the Honourable Court to demonstrate that it has failed in the decision making process thus the application is brought in bad faith.
24. The Respondent prayed that it be awarded costs and it relied on Section 27 (1) of the *Civil Procedure Act* and the judicial decision of *Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another* [2016] eKLR. The Respondent prayed that the suit be dismissed with costs.

3rd and 4th Interested Parties Submissions

25. The 3rd and 4th Interested Parties filed submissions on 8th February, 2024. They submit that the issue as to whether the developer has been issued with development permit or not, the failure by the CECM to stop illegal development and failure to demolish the suit property are matters within the jurisdiction of the County Physical and Land Use Planning Liason Committee envisaged under Section 78 of *the Act*. Reliance is placed on Section 61 (3) and 61 (4) of the Act.
26. The 3rd and 4th Interested parties submit that this court has no original jurisdiction but appellate jurisdiction to hear appeals from the Liason Committee. They submit that this court has no option but to dismiss with costs this judicial review application.
27. They further submit that this application offends the sub judice rule under Section 6 of the *Civil Procedure Act*. They submit that there is in existence previously filed and active instituted proceedings vide two applications dated 18th November, 2023 and 5th December, 2023 filed in Nakuru Succession Cause No 497 of 2013 seeking orders for injunctions and demolition of development being constructed on the suit property L.R No Njoro/ Ngata/ Block 1/65 which is the subject of this Judicial Review application.
28. The 3rd and 4th Interested parties rely on the judicial decisions of Republic v NBI (*sic*) *City County Government Ex-Parte Ndiara Enterprise Ltd* [2017] eKLR and Re- Preston [1985] Ac 835.

Analysis and Determination

29. I have considered the entire application, the replying affidavits and the respective submissions and the issue that arises for determination in my view is whether the Ex-Parte Applicant is entitled to an order of Mandamus?
30. The substantive Notice of motion application is brought under provisions of Section 8 and 9 of the *Law Reform Act*. They provide as follows:

Section 8 of the *Law Reform Act* provides as follows:



1. The High Court shall not, whether in the exercise of its civil or criminal jurisdiction, issue any of the prerogative writs of mandamus, prohibition or certiorari.
2. In any case in which the High Court in England is, by virtue of the provisions of section 7 of the *Administration of Justice (Miscellaneous Provisions) Act, 1938*, (1 and 2, Geo. 6, c. 63) of the United Kingdom empowered to make an order of mandamus, prohibition or certiorari, the High Court shall have power to make a like order.
3. No return shall be made to any such order, and no pleadings in prohibition shall be allowed, but the order shall be final, subject to the right of appeal therefrom conferred by subsection (5) of this section.
4. In any written law, references to any writ of mandamus, prohibition or certiorari shall be construed as references to the corresponding order, and references to the issue or award of any such writ shall be construed as references to the making of the corresponding order.
5. Any person aggrieved by an order made in the exercise of the civil jurisdiction of the High Court under this section may appeal therefrom to the Court of Appeal.

Section 9 of the *Law Reform Act* provides as follows:

1. Any power to make rules of court to provide for any matters relating to the procedure of civil courts shall include power to make rules of court—
 - a. prescribing the procedure and the fees payable on documents filed or issued in cases where an order of mandamus, prohibition or certiorari is sought;
 - b. requiring, except in such cases as may be specified in the rules, that leave shall be obtained before an application is made for any such order;
 - c. requiring that, where leave is obtained, no relief shall be granted and no ground relied upon, except with the leave of the court, other than the relief and grounds specified when the application for leave was made.
2. Subject to the provisions of subsection (3), rules made under subsection (1) may prescribe that applications for an order of mandamus, prohibition or certiorari shall, in specified proceedings, be made within six months, or such shorter period as may be prescribed, after the act or omission to which the application for leave relates.
3. In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other



proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

31. The Court of Appeal in *Kenya National Examinations Council v Republic Ex parte Geoffrey Gathenji Njoroge & Others* [1997] Eklr quoted from Halsbury's Laws of England (3rd Edition) as follows: -

“...the order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”

32. The following passage in *Prem's Law of Writs in India, England and America* (2nd Edition), page 385 was quoted with approval in *Shah v Attorney-General* (No 3) [1970] E A 543, 549:

“Mandamus does not lie against a public officer as a matter of course. The courts are reluctant to direct a writ of mandamus against executive officers of a Government unless some specific act or thing which the law requires to be done has been omitted. Courts proceed with extreme caution for the granting of the writ which would result in interference by the judicial department with the management of the executive department of the Government”.
[Emphasis mine]

33. It is the Ex-Parte Applicant's case that the Respondent is the person vested with the power to ensure that in the City of Nakuru, no buildings will be constructed without development permission and if it becomes aware that it is happening, he must take appropriate action to enforce the law according to Section 57 (3) and (4) and 72 of the *Physical and Land Use Planning Act*, 2019.
34. The Respondent on the other hand submitted that it already began the enforcement process and the *Physical and Land Use Planning Act* does not give it timelines within which it is expected to complete the enforcement process. It submits that the orders the Ex-Parte Applicant is seeking should not and cannot issue against it since the act imposes the duty of enforcement upon it and mandamus cannot be issued for the Respondent to act immediately.
35. Section 57 of the *Physical and Land Use Planning Act*, 2019 provides:
1. A person shall not carry out development within a county without a development permission granted by the respective county executive committee member.
 2. A person who commences any development without obtaining development permission commits an offence and is liable on conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding two months or to both.



3. A county executive committee member shall require a person who has commenced a development without obtaining development permission to restore the land on which the development is taking place to its original condition or as near to its original condition as is possible and that such restoration shall take place within ninety days.
 4. Where a person who is required to do so fails to comply with the provisions of subsection (3), the relevant county executive committee member may undertake to restore the land as required and shall recover the cost of the restoration from the person required to undertake the restoration.
 5. A county executive committee member may revoke development permission if the applicant has contravened any provision of this Act or conditions imposed on the development permission for any justifiable cause.
 6. A county executive committee member may modify the conditions imposed on development permission where circumstances require it or for any justifiable cause.
36. Section 72 of the *Physical and Land Use Planning Act*, 2019 provides:
1. A county executive committee member shall serve the owner, occupier, agent or developer of property or land with an enforcement notice if it comes to the notice of that county executive committee member that—
 - a. a developer commences development on any land after the commencement of this Act without the required development permission having been obtained; or
 - b. any condition of a development permission granted under this Act has not been complied with.
 2. An enforcement notice shall—
 - a. specify the development alleged to have been carried out without development permission or the conditions of the development permission alleged to have been contravened;
 - b. specify measures the developer shall take, the date on which the notice shall take effect, the period within which the measures shall be complied; and
 - c. require within a specified period 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.
 3. Where a person on whom an enforcement notice has been served is aggrieved by that notice, that person may appeal to the relevant County Physical and Land Use Planning Liaison Committee within fourteen days of being served with the notice and the committee shall hear and determine the appeal within thirty days of the appeal being filed.
 4. Any party aggrieved with the determination of the county physical and land use planning liaison committee may appeal to the court only on a matter of law and the court shall hear and determine the appeal within thirty days.
 5. A person who has been served with an enforcement notice and who refuses to comply with the provisions of that notice commits an offence and is liable on conviction to a fine not exceeding



five hundred thousand shillings or to imprisonment for a term not exceeding two months or to both.

37. This court has taken into account the Respondent's Replying Affidavit dated 20th February, 2024. The Respondent deposed that through the Rongai Sub County planner, it issued a stay order on 27th November, 2023 directing that the 1st Interested Party to stop any further development until the documents indicated in the stay order were submitted. The Respondent annexed a copy of the Stay order to the Replying Affidavit. The Respondent also deposed that when the 1st Interested Party failed to comply with the stay order, it proceeded to issue an enforcement notice on 25th January, 2024. The Respondent annexed a copy of the enforcement notice to the Replying Affidavit.
38. This court is satisfied that the Respondent performed its duty in accordance with Section 72 of the Physical Planning and User Act and the mandamus orders sought in the Applicant's Notice of Motion Application cannot be issued.
39. This Court finds that the Notice of Motion Application dated 19th January, 2024 is found to have no merit and is hereby dismissed with costs.
40. It is so ordered.

DATED AND DELIVERED VIRTUALLY AT NAKURU THIS 30TH DAY OF MAY, 2024

A.O. OMBWAYO

JUDGE

