IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KARANJA & AZANGALALA, JJ.A)

CIVIL APPEAL NO. 308 OF 2014

BETWEEN

PATRICK THOITHI KANYUIRA…..……..…….….APPELLANT

VERSUS

KENYA AIRPORTS AUTHORITY…….……...RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Lenaola J.) dated 11th September 2014

in

Petition No. 246 of 2012)

****

JUDGMENT OF THE COURT

[1] Patrick Thoithi Kanyuira, (the appellant), is the registered owner of **property known as LR No. 209/11444** measuring approximately 1.1 acres (hereinafter referred to as the suit property). The suit property is located approximately 400 meters from the Wilson Airport which is run and managed by **Kenya Ports Authority**, (the respondent herein). A brief summary of the circumstances surrounding this matter is as follows:-

[2] Sometimes in the year 2007, he sought to construct 24 residential maisonettes on the suit property with the intention of offering them for sale to interested purchasers. He also secured a loan from Kenya Commercial Bank Limited through its Savings and Loans Limited subsidiary in form of bridging finance in the sum of Shs.67,671,000/=.

[3] By a letter dated 30th September 2008, which was a culmination of several other correspondence and verbal communication between the appellant and the respondent, the respondent, through its managing director, demanded that the appellant cease construction and immediately commence the removal of any erected structures on the suit premises, failing which the respondent would, upon lapse of seven days, effect demolition in accordance with the law and at the appellant's cost. The respondent's decision as contained in the said letter was, *inter alia,* informed by the safety and security of aviation concerns from stakeholders in the aviation industry, over the impropriety of the development, and the potential negative impact on the immense revenue generation and economic potential of the airport.

[4] Following this letter from the respondent, the appellant instituted Judicial Review proceedings seeking orders of certiorari and prohibition against the respondent's decision. This application was heard and dismissed by Wendo, J. through her judgment rendered on 14th October, 2010. There is no evidence of any appeal or application for review of this decision having been made. The appellant thereafter filed suit against the respondent in the Environment and Land Court at Nairobi being ELC No.98 of 2011 seeking compensation. The suit was subsequently withdrawn midway and the appellant thereafter filed Petition No.83 of 2012 before the High Court at Nairobi, whose outcome is now the subject of this appeal. In the petition, the appellant sought the following reliefs:

> *a) A declaration that the respondent's notice and order made on the 30th September 2008 constitutes breach of the appellant's constitutional rights as set out in* ***Articles 2, 3, 19, 20, 21, 23, 28, 40(2)(a) and (b), 40(3)(b), 47(1), 66 and 165 of the Constitution****;*
>
> *b) A declaration that pursuant to the respondent's notice and order made on the 30th September 2008 directed to the appellant in respect of developments made on the suit property, the respondent should compensate the plaintiff for the loss and damages sustained as a consequence thereof;*
>
> *c) An order of compensation by the respondent for the loss and damages sustained in the sum of Kshs.992,336,004/=;*
>
> *d) General damages;*
>
> *er) Costs*.

[5] In support of his claim, in addition to his testimony, the appellant called five other witnesses. They included a valuer, a quantity surveyor, an auditor, and an architect all who testified on various aspects mainly involving the value of the land including the structures thereon, the nature of the ongoing constructions on the suit premises, the documents of title, approval for development issued by the then City Council of Nairobi, and the NEMA licence allowing the appellant to proceed with the construction. A sixth witness from the Ministry of Lands, Physical Planning Department testified and produced the master plan and physical development plan for the suit premises.

[6] The petition was opposed by the respondent vide the replying affidavit of Joy Nyaga, its company secretary, sworn on 11th, May, 2012. At the hearing, the respondent called three witnesses, the airport manager at Wilson Airport, an aviator and chairman of the Wilson Airport air operations, and a Kenya Police service pilot based at Wilson Airport. According to the respondent, while not disputing that the suit property belongs to the appellant, its contention is that the same is adjacent to the Wilson Airport, and construction of the intended structures by the appellant would render unsafe operation of some classes of aircrafts. The respondent attached to its replying affidavit a letter dated 10th, January, 2008 by which the appellant sought approval from the respondent to commence construction of twenty four (24) maisonettes.

Since the letter is not a long one, we shall replicate the contents here. The it reads as follow:-

The Airport Manager

Wilson Airport

Dear Sir,

RE: **LR NO. 209/11444 "SOUTH C"**

Please refer to the above matter. I bought the property mentioned herein recently and I would like to develop twenty four (24) maisonettes on the 1.1 acre plot. Hence this is to kindly request you to authorize me undertake the development.

Yours faithfully,

Patrick Kanyuira

The letter was copied to the Managing Director of the respondent and the Director General Kenya Civil Aviation Authority (KCAA). The Director General KCAA responded to that letter on 24th January, 2008 advising that the request for approval was denied for reason that *"the plot lies within the approach funnel to the main runway 07 – 25 at Wilson Airport, an area which should be free from obstacles"*. This letter was copied to the appellant.

According to the respondent, the appellant ignored that letter and proceeded with construction. The respondent further wrote to the appellant on 19th March, 2008 and on 16th April, 2008 reminding him that the project was unapproved, but the appellant did not heed the warnings, prompting the respondent to issue the cessation notice dated 30th September, 2008 directing the appellant to cease all construction and immediately remove the structures he had erected on the property. That notice was the subject of H.C. Misc. No. 86 of 2009 (JR) in which the appellant, *inter alia*, sought to have quashed by way of Judicial Review, the said cessation order. This application was dismissed. (We shall revert to this issue later). The applicant thereafter filed ELC Suit No. 98 of 2011 which he later withdrew, and subsequently filed Constitutional Petition No.83 of 2012, which we have referred to earlier. As can be seen above, the sequence of what transpired before the matter landed before us is largely admitted by both parties.

[7] By a judgment made on 11th September 2016, the petition was dismissed in its entirety by Lenaola, J. (as he then was). The learned judge held that the respondent had neither acquired compulsorily, nor expressly indicated its intention to compulsorily acquire the suit property. In the same vein, the learned Judge held that the respondent's cessation notice contained in the letter dated 30th September, 2008 had the effect of restricting the activities that could be carried out by the appellant but did not extinguish the appellant's ownership rights. The learned judge was persuaded that the respondent had acted within its statutory powers in issuing the cessation notice and that the appellant ought to have sought the respondent's permission or approval prior to embarking on the construction. The trial judge also made a finding that there was no evidence available by way of a notice published in the Kenya *Gazette* to demonstrate the intention by the respondent to expand the airport from class 2B to class 2C and thereby requiring the appellant's land for that purpose.

[8] Dissatisfied with the judgment by Lenaola, J. (as he then was), the appellant filed in this Court, the notice of appeal dated 12th, September, 2011 followed by the record of appeal filed on 4th November, 2011. The memorandum of appeal contains 19 grounds of appeal. The appellant contends that there was more than sufficient basis and grounds for allowing the petition as presented to the High Court.

[9] Pursuant to this Court's directions issued on 20th September, 2016, the appeal proceeded by way of written submissions, with both counsel waiving their right to orally highlight the submissions. The appellant, in his submissions compacted his 19 grounds of appeal into 5 issues for determination as follows:

> ***1. Whether there was acquisition of the suit property;***
>
> ***2. Whether occupation of land is a condition precedent to compensation for compulsory acquisition;***
>
> ***3. Whether the respondent has power to stop the appellant from developing the suit property;***
>
> ***4. Whether the respondent is mandated to control development near the airport;***

The appellant's submissions were made under the above broad heads.

On the first issue, the appellant submitted that the learned judge failed to appreciate the basis of the

appellant's claim and thereby misdirected himself on the question of whether or not the respondent's actions constituted acquisition of the appellant's interest in the suit property. The respondent had not moved to compulsorily acquire the suit property under the provisions of **Section 13** of the **Kenya Airports Authority Act** and did not plead or lead evidence towards its commencement of any formal process of acquisition of the land that would have resulted in a notice in the Kenya Gazette. On the contrary, the appellant contends that the respondent's actions amounted to appropriation of his proprietary interest in the suit property even without a formal expression of intention to do so on the part of the respondent.

To the appellant, the finding erroneously assumes that property rights exist only upon formal expression and are extinguished upon formal/documented process renouncing them in favour of another holder of the property in issue. The appellant relies on the case of **Attorney General v Halal Meat Products Limited [2016] eKLR** and urges the Court to find favour with his position that the respondent's cessation notice of 30th September, 2008 constitutes actual, functional, effective physical and/or constructive acquisition of the appellant's property by the respondent for its purposes since, to use the respondent's own words, the property and project are on a flight path "***where any development cannot be allowed***." The appellant faults the trial judge's position as to the import and purport of the respondent's cessation notice under section 15 of the Kenya Airports Authority Act that the suit property was still available for other purposes not hazardous to the use of the airport. The appellant further relies on the case of **Halal Meat Products v the Attorney General [2005] eKLR** (a decision of the High Court which was upheld by this Court on appeal) in which the government's continued possession and occupation of premises without compensation despite several requests for handing over was held to amount to an acquisition that went contrary to **section 75** of the Constitution (*now repealed*).

According to the appellant, the foregoing position where a proprietor has been denied the use of private property by the government or a state organ amounts to deprivation of the appellant's property contrary to the provisions of **Article 40(3) (b)** of the **Constitution** and courts are enjoined to give effect to the right to property vested under the above constitutional provision. The appellant also relies on the case of **Arnacherry Limited v Attorney General [2014] eKLR** in which case the High Court allowed a claim for compensation for compulsory acquisition of land without the formality of the process having been undertaken by the government. We are however quick to mention at this stage that the latter is a decision of the High Court and we do not know whether the same was appealed against and if so what the result of any such appeal was.

[10] On the second issue on whether the occupation of land is a condition precedent to the appellant submits that even without any physical occupation of the suit property, the respondent's cessation notice dated 30th September, 2008 amounted to deprivation of the appellant's right to construct on, develop and derive commercial gain from the suit property , with the effect of denying the appellant the right to use the land and the attendant loss and damage to which the court should have awarded in the appellant's favour. The appellant faulted the judge's finding that there was no evidence on record to support the appellant's contention that the respondent wanted to expand Wilson Airport to category 2C and required part of the appellant's property to accommodate the runway protection zone of 510M required for category 2C airport.

The appellant referred to the High Court decision of Nambuye J., (as she then was) in **Orbit Chemical Industries v Attorney General [2012]eKLR** in which she allowed the claim for compensation arising from unjustified prohibition of any dealings by the claimant on the suit property where the Registrar of Titles had without any basis registered a caveat against the title to the said premises. In this case the learned judge held that protection of proprietorship goes hand in hand with protection of the right of use and to determine the proper usage of the land.

Again, we hasten to state that this is a decision of the High court, which has been appealed against, and whose circumstances were totally different from the present case. We may want to point out that this Court has no problem considering, and being guided by decisions of the High court whose jurisprudential value is apparent, but only when such decisions are final and have no possibility of being overturned on appeal. Where counsel is not sure of the finality of such a decision, it would be preferable that such

decisions are not cited to this Court, as they do not inform or persuade this Court in any way, reason being that they could be overturned on appeal, and that would embarrass the Court by leaving it with two conflicting decisions over similar issues.

The appellant submitted further, that he was entitled to compensation it being undisputed that the respondent prevented him from exercising his proprietorship rights over the suit premises by threats of use of force by the respondent being a state agency. The exercise of proprietary rights by the appellant would have led to his economic benefit in completing the construction and sale of the developed units as desired. The appellant contends that he is a victim of the respondent's expansion of the airport whereby the respondent is already using the airport as a class 2C airport. The appellant refers to section 17 of Evidence Act and submits that the respondent made statements of admission in relation to the upgrading of Wilson airport from class 2B to 2C. Accordingly, an admitted fact need not be proved and to that extent, the learned judge misdirected himself and arrived at an erroneous conclusion on the matter.

[11] As regards the third issue, the appellant maintains that the trial judge fell into error in relying on **Section 10** of the **Civil Aviation Act (now repealed)** to uphold the respondent's power to issue notices to the appellant requiring the appellant to remove structures on the suit premises in the public interest and for safety of users of Wilson Airport and its environs. The respondent's right to interfere with the appellant's property is provided for under **Section 14** of the **Kenya Airports Authority Act**, which right is qualified with a mandatory imperative to compensate an affected person for any loss sustained. The judge having relied on **Section 14** above as the basis for upholding the respondent's right to demand removal of the appellant's structures, the appellant assails the judge for failure to consider the provisions of **section14 (3)** relating to compensation for damages to land occasioned by reason of exercise of the powers conferred by **Section 14(1) (a)** of the **Kenya Airports Authority Act**. The appellant argues that the trial judge selectively applied the legal provision and refers us to the case by the Constitutional Court of Uganda in **Oging v Attorney General (2010) 1EA309 at p.312**. In this case, the court laid down the guidelines for statutory and constitutional interpretation which requires the consideration of the Act as a whole without focus on a single provision to the exclusion of all others with an open ended method of interpretation.

The appellant also relies on **section 15(3)** of the **Kenya Airports Authority Act** where the authority is allowed to apply to the High Court for an order of demolition or modification of a building which interferes with the operations of the Airport and which buildings were put up without prior approval of the Authority. The court under **section 15(3)** above has discretion to grant orders as to the payment of compensation and costs. We must however add here that the issue of compensation arises only where prior approval was sought and granted. The appellant submitted that the law is averse to and does not contemplate the present situation where the respondent would interfere with a legitimate development by a private person without judicial sanction and the attendant compensation. It was the appellant's submission that in determining that the respondent has power to interfere with the appellant's developments on the suit property, the court was wrong in relying on the provisions of **section 10** of the **Civil Aviation Act** (*now repealed*) as adopted by **section 57** of the **Civil Aviation Act**, which provides as follows;

> *(1) If the Director-General considers that provisions for Civil Aviation safety and security or efficiency of air navigation ought to be made…*
>
> *(b) by the removal or reduction in height of any such obstruction or surface.*
>
> *He or she may by order, and subject to any conditions specified in the order, require or authorize either the owner or occupier of the land on which the obstruction is situated or any person acting on behalf of the Director-General to enter upon the land and carry out such work as is necessary to enable the warning to be given or the obstruction to be reduced in height…*

Under the Civil Aviation Act, the office of the managing director of the Kenya Airports Authority or the respondent institution does not exist; that all the powers and duties with regard to air safety and operations repose on the Director General of Civil Aviation, who was not a party to the proceedings

before the High court; and the court therefore misdirected itself in finding that the respondent acted within its mandate in purporting to issue a notice that can only be issued *bona fide* by the Director General of Civil Aviation.

[12] On the fourth issue, the appellant submits that the judge's determination that the respondent is mandated to control development near the airport was erroneous in several respects. First the physical planning function was a prerogative of the Nairobi City Council, as it then was, and the respondent was by law obliged to liaise with the local authority to ensure the developments within a particular area do not endanger the use of an airport. Second, **section 32(2)(k)** of the **Physical Planning Act** mandates the local authority to consult any relevant authority and in granting the appellant the authority to develop the suit premises it should have or ought to have made the consultations. Third, the appellant had obtained the relevant approvals before commencing construction on the suit property and finally, no complaint or challenge has ever been made to the Liaison Committee provided for under Physical Planning Act against its designation of the user of the suit premises as residential as further testified by the Director of Planning who produced a master plan. The appellant goes on to submit on the development of the physical development plan under **sections 21(1), 25 to 28** of the **Physical Planning Ac**t which entailed publication in the Kenya *Gazette* and public scrutiny, an avenue that the respondent seems to have ignored. The appellant urges that the acts of the respondent can be construed as an amendment to the local physical development plan without the approval of the director contrary to **section 27(2)** of the **Physical Planning Act**. The appellant therefore seeks orders setting aside the judgment and decree of the High court while allowing the petition as presented before the High court.

[13] In opposing the appeal, the respondent through its submissions filed in Court on 4th November 2016, raises the following issues:-

a) The nature and effect of the appellant's purported cause of action;

b) Whether there was 'acquisition' or unlawful 'appropriation' of the appellant's property;

c) Whether the restriction and limitation of the appellant's use of his property arising from the respondent's performance of its statutory functions constitutes a violation of the appellant's rights under Article 40 of the constitution;

d) Whether the respondent acted disproportionately in the performance of its statutory functions and exercise of statutory powers;

e) What kind of balance has to be struck between the appellant's commercial aspiration to develop his property and the public interest consideration of ensuring the safety of users of aviation facilities and general public;

f) Whether the appellant sufficiently particularized or called evidence in support of his claim regarding alleged violation of Article 47 of Constitution.

g) Whether the trial court was under obligation to consider he evidence tendered in support of the claim on loss of quantum of damages after reaching the conclusion that the petition was not merited.

The respondent submits that the appeal is entirely misconceived and it is not available for the appellant to attempt to re-litigate matters already conclusively determined and in respect of which the decision still stands. The respondent gives a background of the case prior to the cessation notice of 30th September, 2008 to demonstrate that the appellant had unsuccessfully sought approval from the respondent through a letter dated 10th January, 2008 and that there was a chain of correspondence to this effect. For instance, the respondent through its letter dated 28th, January, 2008 declined the appellant's request. That notwithstanding, the appellant proceeded to seek project financing on 28th, March, 2008 from Kenya Commercial Bank. The respondent had also through its letters dated 19th, March, 2008 and 8th May, 2008, put the appellant on notice requiring the appellant to cease construction and reminded him of the

aviation safety concerns which letters the appellant disregarded. Besides, the appellant sought to challenge by way of judicial review proceedings the respondent's decision of 30th September, 2008 in vain as the application was dismissed and the appellant is yet to challenge the decision.

[14] On its second issue, the respondent submits that there was no evidence of acquisition or appropriation of the suit property, the appellant having failed to adduce any evidence to support that allegation. The respondent maintains that the suit property remains the property of the appellant and the appellant having sought approval of the respondent in vain ignored the respondent and went ahead to develop the property to enhance its value in anticipation of compensation from the respondent. The respondent reiterates that it never set out to compulsorily acquire the suit property from the appellant and never embarked on steps that it would have taken if it had any intention to acquire the suit premises. Referring to the **Black's Law Dictionary** definition of appropriation as "*the exercise of control over property; a taking of possession,*" the respondent submits that the doctrine of appropriation claimed by the appellant does not arise.

The respondent further argues that the appellant cannot claim compensation under **section 33** of the **Kenya Airports Authority Act** as the appellant does not satisfy the criteria set out under **sections 13 and 15** of the **Kenya Airports Authority Act** which envisage acquisition only in instances where land is required for purposes of the respondent. The respondent also urged that the dispute was presented to the wrong forum and was not ripe for determination, **section 33** of the **Kenya Airports Authority Act** providing for resolution of the dispute by way of arbitration.

[15] Thirdly, on the alleged violation of the appellant's rights under **Article 40** of the **Constitution**, the respondent takes the position that the rights under **Article 40** referred to above are not absolute and the restrictions in exercise of statutory functions are permissible. The respondent's decision was taken to further statutory functions, done as obligations and in good faith for which no liability should attach. Penalizing public bodies for undertaking a statutory duty would set a dangerous precedent by creating apprehension and fear of incurring liability, on the part of the institutions whilst undertaking their duty. The respondent refers to the case of **H.T.V. Ltd v Price Commission (1976) I.C.R. 170** where Lord Denning emphasized that a public body cannot be fettered or stopped from discharging its public duty. The respondent also refers to the case of **Vekariya Investments Limited v Kenya Airports Authority & 2 Others [2014] eKLR** wherein the right to protection of property under Article 40 of the Constitution was addressed. Majanja J. in his decision held that "*the suit property is not capable of protection in the sense being sought by the appellant because the KAA is acting within its mandate in limiting the user of the property in question for the public good.*"

[16] Turning to the fourth issue, the respondent's submission is that its statutory mandate as set out in **part III** of the **Kenya Airports Authority Act** includes maintenance of facilities for the efficient operation of aircraft, issues that are also subject to international aviation standards. The respondent faults the appellant for attempting to re-litigate the issues that were before the judicial review court and petition and urges the court not to countenance these issues by interfering with those decisions before the High Court. In addition, the respondent argues that the appellant seeks to benefit from his wrong doing and urges the Court to be guided by its decision in **Labh Singh Harman Singh Ltd v Ahmed Salim Ahmed Jeizan [2014] eKLR** by not coming to the aid of a person seeking to extricate himself from circumstances that he or she has created.

As for the balance between the appellant's commercial aspiration to develop his property and the wider public interest, the respondent submits that there are overriding public interest considerations in maintaining aviation safety to avert disaster as set out in **Peter Bogonko v National Environment Management Authority, Nairobi High Court Misc Application NO. 1535 of 2000 (unreported).** The effect of the appellant's claim is to secure public resources to compensate a private individual for the performance of a statutory duty, a position that is untenable as held by the Supreme Court in **Peter Munya v IEBC and Others; Petition No. 2 of 2014. Article 201(d)** of the **Constitution** mandates that public money shall be used in a prudent and responsible way. To buttress his arguments on the overriding nature of public interest, the respondent referred to the Supreme Court decision in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others** (supra); and Court of Appeal decisions in **Kenya Hotel**

Properties Limited v Willisden Investments Limited & 6 Others Civil Application No. 24 of 2012 and **Kenya National Examination Council v R ex parte Kemunto Regina Ouru Nairobi Civil Appeal No.127 of 2009**.

In **Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others Civil Appeal No. 218 of 2014**, this Court had occasion to consider the issue of security and safety of flight paths near human habitation and held that any restriction on habitation near such an area is a limitation permitted by law as reasonable and justifiable in an open and democratic society as contemplated under **Article 24** of the **Constitution**. This being our decision, we can safely state that the reason for this is rather obvious and informed by the fact that any dwellings erected near flight paths pose a threat to the lives both of the inhabitants of such dwellings and also those of the passengers and aircrafts using such pathways. The respondent denies any violation of the appellant's rights under **Article 47** of the Constitution. According to the respondent, the appellant was expected to specifically particularize and prove the alleged violations sufficiently, which he failed to do. The respondent agrees with the trial judge's finding that the appellant did not lead any evidence or make submissions on the alleged violations.

[17] Lastly, the respondent submits that there was no basis for the trial court to consider evidence on quantum even if the appellant had a legitimate claim. The appellant's claim is misconceived in the sense that the appellant had confirmed in cross examination that he had not provided any agreements of sale of land signed before 24th January 2008; the appellant had not provided any receipts or other evidence of actual expenditure; the estimates contained in the Bill of Quantities are of no evidential value as was held in **Bamburi Portland Cement Company Limited v Imranali Chandbhai Abulhussein Civil Appeal No.83 of 1995** and it was incumbent upon the appellant to prove the claim for future earnings, failing which such claim for future earnings is unjustifiable as per the decision in **Nzoia Sugar Company Ltd v Capital Insurance Brokers Ltd Civil Appeal No. 86 of 2009**. Learned counsel for the respondent concluded that the appellant is the author of his own misfortune and the respondent has been dragged to Court for performing its statutory duty in taking steps, of necessity, to avert disaster and ensure aviation safety.

[18] In response, the appellant filed submissions in which he argues that the issues raised in the **High Court Misc. No. 86 of 2009 J/R** were only limited to the propriety of the decision in the letter dated 30th, September, 2008, while the appeal raises further constitutional issues relating to the compulsory acquisition and compensation. The appellant argues that the respondent knew of the development sometimes in December, 2007 and only issued the cessation notice in September 2008, almost a year later. On the mandate of the respondent, the appellant submits that such mandate is limited to control developments within gazetted areas around aerodromes with **section 32(2) (d**) of the **Kenya Airports Authority Act** mandating the respondent as one of the relevant authorities that can make comments on a development plan prior to its approval. In balancing the public and private interest, the appellant refers to the case of **Sea Star Malindi v Kenya Wildlife Services [2002] eKLR** wherein the court observed that private interests can only be sacrificed where decency and fair play is assured.

[19] The Court of appeal derives its appellate jurisdiction from **Article 164(3)** of the Constitution and **section 3(1)** of the Appellate Jurisdiction Act to hear appeals from the High Court such as the present appeal. The mandate of the court of appeal on a first appeal is set out in **Rule 29(1) (a)** of this Court's Rules namely to re-appraise the evidence and to draw inferences of fact. This position has been restated in a plethora of decisions of this Court, including the following cases **(**See **Selle vs Associated Motor Boat Co. [1968] EA 123; Kenya Ports Authority vs Kuston (Kenya) Limited, Civil Appeal No. 315 of 2005)**, and **Kenya Anti-Corruption Commission v Republic & 4 others [2013] eKLR.**

We shall remain loyal to the guiding principles set out in these cases as we re-evaluate the evidence adduced before the trial court to arrive at our independent decision as to whether the impugned judgment should be set aside or not. We have above re-analysed the evidence before the trial court. What we need to do now is to consider the grounds of appeal proffered in this case, *vis a vis* the said evidence, the law, which includes case law as espoused in the cases cited to us, and the able submissions of learned counsel and give our determination.

[20] Most of the facts herein are not disputed. The appellant's ownership of the suit property is not disputed. From the certificate of lease in the record of appeal, the property was transferred to the appellant on 1st, March, 2007. After purchasing the same, the appellant embarked on a project to develop twenty four (24) maisonettes as stated earlier. It is important for us to pause here and state that it cannot be correct for the appellant to claim, as he has done in his submissions, that he had made sales for the maisonettes off plan as early as the year 2006, because as evinced by the document of Title which is part of the record of appeal, the suit property was transferred to him in March 2007. As can be seen from the letter dated 10th, January, 2008, which we have replicated earlier in this judgment, before the appellant could embark on his project, he sought the approval of the respondent, an indication that he appreciated that such approval was necessary due to the close proximity of the suit property to Wilson Airport. We hasten to indicate here, that such approval was not just a formality. It could be granted or denied depending on several considerations. In this case, the respondent denied the said approval, and communicated the said denial to the appellant vide its letter dated 24th, January, 2008. The reason given for the refusal to approve was that:-

> *"The above plot lies within the approach funnel to the main runway 07 – 25 at Wilson Airport, an area which should be free from obstacles…"*

That notwithstanding, the appellant went ahead and decided to commence the construction of the maisonettes in total defiance of the lack of approval by the respondent.

[21] On 14th, February, 2008, the appellant appealed to the Managing Director of the respondent to rescind its earlier decision. Once again, the respondent declined to approve the project restating security concerns, and communicated this to the appellant vide the letter dated 10th March, 2008. The appellant decided to ignore all this and threw caution to the wind and proceeded to seek financing from Kenya Commercial Bank.

It was after several other unheeded warnings that the respondent issued the letter dated 30th September, 2008 ordering the appellant to cease construction on the property and to remove the buildings and any other structures on the suit property. It is that letter that the appellant challenged by way of Judicial Review before Wendo J, an application which was dismissed on 14th October, 2010. All this is not disputed. According to the appellant however, due to the cessation order, he suffered substantial loss which he particularised in paragraph 14 of Petition No. 83 of 2012, but which the High Court declined to award, prompting this appeal before us.

[22] The main issue for determination in our considered view is whether the appellant should be paid the amounts he was claiming from the respondent before the

High Court. Should he be paid the monies he had borrowed from KCB as loan, even after approval to construct the maisonettes had been declined? Should he be compensated for the monies he had expended to put up the structures, which he put up without the said approval? Was the respondent's act of stopping construction tantamount to acquiring the suit property compulsorily without compensation as stated by the appellant? Was the appellant's right to property guaranteed under **Article 40 of the Constitution of Kenya** violated? Was the appellant's right to fair administrative action violated? Did the court properly apply the doctrine of proportionality espoused in **Article 24 of the Construction** in trumping the appellant's right to the enjoyment of his property in favour of public interest?

The answers to the above questions will dispose of this appeal. Let us start by examining the legal basis for the cessation order. The said order was made under **Section 14** and **15 of the Kenya Airports Authority Act Cap 395 of the Laws of Kenya**. **Section 15(3) of KAA Act** provided as follows:-

> *"Where any person erects any building which in any way interferes with the operation of any service provided by the Authority under this Act, the Authority may, unless the person has previously obtained the approval of the Managing Director to the erection of such building or has notified it to the satisfaction of the Managing Director, apply to the High Court for an order for the*

demolition or modification of such building, as the case may require..."

It was the appellant's submission that this provision does not require or authorize the respondent to give approvals before a party can put up buildings in the vicinity of the respondent's premises. According to the appellant, such duty reposes on the Director General of the Kenya Civil Aviation Authority, who was not the one who issued the impugned cessation notice, and who was also not a party to the proceedings giving rise to this appeal.

[23] We note that this issue was raised before Wendo, J. in the Judicial Review matter which was dismissed, and the same was dealt with extensively. As pointed out by the respondent, that judgment was never appealed against and the appellant should not be allowed to re-litigate it here. The learned judge found that the respondent had authority to grant approval. We agree that there was no appeal from Wendo, J.'s

judgment. We note however that the issue was raised and determined before Lenaola, J. (as he then was), and it is on that basis that we shall determine the same. A cursory look at **section 15(3) of the KAA Act**, shows that it is necessary for one before constructing any structures near the respondent's facilities to seek the approval of the Managing Director, failing which the respondent can go to court and seek demolition orders, if the erected structures are found to interfere with the safety, and security of the respondent's facilities. **Section 15 KAA Act** may not expressly say so but the interpretation is simple, unambiguous and on point.

This provision clearly shows that before a person erects a building or any structure which is likely to interfere with the operations of the respondent, then approval of the respondent, must be sought. Indeed, from the appellant's own conduct, he must have been aware of this requirement and that would explain why he sought the approval in the first place. As noted earlier, the approval sought was denied and an appeal against that refusal was also denied.

[24] In our view, the construction of the said structures, and buildings in express and flagrant defiance of the respondent's decision, was a high risk venture, whose outcome the appellant must have foreseen. Any prudent person would have ensured that he overcame that hurdle of obtaining all the necessary approvals, before sinking his funds into such a project, or even taking a loan to finance the same. If he was unhappy with the decision of Wendo, J. of failing to quash the cessation order, he had recourse of preferring an appeal against the decision, which he did not do.

Instead, he decided to go ahead with his project, the missing approvals notwithstanding. In our view, he deliberately took the risk and he must embrace the outcome, which outcome includes any loss attendant or consequential to that risk. He took the loan after the approvals had been denied, started construction without the approvals and even continued to put up the buildings even after his appeal to the respondent to rescind the decision denying him approval was declined. Did the respondent's action amount to constructive compulsory acquisition of the appellant's property? We don't think so. We say so, because the respondent did not take over the appellant's land. Indeed had the appellant obtained the necessary approvals and it later turned out that the construction would compromise the safety and security of the Airport, then the respondent would definitely have been ordered to pay compensation to the appellant. Unfortunately, that is not the case here.

The case of **Halal Meat Products Limited vs The Attorney General [2005] eKLR,** cited to us by the appellant is very different from the appellant's case. In that case, there was no issue of putting up structures without the requisite approvals. Indeed, in that case the Government had undertaken to take over the appellant's abattoir, not compulsorily, but by agreement which the Government later on failed to honour. When the appellant in that case went to court, he was asking the court to order the Government to honour its part of the agreement, which the court did; and so awarded proven damages against the Government. That case is, in our view, not relevant at all to the appellant's situation, and cannot be called in his aid.

[25] There was in our view no case of "*functional acquisition here*". **Article 40 of the Constitution** does

not therefore come into play here. On whether the appellant was accorded fair hearing before action was taken against him, we find that there is sufficient correspondence on record to show that there was communication between him and the respondent before the action was taken. It is in evidence that the appellant was actually in communication with one Mr. Kabetu, an officer of the respondent who informed him that the approval had been denied even before the formal communication was done. The appellant testified before the trial court that even after he was informed of the denial of the approval, he proceeded with the construction which was then at excavation stage. He cannot therefore say that he was not heard on the issue. It is also instructive to note that all this was happening between 2007 and 2009, when **Article 47 of the Constitution** was not in existence. Moreover, the rules of natural justice were complied with as the appellant was heard before the decision was made. There was therefore clearly no violation of **Article 47 of the Constitution** as alleged as the Constitution cannot be applied retroactively. We also note from the record that indeed, the respondent had even offered to exchange the parcel of land in question for another one elsewhere so that the matter could be resolved amicably. This is evident from the respondent's letter to the appellant dated 21st, August, 2009.

In response to the said letter, the appellant even agreed to the proposed exchange vide the letter from his advocates dated 8th, December, 2008. We do not know why the said negotiations failed, but this in our view is a manifestation or demonstration of *bona fides* on the part of the respondent. It further buttresses the respondent's stand that it harboured no intention whatsoever to compulsorily acquire the appellant's property.

As to whether the court properly balanced the public's right to safety and security and the appellant's right to enjoy his property, we are satisfied that the court did so, and did not contravene **Article 24 of the Constitution**.

This Court when dealing with the issue of security and safety of airports in **Kenya Airports Authority vs Mitu-Bell Welfare Society & 2 Others, Civil Appeal No. 218 of 2014** held as follows:-

> *"…In our considered view, subject to approvals and limitations authorized by law, the security and safety of flight paths is not negotiable. Article 24 of the Constitution recognizes that a right or fundamental freedom shall not be limited except by law and such limitation must be reasonable and justifiable in an open and democratic society. In our view, the security and safety of flight paths is a limitation on enjoyment of the right and freedoms in the Bill of Rights; such a limitation is permitted by law and is reasonable and justifiable in an open and democratic society."*

In this case, the public interest rights of the larger number of people who are likely to use Wilson Airport trumped the individual right of the appellant to own and enjoy his property under **Article 40 of the Constitution**. We reiterate, that the appellant was indeed offered the option to exchange the property for another, which proposal appears not to have materialised. In our view, that would have been a safer route to go given the circumstances of the case.

[26] Having considered the entire record of appeal, before us, the grounds of appeal relied upon, the submissions of learned counsel, and the law, our finding is that the learned Judge did not fall into error when he made his findings in the impugned judgment. We find that indeed, the appellant was in the wrong for neglecting to obtain the necessary approval before embarking on his project. We find that he was solely to blame for the loss that befell him, as he deliberately aggravated his loss by failing to heed the warning given by the respondent as demonstrated earlier. He even conceded before the trial court that by the time the denial of the approval by the respondent was communicated to him, the project was at excavation stage.

If indeed he was concerned about mitigating his loss, he should not have proceeded with the project until the issue of the approval was resolved. We find that indeed, the appellant was the author of his own misfortune. He cannot be allowed to benefit from his intransigence. We reiterate here this Court's holding in the **Labh Singh case** (supra) where we stated:

> "*No one is entitled to the aid of a court of equity when that deed hasbecome necessary through his*

or her own fault…. A court of equity shall not assist a person in extricating himself from circumstances that he or she has created."

In as much as we sympathise with the appellant for his loss, neither the law, nor equity can come to his aid. We find that the learned Judge was right in dismissing the petition. We have said enough to show that this appeal lacks merit. In the circumstances, it is hereby dismissed with costs to the respondent.

Dated and delivered at Nairobi this 24th day of March, 2017.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

F. AZANGALALA

……..…

JUDGE OF APPEAL

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

DEPUTY REGISTRAR