



**Republic v Nairobi City County Physical Land Use Planning Committee
& 2 others; Dulu (Exparte) (Environment and Planning Judicial Review
1 of 2024) [2024] KEELC 6423 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6423 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND PLANNING JUDICIAL REVIEW 1 OF 2024

AA OMOLLO, J

SEPTEMBER 26, 2024

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

ORDERS OF MANDAMUS

AND

IN THE MATTER OF AN APPLICATION BY GEORGE ABALEKA

DULU

AND

IN THE MATTER OF LAW REFORM ACT, CAP 26 OF THE LAWS

OF KENYA

AND

IN THE MATTER OF THE PHYSICAL AND LAND USE PLANNING

ACT (NO. 13 OF 2019)

AND

IN THE MATTER OF SECTION 78, 79, 80 AND 87 OF THE

PHYSICAL AND LAND USE PLANNING ACT (NO.13 OF 2019)

AND

IN THE MATTER OF NAIROBI COUNTY PHYSICAL AND LAND

USE PLANNING LIAISON COMMITTEE

AND

IN THE MATTER OF ARTICLES 22, 23, 40, 47, 48 AND 50 OF THE

CONSTITUTION OF KENYA 2010

AND



JUDGMENT – ELC EP JR 1 OF 2024 1
IN THE MATTER OF THE DECISION OF THE DIRECTOR
PLANNING COMPLIANCE & ENFORCEMENT, NAIROBI CITY
COUNTY MADE ON THE 17TH DAY OF JULY, 2023 AGAINST THE
APPLICANT

BETWEEN

REPUBLIC APPLICANT

AND

NAIROBI CITY COUNTY PHYSICAL LAND USE PLANNING
COMMITTEE 1ST RESPONDENT
DIRECTOR PLANNING COMPLIANCE & ENFORCEMENT, NAIROBI CITY
COUNTY 2ND RESPONDENT
NAIROBI CITY COUNTY 3RD RESPONDENT

AND

GEORGE ABALEKA DULU EXPARTE

JUDGMENT

Pleadings

1. The exparte applicant obtained leave on 31st July, 2023 to take out these judicial review proceedings. Subsequently, the motion dated 11th August 2023 filed together with the chamber summons application was deemed as duly filed in compliance with the directions of 18th October, 2023. The Respondents were granted time to file a response/replying affidavit from 9th April, 2024 with the time again extended on 24th June, 2024 by a period of 14 days. The Respondents did not file any replying affidavit within the said time line as at the date of writing this judgement on 20th September, 2024.
2. The exparte applicant is seeking to be granted the following orders;
 - i. That An order of Mandamus do issue to the 1st Respondents to accept, file, issue a case number and directions as to the hearing to the appeal dated 20th July, 2023 lodged by the Applicant.
 - ii. That a Conservatory Order do issue and or stay of the enforcement, and any further enforcement of the 2nd Respondent’s notice of enforcement dated 17th July, 2023 as served upon the ex parte Applicant pending the acceptance, filing, issuance of a case number, and giving directions as to the hearing and the final determination of the substantive Appeal dated 20th July, 2023 by the 1st Respondent
 - iii. That costs of this application and the suit be awarded to the Ex-parte Applicant herein.
 - iv. Any other order the court deems fit to grant.
3. The application was based on the grounds listed on its face inter alia;



- a. That the 2nd Respondent issued the Applicant with an enforcement notice dated 17th July, 2023 expiring in 21 days from the date thereof with regards to a purported illegal extension/change of use. That is, purportedly running an office in a residential area without development permission from the County Government of Nairobi on L.R No. 2/289, Baraka Villas Estate, Off Kirichwa Road Kilimani, Dagoretti North Sub-County.
 - b. That in response to the aforesaid enforcement notice, the Applicant exercised his right as provided in law by seeking to appeal to the Nairobi County Physical and Land Use Planning Liaison Committee on 20th July, 2023, the body statutorily mandated and with the jurisdiction in law under the [Physical and Land Use Planning Act](#) under Section 78, 80 and 87.
 - c. That however, the Applicant has been treated to an unending circus by the Nairobi County Physical and Land Use Planning Liaison Committee and as such been unable to file his appeal to date with various excuses been offered by the Liaison Committee including but not limited to;
 - i. There are no offices to effect payment therefore the committee cannot allow filing of the appeal by the Applicant.
 - ii. That the committee has internal administrative issues and cannot therefore accept the appeal by the Applicant
 - iii. That the Applicant needs to wait for the Chairperson of the Committee in order to get a case number.
4. The application is further supported by the affidavit of the exparte Applicant (George Abaleka Dulu) sworn on the 11th August, 2023. He deposed that the Notice of Enforcement dated 17th July, 2023 is a nullity and contravenes the provisions of article 47 of [the Constitution](#) as read together with Section 3 and 4 of Fair Administration Action Act. He highlighted the contraventions as follows;
- i. Subject to an administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair before the Notice of Enforcement dated 17th July, 2023 was issued.
 - ii. Give written reasons for the action before the Notice of enforcement dated 17th July, 2023 was issued.
 - iii. Give prior and adequate notice of the nature and reasons for the proposed administrative action before the Notice of enforcement dated 17th July, 2023 was issued.
 - iv. Granted an opportunity to be heard and to make representations in that regard before the Notice of Enforcement dated 17th July, 2023 was issued.
 - v. Granted a statement of reasons pursuant to section 6 before Notice of Enforcement dated 17th July, 2023.
 - vi. Given a notice of the right to cross-examine or where applicable before Notice of enforcement dated 17th July, 2023 was issued.
 - vii. Given an opportunity to attend proceedings, in person or in the company of an expert of his choice before Notice of Enforcement dated 17th July 2023 was issued.
5. He deposed further that conservatory orders should be granted on the inherent merit of the case bearing in mind the public interest in relation to the duties performed by the 1st Respondent constitutional values and the proportionate magnitude and priority levels attributed. That in granting



the conservatory orders, the parties will still have abilities to prosecute their case or present their defences without prejudice.

6. The Applicant avers that the 1st Respondent's decision to deny him a chance to file the appeal before the Liaison Committee is procedurally unfair, inefficient, unreasonable and in breach of the rules of natural justice. That the order of mandamus serves the purpose to compel the performance of a public duty or any act contrary to or evasive of the law. In the premises, it is fair, just and equitable for the application to be allowed.

Submissions:

7. The Applicant filed lengthy submissions dated 3rd May, 2024 which included what he termed as breach of his Constitutionally guaranteed rights under articles 22, 23, 40, 47, 48 and 50 of *the Constitution*. He cited the case of *Odd Jobs Vs. Muhia* (1970) EA 476 and *Great Lakes Transport Co. (u) Ltd Vs. Kenya Revenue Authority* (2009) eKLR and invited the court to determine the issue of breaches of Constitutional Rights though not pleaded.

8. Further, it is his submission that Section 79(1) of PLUPA is unconstitutional by virtue of allowing the Committee to determine their own procedures in terms of payments, internal administrative issues and the person in charge of giving case numbers. That the way the Committee has conducted itself is not reasonable and is contrary to article 47 and 48. He adds that the right to be heard was reiterated in the case of *Mbaki & Others Vs Macharia & Another* (2005) 2 EA 206 where the court stated;

“The right to be heard is a valued right, it would offend the notions of justice if the rights of a party were to be prejudiced or affected without the party being offered an opportunity to be heard.”

9. The Applicant went further to state that a mere declaration will not suffice. It must be followed with an award of damages which would reflect the courts view that wanton violation by a public body sustained by tax payers is not acceptable. That it is clear the administrative decision was taken in bad faith and completely outside the legitimate scope of the empowering provisions of the law. The Applicant proceeded to submit on the principles applicable on award of damages for constitutional violations.

10. Under the heading of the prayers sought, the ex parte applicant submits that he has met the threshold for the grant of the orders sought as in the circumstances of this case, there will be greater prejudice to the ex parte applicant before the appeal is heard and determined. He cited the Court of Appeal decision in *Alfred N. Mulwa Vs. Ethics & Anti-Corruption Commission and 4 Others* (2016) eKLR where even after dismissing an application for conservatory orders, the court went ahead to assert the constitutional rights of the Applicant and the need for the court to protect those rights.

Analysis and Determination:

11. On the face of the pleadings, what was filed is a judicial review application seeking for orders of mandamus and conservatory orders. It is trite law that Judicial Review Proceedings are special class from the ordinary proceedings. This is so because the courts hands are limited to determining the legality of the process of the decision making and not the merit of the decision. See the case of *Municipal Council of Mombasa Vs. Republic U Umoja Consultants Ltd* CA Civ. App. No. 185 of 2001.



12. The duty of the court in JR Proceedings was outlined in the case of *Patroli vs. Kabale District Local Government Council and Others* (2008) 2 EA 300 where it was held thus;

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedure improprietyillegality is when the decision-making authority commits on error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so a vested by law in the District Service Commission....Irrationality is when there is such gr....unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision there is a failure to act fairly on the part of the decision-making authority in the process taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice to act with procedural fairness towards one to be affected by the decision. It may also invo... failure to adhere and observe procedural rules expressly laid down in a statute or legislature Instrument by which such authority exercises jurisdiction to make a decision.”

13. Having set a basis and parameter of judicial review proceedings, the question for this court to settle is whether or not the applicant has made a case. The Applicant pleaded that he was served with enforcement notice which notice he intended to challenge through an appeal process. However, the Respondents failed to provide him with a forum to present lodge and prosecute such an appeal thus denying him his right to access justice and a fair trial. The Applicant exhibited letters he lodged as a form of appeal and efforts to have the Respondents register/give it a case number. He also exhibited the enforcement notice that formed the basis of his appeal. The Respondents did not file any reply to the contradict the facts alluded to by the exparte Applicant.

14. The enforcement notice read in part (last paragraph) thus;

“A person who uses or causes or permits to be used the land to which this notice relates or carries out or causes or permits to be carried out operation or the said land in contravention of this notice shall be guilty of an offence provided for in Section 57, 67 and 72 of the *Physical and Land Use Planning Act* No. 13 of 2019”

15. Section 72 (3) & (4) of PLUPA *Act No. 13 of 2019* states thus;

“(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.

16. Thus, the law under which the enforcement notice was issued provides avenue of appeal to any person aggrieved by the issuance and service of the enforcement notice. The exparte Applicant being such



a person aggrieved took steps to lodge an appeal. It appears the Respondents have not set out clear mechanism for receiving such an appeal or they neglected to act on the complaint lodged. Hence the Applicant has made a good case in seeking an order of judicial review in the form of Mandamus.

17. Odunga J (as he then was) in the case of *R vs Kenya Broadcasting Corporation exparte Musikari Kombo* (2018)Eklr cited at paragraph 14 the case of *Shah vs A.G* (1970) EA 543 which cited case discussed the purpose of mandamus thus;

“Mandamus is essentially English in its origin and development and it is therefore logical that the court should look for an English definition. Mandamus is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen’s Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. Mandamus is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature...”

18. Should the court grant an order in conservatory nature? The Applicant cited inter alia the case of *Board of Management of Uhuru Secondary School vs City County Director of Education and 2 Others* (2015) eKLR which summarised the principles for grant of conservatory orders as;

- i. The need for the applicant to demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he is likely to suffer prejudice.
- ii. The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.
- iii. Thirdly, the Court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.

19. In this instance, the Applicant is enjoying stay orders that were granted at the leave stage. This decision once given would finalise the matter. The question then arises that if the order of Mandamus is granted without any order staying the enforcement notice, does that expose the Applicant? My answer is yes because as long as no appeal has been registered, the Applicant will have no place to apply for the extension or renewal of the orders of stay of the enforcement notice.

20. In the circumstance, I am satisfied that conservatory orders ought to be granted to avert the violation of the Applicants’ right of access to justice and the right to be heard on the merits or otherwise pending the acceptance of his appeal or unless/until the enforcement notice dated 17th July, 2023 is withdrawn by the Respondents.

21. In conclusion, I hold that the application dated 11th August, 2023 is merited. It is allowed and orders issued thus:



- a. That an order of Mandamus do and is hereby issued directed at the 1st Respondents to accept, file, issue a case number and directions as to the hearing to the appeal dated 20th July, 2023 lodged by the Applicant within 14 days of being served with this decree/order.
- b. That a Conservatory Order is issued staying of the enforcement, and any further enforcement of the 2nd Respondent's notice of enforcement dated 17th July, 2023 as served upon the ex parte Applicant pending the acceptance, filing, issuance of a case number, and giving directions as to the hearing and the final determination of the substantive appeal dated 20th July, 2023 by the Applicant.
- c. That in default of compliance with order (a) above once served on the Respondents, an order of Certiorari be and is hereby issued removing into this court the enforcement notice dated 17th July, 2023 for being null and void and in breach of the Exparte Applicant's constitution right to be heard.
- d. That costs of this application/suit awarded to the Ex-parte Applicant herein.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF SEPTEMBER, 2024.

A. OMOLLO

JUDGE

