



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**JUDICIAL REVIEW APPLICATION NO. 6 OF 2016**

**(Formerly Nanyuki HCC JR. NO. 2 OF 2015)**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE PROCEEDINGS IN  
THE NATURE OF**

**JUDICIAL REVIEW**

**IN THE MATTER OF AN APPLICATION OF THE ENFORCEMENT NOTICE DATED 15TH  
SEPTEMBER 2015 BY THE DIRECTOR OF LAND HOUSING AND URBAN DEVELOPMENT  
LAIKIPIA COUNTY**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**-VERSUS-**

**THE DIRECTOR OF LAND HOUSING AND URBAN**

**DEVELOPMENT LAIKIPIA COUNTY.....RESPONDENT**

**AND**

**PHILIP KING'ORI NDERITU & ESTHER MUTHONI NDERITU**

**Suing as administrators of the Estate of Nderitu Gikaria.....EX APPLICANTS**

**RULING**

1. Pursuant to the leave granted to the *ex parte* applicants, Philip King'ori Nderitu and Esther Muthoni Nderitu, on **25th September, 2015**, the *exparte* applicants filed the notice of motion dated **23rd October, 2015** seeking the following orders:-

- 1) An order of *certiorari* to remove to this Honourable court and quash the respondent's enforcement notice dated 15th September, 2015.
- 2) An order of prohibition to prohibit the respondent or any other person acting under his behest, direction and authority from demanding, directing, insisting upon or ordering the applicants to comply with the enforcement notice dated 15th September, 2015.

3) An Order of prohibition to prohibit the respondent or any person acting under his behest, direction and authority from entering into the premises and executing the requirements of the enforcement notice dated 15th September, 2015.

4) An order directing the respondent to constitute a physical planning Liaison Committee to hear the applicants' Appeal against the enforcement notice dated 15th September 2015.

5) Costs of the application.

2. As can be discerned from the grounds on the face of the application, the statements of facts, the affidavits filed in this matter and the submissions filed on behalf of the applicants, the applicant's case against the respondent is as follows:-

1. That they had been granted permission by the Municipal Council of Nanyuki (the predecessor of the Laikipia County Government) to close and use the public access road which is the subject matter of these proceedings.

2. That after they closed the road, they surrendered their land and opened a new alternative access road through their property for use by the public.

3. That following closure of the road, they invested heavily on the public utility (put up installations whose value is well over six million Kenya Shillings).

4. Terming the enforcement notice arbitrary, unreasonable, unconscionable, unprocedural, unlawful and unfair; the applicant claim that their attempt to appeal to the Physical Planning Liaison Committee has been unsuccessful (the Laikipia County Government Staff is said to have refused to receive the Appeal).

5. The applicants accuse the respondent of having failed and/or refused to constitute a Physical Planning Liaison Committee to hear their appeal hence defeating their intention and right to appeal.

6. It is the applicants case that because the respondent, vide its predecessor in entitlement to the public access road had acceded to their application for closure of the public access road hereto, the respondent is estopped from issuing an enforcement notice to the applicants without giving them enough notice to relocate their business.

7. By issuing the enforcement notice hereto, the respondent is said to have acted ultra vires his powers.

8. The enforcement notice is also said to be in breach of **Articles 10, 21, 47 and 53** of the Constitution of Kenya in that there was no transparency, accountability and integrity and that due process was not followed in closing the public access road in question.

9. The respondent is also accused of having failed to afford the applicants an opportunity to be heard yet they had heavily invested on the public access road which is the subject matter of the enforcement notice.

3. In reply and opposition to the application, the Chief Officer Lands, Infrastructure and Urban Development for the County Government of Laikipia vide the replying affidavit he swore on **5th November, 2015** has deposed as follows:-

1. That the application is incompetent and fatally defective as it offends mandatory provisions of the law.

2. That the impugned enforcement notice was valid and within the respondent's mandate.

3. That the applicants cannot compel the respondent to constitute a Physical Planning Liaison Committee to hear their appeal.
4. That the applicants should not be allowed to alienate public land.
5. The enforcement notice is not arbitrary, unreasonable or unlawful as it is meant to protect the public utility hereto from alienation.
6. That the respondent's predecessor did not consent to closure of the road, it only allowed the applicants' to fence it off. Besides, it reserved its right to review its decision.
7. That the applicants have never applied for and obtained permission from the respondent to close the public utility hereto nor did the respondent surrender the public utility to them.
8. That the respondent has never allowed the applicants to invest on the public utility.
9. That no amount of investment or development on the said public utility can persuade the court to convert a public utility to a private utility.
10. That the applicants have never received any appeal from the applicants.
11. That the respondent in issuing the impugned enforcement notice did not breach any law of the land or breach the applicants legal or constitutional rights.
12. That the applicants are challenging the notice period yet they have not asked the respondent to extend it.
13. That the proceedings herein are meant to legitimise the applicant's attempt to alienate a public utility hence an abuse of the process of the court.
14. That there is no notice on which an order of certiorari can lie as by the time this proceedings were instituted the notice had expired; and
15. That it is not in public interest to grant the orders sought.

In view of the foregoing, it is contended that the applicants have not made up a case for being granted the orders sought.

4. The application was disposed of by way of written submissions.

#### **Submissions for the applicants**

5. On behalf of the applicants, it is submitted that use of the public utility herein by the applicants was not illegal (was consensual); that the issuance of the enforcement notice hereto was in violation of **Articles 10** and **47** of the constitution; that due process was not observed in issuing the enforcement notice and that there was no transparency and accountability. Further that the applicants have being denied a chance to appeal by the respondent's failure to set up the Physical Planning Liaison Committee to hear the applicants' appeal. It is submitted that the alleged failure of the respondent to constitute the Physical Planning Liaison Committee to hear the applicants' appeal justifies award of an order for mandamus, compelling the respondent to constitute the said committee with a view of hearing the applicants' appeal.

6. It is further submitted that the enforcement notice was not proper because the Director of Land, Housing and Urban Development, Laikipia County had no powers to issue the notice.

7. It is reiterated that the applicants' right to fair administrative action was violated by the respondent.

## **Submissions for the Respondent**

8. On behalf of the respondent, it is submitted that by issuing the impugned enforcement notice, the respondent neither acted ultra vires his powers nor breached any law or violated the applicants' rights.
9. The applicants are said to have failed to demonstrate that the respondent failed to discharge its duties or in discharging those duties, abused its powers or misused its authority.
10. The application is said to be bad in law for violating the provisions of **Section 7(2)** of the Fair Administrative Actions Act, 2015 and provisions of **Order 53 Rule 3(1)(2)** of the Civil Procedure Rules, 2010 in that it is brought under **Order 53 Rule 1(1)(2)(3)** and **(4)** as opposed to **Order 53 Rule 3(1)** and **(2)** of the said rules.
11. The applicants have not demonstrated that the impugned notice was arbitrary, unreasonable, unconscionable, unprocedural, unlawful or unfair.
12. It is further submitted that the courts jurisdiction is not properly invoked because the applicants have not cited the provisions of the law on which the application is premised.
13. With regard to the applicants' contention that the respondent had given them permission to close the public utility herein, it is submitted that that permission did not confer any proprietary rights to the applicants over the said public utility. It is pointed out that the respondent reserved its right to review the decision in future, if need be.
14. Since the subject matter of the impugned enforcement is a public utility, it is submitted that no amount of development on the said utility can persuade the court to convert a public Road to a Private property.
15. With regard to the applicants' contention that their rights under **Articles 10, 21, 47** and **53** of the constitution were violated, it is submitted that the applicants cannot purport to enforce their rights and fundamental rights by attempting to alienate a public road.
16. With regard to the issue of notice, it is submitted that the law does not provide for the notice period to be issued to a person who has encroached on a public utility. Pointing out that the respondent gave the applicants' seven (7) days to comply with the enforcement notice, the respondent submits that if the applicants felt that the notice period was insufficient, they ought to have applied for extension of the notice. It is further pointed out that the applicants have not intimated to the court the period they require to comply with the notice.
17. It is reiterated that the respondent neither acted in excess of her powers nor acted illegally to warrant issuance of the orders sought.

## **Analysis and determination**

18. It is trite law that judicial review is concerned with the decision making process and not the merits of the decision itself. In this regard see the cases of **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd; Mombasa High Court Civil Appeal No.185 of 2001** and **Republic vs. Kenya Revenue Authority ex parte Yaya Towers Ltd (2008) e KLR.**
19. As pointed out above, the dispute herein relates to discharge of powers conferred to the public authorities established under the Physical Planning Act, and in particular, the power to issue enforcement notices. The said power is donated under **Section 38** of the Physical Planning Act, 1996 (now repealed), hereinafter referred to as the Act), which provides as follows:-

**38(1) When it comes to the notice of a local authority that the development of land has been or is being carried out after the commencement of this Act with out the required development**

permission having been obtained, or that any of the conditions of a development permission granted under this Act has not been complied with, the local authority may serve an enforcement notice on the owner, occupier or developer of the land.

(2) An enforcement notice shall specify the development alleged to have been carried out without development permission, or the conditions of the development permission alleged to have been contravened and such measures as may be required to be taken within the period specified in the notice to restore the land to its original condition before the development took place, or for securing compliance with those conditions, as the case may be, and in particular such enforcement notice may require the demolition or alteration of any building or works or the discontinuance of any use of land or the construction of any building or the carrying out of any other activities.

(3) Unless an appeal has been lodged under subsection (4) enforcement notice shall take effect after the expiration of such period as may be specified in the notice.

(4) If a person on whom an enforcement notice has been served under Sub section (1) is aggrieved by the notice he may within the period specified in the notice appeal to the relevant liaison committee under Section 13.

(5) 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.

(6) 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.

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

Section 39 there under provides as follows:-

39 (1) If, within the period specified in the enforcement notice or within such further period as the local authority may determine any measures required to be taken (other than discontinuance of any use of land) have not been taken, the local authority may enter on the land and take those measures and may, without prejudice to any penalties that may be imposed or any other action that may be taken under this Act, recover from the person on whom the enforcement notice is served, any expenses reasonably incurred by it in connection with the taking of those measures.

(2) If such person has not lodged an appeal under section 38 he shall not be entitled to question the validity of any action taken by the local authority under subsection (1) upon any grounds, that could have been raised in such appeal.

(3) Where a local authority has taken action under subsection (1) any material removed by it from the land in pursuance of such action shall, unless the owner claims and removes such material within thirty days, be sold and the proceeds thereof, after deduction of any expenses reasonably incurred by the local authority in connection with such action and sale, be paid to the owner.

(4) Any person who obstructs, or otherwise interferes with, a local authority in the execution of its functions under subsection (1) shall be guilty of an offence and shall be liable to a fine not exceeding fifty thousand shillings or to an imprisonment not exceeding two years or to both."

20. It is clear from the foregoing cited provisions of the law that Local authorities (in the circumstances of this case read a County Governments), have power to issue enforcement notices on land owners or occupiers of land within their area of jurisdiction. It is also clear that the Act provides the procedure of challenging such a notice by an aggrieved person and the consequences of failure to challenge the notice.

21. Under **Section 38(2)** of the Act, a person who has not lodged an appeal under **Section 38** of the Act shall not be entitled to question the validity of any action taken by the local authority under subsection (1) upon any grounds, that could have been raised in such appeal.

22. In the circumstances of this case, the applicants who did not file an appeal against the impugned enforcement notice as by law required, claim that they were prevented from filing the appeal by the respondent whom they accuse of having failed to constitute the requisite Appeals Committee to receive, hear and determine their appeal.

23. Owing to the alleged failure by the respondent to constitute the requisite appeals committee to receive, hear and determine their appeal, the applicants contend that their right to a fair administrative action under **Article 47** of the Constitution was violated by the Respondent.

24. As this limb of the applicants' case has a strong bearing on the applicants' application, I will consider it first. The issue that arises from the applicants' claim that they were prevented from complying with the provisions of **Section 38** of the Act by the applicants' failure to receive their appeal and/or constitute the requisite Liaison Committee to receive, hear and determine their appeal is whether the respondent is obligated to receive or constitute a Liaison Committee to receive, hear and determine appeals emanating from its enforcement notices.

25. In answering this question, I begin by pointing out that the Physical Planning Liaison Committees are a creature of the Law. In this regard see **Section 7 to 9** of the Act, which provide as follows:-

**"7. There shall be established the Physical Planning Liaison Committees in accordance with the provisions of section 8.**

**8.(1) The National Physical Planning Liaison Committee (hereinafter in this Act referred to as "the National Liaison-Committee") shall consist of the following members—**

**(a) the Permanent Secretary, who shall be the Chairman;**

**(b) the Director who shall be the secretary;**

**(c) the Permanent Secretary for the time being in charge of the Provincial Administration;**

**(d) the Commissioner of Lands;**

**(e) the Director of Medical Services;**

**(f) the Director of Surveys;**

**(g) the Director of National Environmental Secretariat;**

**(h) The Director of Urban Development;**

**(i) the Director of Housing;**

**(j) the Director of Agriculture;**

**(k) the Director of Industry;**

**(l) the Director of Education;**

**(m) the Director of Water Development;**

**(n) the Chief Engineer (Roads), Ministry of Public Works and Housing;**

**(na) the Director-General of the Kenya National High ways Authority;**

**(nb) the Director General of the Kenya Rural Roads Authority;**

**(nc) the Director-General of the Kenya Urban Roads Authority;**

**(o) the Chief Architect, Ministry of Public Works and Housing; and**

**(p) a Registered Physical Planner in private practice duly appointed by the Minister on the advice of the Physical Planners Registration Board.**

**(2) The Nairobi Physical Planning Liaison Committee shall consist of the following members**  
—

**(a) the Provincial Commissioner of Nairobi, who shall be the Chairman;**

**(b) the Director of City Planning and Architecture, who shall be the secretary;**

**(c) the Director;**

**(d) the Commissioner of Lands;**

**(e) the Director of Housing;**

**(f) the Director of Agriculture;**

**(g) the Director of Urban Development;**

**(h) the Director of Surveys;**

**(i) the Director of Medical Services;**

**(j) the Director, National Environment Secretariat;**

**(k) the Director-General of the Kenya Urban Roads Authority;**

**(l) the General Manager, Water Sewerage Department, Nairobi City Council;**

**(m) the Director of City Education;**

**(n) the Director of Water Development;**

**(o) the Chief Architect, Ministry of Public Works and Housing;**

**(p) the Town Clerk, Nairobi City Council; and**

**(q) a registered physical planner in private practice duly appointed by the Minister on the advice of the Physical Planners Registration Board.**

**(3) Each District Physical Planning Liaison Committee shall consist of the following members**

—

- (a) the District Commissioner who shall be the chairman;**
- (b) the District Physical Planning Officer who shall be the secretary;**
- (c) the Clerk of the County Council;**
- (d) the District Lands Officer;**
- (e) the District Surveyor;**
- (f) a representative of the Kenya Rural Roads Authority;**
- (g) the District Education Officer;**
- (h) the District Agricultural Officer;**
- (i) the District Water Engineer;**
- (j) the District Community Development Officer;**
- (k) the District Public Health Officer;**
- (l) the Clerks of all Urban and Town Councils within the respective districts;**
- (m) the Chairmen of Town Planning and Works Committees of all local authorities in the respective districts;**
- (n) the District Environment Officer;**
- (o) the District Social Development Officer;**
- (p) the District Architect; and**
- (q) a registered physical planner in private practice duly appointed by the Minister on the advice of the Physical Planners Registration Board.**

**(4) Each Municipal Physical Planning Liaison Committee shall consist of the following members—**

- (a) the District Commissioner who shall be the chairman;**
- (b) the District Physical Planning Officer who shall be the secretary;**
- (c) the Town Clerk;**
- (d) the District Land Officer;**
- (e) the District Water Engineer;**
- (f) a representative of the Kenya Urban Roads Authority;**
- (g) the Chairman of the Municipal Town Planning and Works Committee;**
- (h) the District Environment Officer;**

**(i) the District Surveyor;**

**(j) the Municipal Architect;**

**(k) the Director of Social Services of the Municipal Council concerned; and**

**(l) a registered physical planner in private practice duly appointed by the Minister on the advice of the Physical Planners Registration Board.**

**Notwithstanding the provisions of section 8, a liaison committee may co-opt such other persons as it deems fit to assist the committee in its deliberations.”**

26. The Committees being a creature of the law and there being no obligation imposed on the respondent to constitute them, I find the contention that the applicant was prevented from appealing by the respondent’s failure to constitute the relevant Liaison Committee to be misplaced and/or premised on a misapprehension of the law.

27. On whether the respondent was obligated to receive the applicants’ appeal, under the rules enacted to facilitate lodging and determination of complaints against actions or inactions of the public authorities clothed with public power under the Physical Planning Act namely, the Physical Planning (Appeals to the Physical Planning Liaison Committee) regulations, 1998 (hereinafter “the Rules):

**“All appeals shall be made on forms P.P.A 8 and P.P.A 9 set out in the schedule respectively and issued by the relevant liaison committee or local authority, and shall include such particulars as may be required by the directions printed on the forms.”** See Rule 3 of the Rules.

28. The secretary to the relevant liaison committee shall within ninety days of receipt of the application in writing inform the petitioner the date on which the liaison committee shall consider the appeal.

29. Under the Rules, the secretary to the relevant liaison committee is obligated to inform the petitioner of the decision of the committee within sixty days.

30. Under **Rule 3** aforementioned, there are two places where the applicants could have lodged their appeal; these are the local authority concerned (read the County Government) concerned or the relevant liaison committee.

**Did the applicant lodge any appeal to any of above mentioned legal entities within the time stipulated in law and/or at all?**

31. With regard to this question, I find no evidence capable of proving that the applicant filed an appeal or made attempts to file an appeal as by law required which were frustrated by the respondent. The letter annexed to the applicants’ supporting affidavit, dated 21st September 2015, is not the appeal contemplated in law. Besides, by the time the letter herein was written, the impugned enforcement notice had already become operative.

32. By dint of the provisions of **Section 38(4)** of the Physical Planning Act, the applicants’ if aggrieved by the notice ought to have appealed before the notice became operative.

33. Under **Section 38(4)** aforementioned, the appeal has to be lodged with the relevant liaison committee and not the Local Authority. The duty of the local Authority under the rules is to issue the appeal, but not to receive it.

34. Even though the notice period is admittedly short, I note that in that notice, the respondent notified the applicants’ of their right to appeal to the relevant liaison committee or to the High Court.

35. Since the allegation that the applicants' were prevented from appealing by the respondent has neither been proved nor substantiated, I find and hold that the applicants' claim that they were not accorded a fair administrative action to be without basis.

36. As **Section 39(2)** of the Physical Planning Act does not allow a person who did not lodge an appeal as required by **Section 38** to question the validity of any action taken by the local authority under **Section 39(1)** upon any grounds, that could have been raised in such appeal, I agree with respondent's submissions that she neither acted in excess of her powers nor acted illegally to warrant issuance of the orders sought.

37. The upshot of the foregoing is that the application herein has no merit and is dismissed with costs to the respondent.

**Dated, signed and delivered in Nyeri on this 24<sup>th</sup> day of January, 2017.**

**L N WAITHAKA**

**JUDGE**

In the presence of:

Mr. Kiminda h/b for Mr. Bwomwonga for the applicant

N/A for the respondents

Court clerk - Esther