



Republic v Nairobi Physical and Land Use Planning Liaison Committee; Mathu, Chairman, Shah, Vice Chairperson and Ndegwa Secretary (All jointly suing as and on behalf of Kyuna Neighbours Association) (Exparte); Director General, Nairobi Metropolitan Services & 2 others (Interested Parties) (Environment and Land Judicial Review Case E008 of 2022) [2023] KEELC 361 (KLR) (26 January 2023) (Judgment)

Neutral citation: [2023] KEELC 361 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E008 OF 2022**

**LN MBUGUA, J
JANUARY 26, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

**NAIROBI PHYSICAL AND LAND USE PLANNING LIAISON
COMMITTEE RESPONDENT**

AND

**KIMATHI MATHU, CHAIRMAN, ATUL SHAH, VICE CHAIRPERSON AND
CHRIS NDEGWA SECRETARY (ALL JOINTLY SUING AS AND ON BEHALF
OF KYUNA NEIGHBOURS ASSOCIATION) EXPARTE**

AND

**DIRECTOR GENERAL, NAIROBI METROPOLITAN SERVICES INTERESTED
PARTY**

SHANZU RETREAT LIMITED INTERESTED PARTY

SHANAWAZ MOHAMEDALI WISSANJI MURJI INTERESTED PARTY

JUDGMENT

1. By a Notice of Motion dated 1.7.2022, the Exparte Applicant (a Resident’s Association) seek the following orders);
 - a. The honorable court be and is hereby pleased to grant a judicial review order of CERTIORARI, to remove to this Honorable Court for purposes of quashing, the decision



of the Respondent herein made on the 6th of April, 2022 in APPEAL NO: NCCG/NMS/PLUPLC/0050 of 2022 and all actions and/or decisions consequent thereon.

- b. The honorable court be and is hereby pleased to grant a judicial review order of PROHIBITION, restraining the Respondent either by itself, its agents, appointees, employees, officers or anyone howsoever acting under or through its authority from in anyway howsoever, implementing and/or giving effect to the Respondent's impugned decision, made on the 6th of April, 2022 in APPEAL NO: NCCG/NMS/PLUPLC/0050of2022 and all actions and/or decisions consequent thereon.
 - c. The honorable court be and is hereby pleased to grant a Judicial Review Order DECLARING that the Respondent's impugned decision, made on 6th April, 2022 in APPEAL NO: NCCG/NMS/PLUPLC/005OF2022, amounts to a violation of the Ex-parte Applicant's right to fair administrative action.
 - d. That the honorable court be and is hereby pleased to grant any further and/or consequential orders necessary to give effect to the justice of the matter herein.
 - e. That the Respondent bear the costs herein on a full indemnity basis.
2. The Applicant's case is anchored on the statutory statement of facts, as well as the supporting and verifying Affidavits of the QS Kimani Mathu, all dated 13.6.2022. The Exparte Applicants contend that the 3rd Interested Party is the owner of plot No. 7156/268 and 269 Kyuna Road situated in their neighborhood of which the said 3rd Interested Party is undertaking development of 8 Town houses thereon. The 2nd Interested Party is the developer of the proposed town houses.
 3. The Exparte Applicants aver that the proposed developments of the 8 Town houses were irregular and unlawful as they did not conform with the applicable zoning regulations and they therefore lodged their complaint to the 1st Interested party vide a letter of 10.11.2021. The 1st Interested Party in response thereof issued an Enforcement Notice dated 6.12.2021 where they gave directions stopping any further construction on the suit land; the change of user along with the building plans were to be re-submitted.
 4. The Exparte Applicant further stated that 95 days later, on 11.3.2022, the 3rd, Interested Parties lodged an appeal with the Respondent challenging the Enforcement Notice culminating in the decision of 6.4.2022 in which the Enforcement Notice was quashed and the previous building plan approvals were reinstated.
 5. The Exparte Applicants contend that the decision of the Respondent is unfair and unjust on the grounds that:
 - a) "First, the impugned decision was made ultra vires, as the Respondent is precluded by Section 72(3) of the PLUPA, 2019 from assuming jurisdiction over an Appeal lodged out of a statutory time – bar;
 - b) Secondly, the Applicant, its members and Residents of Kyuna, Nairobi were deprived of their constitutional Right to be heard, as they were never notified of the appeal number NCCG/NMS/PLUPLC/0050of2022, nor the subsequent decision by the Respondent: despite the Applicant herein having lodged the protest vide a letter dated 10th November, 2021 against which the 1st Interested Party undertook investigations and issued an enforcement notice on the 6th of December 2021.



- c) Thirdly, the Respondent is unlawfully usurping and imposing an undue fetter on the exclusive legal mandate of the 1st Interested Party, on regulation of physical and land use development, within Nairobi City County as the planning authority for Nairobi City County in contravention of Section 72(1) of the PLUPA, 2019 Gazette Notice No 2694 Vol. CXXII-No 53 of 26th March, 2020 as read with Section 72, PLUPA, 2019 as read with the Fourth Schedule, Part 2, Para 8 and 10, Constitution”.
6. All the parties were served. However, the Respondent did not file any response. Equally there was no representation of the 1st Interested Party even though it is now a defunct entity.
 7. The 2nd and 3rd Interested Parties have opposed the suit vide a Replying Affidavit of one Tom Bowma, a director of the 2nd Interested Party dated 22.9.2022. The two Interested Parties contend that the jurisdiction of this court has been illegally and procedurally invoked before exhaustion of the redress mechanisms set out under the relevant statutes that is Section 9(2) and (4) of the *Fair Administrative Action Act* and Section 72(4) of the *Physical and Land use Planning Act* (PLUPA) of 2019.
 8. They further state that none of the Grounds advanced by the Exparte Applicants are merited.
 9. On the question of time bar, the 2nd & 3rd Interested Parties aver that after they were served with the Enforcement Notice they lodged an appeal filed on 9.12.2021 with the Director General who failed to render a decision prompting the two parties to lodge a 2nd appeal dated 7.2.2022 to the Respondent. This time round, a decision was rendered but out of sheer oversight, the Respondent only made reference to the 2nd Appeal and even then, it gave incorrect date of the appeal as 11.3.2022. Thus the first appeal was filed within 14 days on 9.12.2021, hence the same was lodged procedurally.
 10. On the ground that the Exparte Applicants were not given a hearing, the 2nd & 3rd Interested Parties aver that the Respondent was not obligated by law to notify the Exparte Applicant. That in any case, the Exparte Applicant had already put their case vide their letter of 10.11.2021 addressed to the 1st Interested Party, to which the Exparte Applicant had communicated and expressed their objections in relation to the change of user and building plans issued by the 1st Interested Party. Thus while rendering its decision of 6.4.2022, the Respondent was already seized of the aforementioned objections of the Exparte Applicants.
 11. The 2nd & 3rd Interested Parties contend that as a matter of fact, it is them who had been deprived of an opportunity to be heard by the 1st Interested Party when the Enforcement Notice was issued solely on 6.12.2021 on the basis of the Exparte Applicants’ letter of 10.11.2021 without giving the 2nd & 3rd Interested Parties an opportunity to be heard.
 12. On the ground that the Respondent had usurped the powers of the 1st Interested Party, it was argued that the Respondent has the legal mandate to hear and determine appeals emanating from Enforcement Notices, as set out in Section 72 (3) as read with Section 78 (d) of the *Physical and Land use Planning Act*.
 13. The 2nd & 3rd Interested Parties therefore urge the court to dismiss the suit with costs.
 14. In their submissions, the Exparte Applicants have reiterated the averments set out in their statutory statements and affidavits while framing the following issue for determination;

“whether the Respondent acted unlawfully in admitting and determining the 2nd & 3rd Respondents’ impugned Appeal No NCCG/NMS/PLUPLC/0050of2022, outside the statutory timeline, and without hearing the Ex-parte Applicant?”



15. It was submitted that the Respondent not only lacks legal authority, but is patently acting in excess of jurisdiction or power conferred to it under any known law by purportedly assuming jurisdiction of an appeal against an enforcement notice whereas it is not authorized to do so. In any event such an Appeal admitted outside the statutory timeline is a nullity.
16. To this end the Exparte Applicants have cited the case of Nairobi City County Government v Nairobi Metropolitan Services & 13 others [2020] EKLR where the issue of the legality and establishment of the Nairobi Metropolitan Services was found to be paramount. Other cases cited by the Exparte Applicants include Republic v Kenya Revenue Authority Exparte Stanley Mombo Amuti [2018] eKLR, Aprim Consultants v Parliamentary Service Commission and Another Civil Appeal No. E039 of 2021 (COA) and Rv. PPARB and Another Exparte Selex Sistemi Integrati [2008] KLR 728
17. The 2nd & 3rd Interested parties have likewise reiterated the averments set out in their Replying Affidavit in so far as their submissions are concerned. They emphasized that no application was ever made by the Exparte Applicants seeking exemption to exhaust the mechanisms set out under Section 72(4) of the PLUPA, that their first appeal was lodged within 14 days and that the Committee of the Respondent was not obligated to notify the Exparte Applicants about the appeal. In support of their case, the 2nd & 3rd Interested Parties relied on the case of Republic v Kenya Revenue Authority Exparte Style Industries Limited [2019] eKLR.

Determination

18. I have considered all the rival arguments proffered by the Exparte Applicants and the 2nd and 3rd Interested Parties. The issues falling for determination are 1) whether this court has jurisdiction to determine the dispute: 2) whether the Respondent had the mandate to hear and determine the appeal 3) Whether the Exparte Applicants were deprived of their right to be heard by the Respondent and 4) what is the relief available to the protagonists.

Jurisdiction

19. The 2nd and 3rd Interested Parties have challenged the jurisdiction of this court contending that the suit was filed contrary to the provisions of Section 9(4) of the *Fair Administrative Action Act*. That the Exparte Applicants did not apply to this court to be exempted from the obligation to exhaust the Dispute Resolution Mechanisms, set out under PLUPA.
20. The provisions of Section 9 (1) of the Fair Administrative Actions Act provides that;

“Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of *the Constitution*”.
21. Section 9 (2) thereof stipulates that;

“The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted”.



22. While Section 9 (4) of the same Act provides that;
- “Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.”
23. The question is, does this court have jurisdiction to determine this suit in light of the above provisions of law?.
24. The provisions of Section 72 (4) of the *Physical and Land Use Planning Act* (PLUPA) provides that:
- “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”.
25. The proceedings before me are however not in the nature of an appeal, they are Judicial Review proceedings.
26. In the case of Issa Ahmed & 15 others v Mohamed Al-Sawae [2021] eKLR, the court cited the case of Republic vs. National Environmental Management Authority Exparte Sound Equipment [2011] eKLR, where it was stated as follows;
- “...Where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it..”
- Also see Jamii Telecommunication Ltd v County Government of Uasin Gishu [2020] eKLR.
27. What resonates from the statutes and case law is that matters relating to development and planning ought to be resolved by the bodies mandated to deal with such issues under the applicable statute; primarily the *Physical and Land Use Planning Act* (PLUPA).
28. The genesis of this dispute stems from some kind of approvals given to the 3rd Interested Party by the 1st Interested Party to construct 8 town houses on the parcels of land 7158/268 and 269 of which the Exparte Applicants were of the view that the said approvals were contrary to the law. They lodged an complaint to Nairobi Metropolitan Services (NMS) via their letter of 10.11.2021 whereby Nairobi Metropolitan Services acting on the said complaint issued an enforcement Notice dated 6.12.2021 stopping the 2nd & 3rd Interested Parties from undertaking any further construction.
29. The 2nd and 3rd Interested Parties were aggrieved by the said enforcement notice and they lodged an appeal with the Respondent culminating in the decision of 6.4.2022, the one being challenged herein.
30. There is no evidence to indicate how the decision of 6.12.2021 and that of 6.4.2022 were arrived at. In the case of the enforcement notice, there is nothing to show that the 2nd and 3rd Interested Parties were notified of the complaint and given a chance to be heard. Likewise in the decision of 6.4.2022, the Exparte Applicants were given a black out.



31. What emerges is that the bodies entrusted to resolve the dispute carried out the task with disregard to the rules of natural justice as set out under Article 47 of *the Constitution* and Section 4 of the Fair Administrative Actions Act.
32. In the case of *Republic v Kenya Revenue Authority Ex Parte Style Industries Limited* [2019] eKLR, the court stated that;

“Judicial review is about the decision making process, not the decision itself. The role of the court in Judicial Review is supervisory”.
33. Having established that both 1st Interested Party (NMS) and the Respondent did not carry out their mandate as required by the law, then this court invokes its supervisory jurisdiction to hear this suit, while keeping in mind that the court cannot delve into the merits of the decision, but can only look into the decision making process. In that regard, the court will proceed to determine this suit.

Whether the Respondent had the mandate to hear the appeal

34. The Exparte Applicants contend that the Respondent had no mandate to hear the appeal as it had usurped the powers of the 1st Interested party and that the appeal was time barred. The legal framework on matters “Enforcement notice” is provided for under Section 72 of PLUPA, where the County Executive Committee is the one mandated to issue such Notice. However, it is common ground that NMS had taken over such powers by the time they were issuing the Notice.
35. The provisions of Section 72 (3) of PLUPA stipulates that:

“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.”
36. While Section 78 (d) of the aforementioned Act provides that:

“The functions of the County Physical and Land Use Planning Liaison Committee shall be to— hear appeals with respect to enforcement notices”.
37. It is crystal clear that the Respondent had the statutory mandate to hear the appeal.
38. On the issue that the Appeal was lodged out of time, the 2nd & 3rd Interested Parties have proffered an account of how they sought redress after they were served with the enforcement notice such that they filed two appeals. Sadly, the Respondent has not made any appearance in this matter to explain this position. Needless to say that the 2nd and 3rd interested parties have demonstrated that they embarked on challenging the enforcement notice as per their document dated 8.12.2021 titled “ Appeal against enforcement notice...”.

Right to be heard.

39. I have already pronounced that the Exparte Applicants were not given a hearing in the determination of the Appeal yet they triggered the issuance of the enforcement notice.



40. In the case of *Depar Limited v County Executive Committee Member for Lands, Physical Planning, Housing and Urbanization & another* [2021] eKLR, the court stated that;

“The court is of the opinion that a public authority must act within the four corners of the law wherever it takes any administrative or executive action. Every action must be anchored in the law and it must have a lawful justification or excuse. No action should be taken capriciously, arbitrarily and without due process. That is what the rule of law is all about”.

41. And in the case of *Republic v Director of Physical Planning Ex-Parte Globe Developers Limited & 3 others* [2017] eKLR, Odunga J (As he then was) cited the case of *Onyango Oloo v Attorney General* [1986-1989] EA 456 where the Court of Appeal had expressed itself as follows:

“The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard”.

42. I conclude that the Exparte Applicants were deprived of their Right to be heard as they were never notified of the appeal, or given an opportunity to be heard.

The Relief

43. I find that the decision of the Respondent was irrational and was tainted with procedural impropriety in failing to accord the Exparte Applicant an opportunity to be heard. But on the same breadth, the decision appealed before the Respondent, that is the Nairobi Metropolitan Services decision of 6.12.2021 falls in the same league. Two wrongs can certainly not make a right. In the case of *Republic v Kenya Revenue Authority Ex Parte Style Industries Limited* (supra) the court stated that:

“The court must decide whether to review the agency's action or to remit the case to the agency”.

44. I find that the most efficacious order is to remit the appeal back to the Respondent for hearing and determination according to the law. It is so ordered, but the determination is to be carried out within 30 days. Each party to bear their own costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JANUARY, 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Wandati for 2nd & 3rd Interested Parties

Court Assistant: Eddel

