



Republic v County Executive Committee Member (Lands, Urban Development, Environment and Climate Change Government of Makueni County & another; Highway Holdings Ltd (Exparte Applicant) (Judicial Review Application E010 of 2021) [2023] KEELC 15755 (KLR) (15 February 2023) (Judgment)

Neutral citation: [2023] KEELC 15755 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
JUDICIAL REVIEW APPLICATION E010 OF 2021**

TW MURIGI, J

FEBRUARY 15, 2023

IN THE MATTER OF DECISION TO REVOKE DEVELOPMENT PERMISSION DATED 13TH OF OCTOBER 2021 & ENFORCEMENT NOTICE DATED 19TH OF OCTOBER 2021 BY COUNTY EXECUTIVE COMMITTEE MEMBER-LANDS, URBAN DEVELOPMENT, ENVIRONMENT AND CLIMATE CHANGE- GOVERNMENT OF MAKUENI COUNTYU

BETWEEN

REPUBLIC APPLICANT

AND

COUNTY EXECUTIVE COMMITTEE MEMBER (LANDS, URBAN DEVELOPMENT, ENVIRONMENT AND CLIMATE CHANGE GOVERNMENT OF MAKUENI COUNTY 1ST RESPONDENT

GOVERNMENT OF MAKUENI COUNTY 2ND RESPONDENT

AND

HIGHWAY HOLDINGS LTD EXPARTE APPLICANT

JUDGMENT

1. By a notice of motion dated January 21, 2022 brought pursuant to the provisions of order 53 rule 3 of the *Civil Procedure Rules* and section 8 and 9 of the *Law Reform Act* cap 26 Laws of Kenya and all other enabling provisions of the law, the applicant seeks the following orders:-

- 1) That an order of *certiorari* do issue to bring to this court for purposes of being quashed the decision by the 1st respondent in his official capacity as an employee, officer and agent of the 2nd respondent made or contained in the letters dated October 13, 2021 reference MCC/



LUDECC/Approvals/Vol4/190/56 titled revocation of development permission and October 19, 2021 titled enforcement notice.

- 2) The respondents do meet the costs of this application.
2. The application is premised on the grounds appearing on its face together with the statutory statement and verifying affidavit of the *ex parte* applicant sworn on even date.
3. A summary of the grounds, the statutory statement and the averments is that the *ex parte* applicant is the owner of land parcel No Makueni/Unoa/2424. That *vide* a letter dated February 24, 2021, the 1st respondent was upon application granted the *ex parte* applicant approval to develop its property. That on November 30, 2021 the employees of the 2nd respondent proceeded to the site to demolish his property in enforcement of the letter dated October 13, 2021 revoking the development permission and the enforcement notice dated October 19, 2021. The *ex parte* applicant averred that he was never served with the letters dated 13th and October 19, 2021. He further averred that he became aware of the 1st respondent's decision contained in the letter dated October 13, 2021 when the 2nd respondent went to the site to enforce the decision.
4. He further averred that the 1st respondent's decision contained in the two letters adversely affects his right to fair hearing in that:-
 - i. The 1st respondent took the decision without giving the *ex parte* applicant an opportunity to state its case. That the decision revoking the permission granted to the applicant was taken on October 13, 2021 and the applicant was never notified of the same or given an opportunity to state his case. That the 1st respondent decision revoking the permission granted to the applicant is null and void as it offends the rules of natural justice and the *Fair Administrative Action Act* 2016.
 - ii. The administrative action was taken with an ulterior motive calculated to prejudice the legal rights of the applicant since he was not given an opportunity to be heard or notified of the decision thereof. That he was not served with the decision and became aware of the same when the 1st respondent visited the construction site to demolish the development.
 - iii. The administrative decision was made in bad faith as the respondents ignored the rules of natural justice and the provisions of the *Fair Administrative Act* and the *Physical and Land Use Planning Act*.
 - iv. The administrative decision is unreasonable because it offends the rules of natural justice and the clear provisions of the law.
 - v. The administrative decision violates the *ex parte* applicant's legitimate expectation that the respondents should comply with the rules of natural justice and the clear provisions of the law which was not the case.
 - vi. That the decision is unfair since it was made in violation of the rules of natural justice and the clear provisions of the law.
5. Finally, counsel submitted that the decision is null and void and should be quashed since it violates the principles of natural justice.
6. The respondents did not respond to the application though they were duly served.
7. The application was canvassed by way of written submissions.



The Ex Parte Applicant's Submissions

8. The *ex parte* applicant's submissions were filed in court on September 27, 2022. Counsel for the *ex parte* applicant identified the following issues for the court's determination:-
 - i. Whether or not the decisions by the 1st respondent to revoke the development permission granted to the *ex parte* applicant contained in the letter dated October 13, 2021 and the enforcement notice contained in the letter dated October 19, 2021 were null and void for want of service upon the *ex parte* applicant as prescribed by the [Physical and Land Use Planning Act](#) 2019.
 - ii. Whether or not the decisions were in violation of the rules of natural justice in that they were arrived at in the absence of the *ex parte* applicant (being the person to whom the action or decision relates) and as such was never given an opportunity to state its case and be heard before the decision was made.
 - iii. Whether or not the decisions in issue were taken with an ulterior motive or purpose calculated to prejudice the legal rights of the *ex parte* applicant. Failure to hear the *ex parte* applicant before the decision was arrived at, the failure to serve the decision upon the *ex parte* applicant and the attempts by the respondents to enforce the said decisions failure of service notwithstanding shows a clear ulterior motive by the respondents calculated to ensure that the *ex parte* applicant lost all opportunity to either appeal against the said decision before the implementation as permitted by the [Physical and Land Use Planning Act](#) 2019 or approach this court as permitted by the [Fair Administrative Action Act](#) 2015.
 - iv. Whether or not the *ex parte* applicant is entitled to an order of *certiorari* to bring to this court for purposes of being quashed;
 - a). The 1st respondents letter dated October 13, 2021 referenced MCC/Ludecc/Approvals/Vol4/190/56 titled revocation of development permission and.
 - b) The 1st respondent's letter dated October 19, 2021 titled enforcement notice.
 - v. Who is to bear the costs of these proceedings.
9. On the first issue, counsel submitted that the 1st respondent failed to comply with the provisions of section 72(1) of the [Physical and Land Use Planning Act](#) which stipulates that the 1st respondent was under a duty to serve the applicant with the enforcement notice.
10. On the issue of whether the 1st respondent's decision violates the principles of natural justice, counsel submitted that the applicant was not given an opportunity to state his case before the decision was made. He went on to submit that the applicant became aware of the decision when the 2nd respondent went to the site and sought to enforce the decision. Counsel maintains that the decision to revoke the development permission granted to the *ex parte* applicant offends the principles of natural justice since the *ex parte* applicant was not granted an opportunity to be heard before the decision was made.
11. On the third issue, counsel submitted that the failure by the 1st respondent to accord the *ex parte* applicant an opportunity to state its case before arriving at its decision, failure to serve the decision



upon the *ex parte* applicant and the attempts by the respondents to enforce the decision shows a clear ulterior motive calculated to ensure that the applicant lost the opportunity to appeal against the decision before its implementation.

12. Counsel urged the court to grant the orders sought.

Analysis And Determination

13. Having considered the application and the applicant's submissions I find that the only issue that arises for determination is whether the rules of natural justice were breached by the 1st respondent in arriving at its decision.

14. The parameters of judicial review were re-affirmed by the Court of Appeal in the case of *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd* CA Civil Appeal No 185 of 2001 where it held:-

“judicial review is concerned with the decision making process, not with the merits of the decision itself; the court would concern itself with such issues as to whether the decision maker had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision, the decision maker took into account relevant matters or did take into account irrelevant matters. The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself – such as whether there was or there was not sufficient evidence to support the decision”

15. Further in the case of *Republic v Kenya Revenue Authority Ex parte Yaya Towers Limited* [2008] eKLR, the Court of Appeal reaffirmed that the purpose of judicial review and stated as follows:-

“The remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision-making process itself. It is important to remember in such case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he/she has been subjected....”

16. In the case of *Pastoli v Kabale District Local Government Council And others* [2008] 2EA 300 the court set out the duty of a court in judicial review applications as follows:-

“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 procedural impropriety illegality is when the decision making authority commits an 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 irrationality is when there is such gross 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 is usually in defiance of logic and acceptable moral standards Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the rules of natural justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and



observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.”

17. In judicial review therefore, the court must not be seen to be usurping the powers of the body whose conduct is in question.

Whether the decision of the 1st respondent violated the rules of natural justice

18. The ex-parte applicant seeks orders to quash the decision of the 1st respondent contained in the letters dated October 13, 2021 and October 19, 2021 on the grounds that the decision violates the principles of natural justice. The applicant submitted that he was not accorded an opportunity of stating his case before the decision was made by the 1st respondent.
19. The applicant further submitted that he was not served with the 1st respondent’s decision and the enforcement notice and only became aware when the 2nd respondent went to his premises to enforce the notice contained in the letter dated October 19, 2021.
20. The right to be heard is anchored in article 47 and 50 of the *Constitution* of Kenya 2010 and section 72(1) of the *Physical and Land Use Planning Act* 2019. The applicant contended that the 1st respondent decision contained in the letter dated October 13, 2021 violates the principles of natural justice as he was not given an opportunity to state his case before the decision was made.
21. It is a principle of common law that no man shall be condemned unheard.
22. In *Onyango Oloo v Attorney General* [1986-1989] EA 456 the Court of Appeal expressed itself as follows;

“The rules of natural justice apply to administrative action in so far as it affects the rights of the appellant and the appellant’s legitimate expectation to benefit from the remission by a release...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...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...To consider” is to look at attentively or carefully, to think or deliberate on, to take into account, to attend to, to regard as, to think, hold the opinion... “consider” implies looking at the whole matter before reaching a conclusion...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless



parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...courts are not to abdicate jurisdiction merely because the proceedings or of an administrative nature or of an internal disciplinary character. It is a loan, which the courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...denial of the right to be heard renders any decision made null and void ab initio."

23. In *Egal Mohamed Osman v Inspector General of Police & 3 others* [2015] eKLR at page 7 the court at the time referred to the *Management of Committee of Makondo Primary School and another v Uganda National Examination Board*, HC Civil Misc application No 18 of 2010, in which the Ugandan Supreme Court stated as follows regarding the rules of natural justice;

"It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the lord god hence the rules enjoy superiority over all laws made by humankind and that any law that contravenes or offends against any of the rules of natural justice, is null and void and of no effect. The rule as captured in the latin phrase *audi alteram partem* literally translates into hear the parties in turn and has been appropriately .

24. The applicant averred that it is the registered owner of land parcel No Makueni/Unoa/2424. In this regard the *ex parte* applicant annexed a copy of the title deed for land parcel No Makueni/Unoa/2424, the certificate of official search and letter of consent dated May 20, 2021 to its verifying affidavit. It is crystal clear that the *ex parte* applicant is the owner of the said property.
25. The *ex parte* applicant further averred that on February 24, 2021, the 1st respondent granted it approval to develop land parcel No Makueni/Unoa/2424. In this regard the *ex parte* applicant annexed the notification for approval on Makueni/Unoa/2424 within Wote township dated 24th and February 26, 2021 issued by the 1st respondent and payment receipts towards the same issued by the 2nd respondent. It is clear from the annexures that the 1st respondent granted the *ex parte* applicant permission to develop its property.
26. The applicant submitted that the 1st respondent's decision was contrary to section 72(1) of the *Physical and Land Use Planning Act* which provides as follows: -
1. A county executive committee member shall serve the owner, occupier, agent or developer of property or land with an enforcement notice if it comes to the notice of that county executive committee member that-
 2.
 - (a) A developer commences development on any land after the commencement of this Act without the required development permission having been obtained or
 - (b) Any condition of a development permission granted under this Act has not been complied with.



27. The 1st respondent's decision is contained in the letter dated October 13, 2021 referenced MCC/LUDECC/Approvals/Vol4/190/56 titled "revocation of development permission" is addressed to the *ex parte* applicant. It states in part as follows:-

"It has come to our attention that your development has not been undertaken in adherence to the approved building plans. It has been established that your development has fully blocked a public access road which you are fully aware of and made alterations in the ongoing development which have not been provided in the approved plans.

By this letter the development permission as earlier granted is revoked forthwith in line with the *Physical and Land use Planning Act* 2019 in light of development on public access road and consistencies of the building works with the approved plans. You are required to immediately stop any development within the land and surrender back to this office the approved development plans and Forms PPA 2 therein within the next 7 days."

28. The enforcement notice is contained in the letter dated October 19, 2021. The enforcement notice was issued by the 1st respondent to the *ex parte* applicant and it states in part as follows:-

"..It is noted that your development within Wote township encroaches onto a road reserve, completely blocking it contrary to requirements by law and provision of part iv of the Physical and Land Use Act 2019 have been complied with. Besides, the ongoing development has been altered from the approval building plans without the consent of the approving authority.

You are hereby required to immediately stop the ongoing development, remove the structures encroaching on the road and reapply for development permission within a period of 7 days from the date of the notice failure to which the county government of Makueni may enter on the suit land and execute the requirements as outlined herein above and may recover as a civil debt in any court of competent jurisdiction any related expenses incurred."

29. In the letter dated October 13, 2021, the *ex parte* applicant was required to immediately stop any development on land parcel No Makueni/Unoa/2424, to surrender to the 1st respondent the approved plans and PPA 2 forms within 7 days while the letter dated October 19, 2021 required the *ex parte* applicant to remove the structures encroaching on the road and reapply for the development permission within a period of 7 days from the date of the notice.

30. The applicant avers that he was not given an opportunity to state his case before the decision was made. It is crystal clear that the 1st respondent granted the *ex parte* applicant approval to develop its property within Wote township. In its letter dated October 13, 2021, the 1st respondent revoked the development permission on the grounds that the development was being undertaken contrary to the approved building plans.

31. From the letter dated October 13, 2021, it is clear that the 1st respondent was communicating the decision it had made. There is no evidence that the *ex parte* applicant was accorded any hearing before the decision was made or that he was served with the decision.

32. The applicant contends that he was not served with the decision and the enforcement notice in line with section 72(1) of the *Physical and Land Use Planning Act*. Section 72(1) is couched in mandatory terms that the 1st respondent should serve the owner, occupier or developer of a property with the enforcement notice if it comes to the attention of the 1st respondent that the developer does not have development permission or that any development condition has not been complied with. In *Republic v*



Registrar of Companies ex parte Githungo [2001] KLR 299, the court held that natural justice requires that persons who might be affected by administrative acts, decisions or proceedings be given adequate notice of what is proposed.

33. In the instant case, there is no evidence that the *ex parte* applicant was served with the decision or the enforcement notice. From the evidence placed before me, it is clear that decision of the 1st respondent violated the principles of natural justice as the *ex parte* applicant was not accorded an opportunity to state his case.
34. Therefore, by taking an action which clearly adversely affected the interests of the *ex parte* applicant, the 1st respondent was duty bound to ensure that in the process of arriving at its decision, the rules of natural justice were adhered to. Otherwise such a decision would be tainted with illegality and procedural impropriety.
35. I have no hesitation in finding that the 1st respondent's decision revoking the development permission granted to the *ex parte* applicant contained in the letter dated October 13, 2021 and the enforcement notice contained in the letter dated October 19, 2021 were made in breach of the rules of natural justice.
36. The *ex parte* applicant is therefore entitled to an order of *certiorari* to quash the letter dated October 13, 2021 revoking the development permission and the enforcement notice contained in the letter dated October 19, 2021 notifying the *ex parte* applicant to stop the ongoing development and removal of the structures and reapply for development permission within seven days from the date of the notice.
37. The upshot of the foregoing is that the application dated January 21, 2022 is merited and the same is allowed in the following terms:-
 1. An order of *certiorari* removing into this court for the purpose of being quashed a decision of the respondent communicated in a letter dated the October 13, 2021 and referenced MCC/Ludecc/Approvals/Vol4/190/56 and the enforcement notice contained in the letter dated October 19, 2021 and which decision is hereby quashed.
 2. The costs of this application are awarded to the *ex parte* applicant and the same shall be borne by the respondents.

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HON. T. MURIGI

JUDGE

JUDGMENT SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 15TH DAY OF FEBRUARY, 2023.

IN THE PRESENCE OF: -

Court Assistant – Mr. Kwemboi

Mathuva for the Ex parte Applicant.

