



Case Number:	Elc Jr Misc. App. No. 4 Of 2015
Date Delivered:	11 Mar 2016
Case Class:	Civil
Court:	High Court at Malindi
Case Action:	Ruling
Judge:	Oscar Amugo Angote
Citation:	Fatimabai Alarhia Khamisa v The County Government of Kilifi [2016] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Kilifi
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC JR MISC. APP. NO. 4 OF 2015**

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW  
ORDERS OF**

**CERTIORARI, PROHIBITION AND MANDAMUS**

**AND**

**IN THE MATTER OF: ORDER 53 RULES 1, 2, 3 AND 4 OF THE CIVIL PROCEDURE RULES**

**AND**

**IN THE MATTER OF: THE LAW REFORM ACT, CAP 26 LAWS OF KENYA**

**AND**

**IN THE MATTER OF: THE PHYSICAL PLANNING ACT CAP 286**

**AND**

**IN THE MATTER OF: THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**BETWEEN**

**FATIMABAI ALARHIA KHAMISA.....EXPARTE APPLICANT**

**=VERSUS=**

**THE COUNTY GOVERNMENT OF KILIFI.....RESPONDENT**

**R U L I N G**

**Introduction**

1. The Notice of Motion before me is the one dated 4<sup>th</sup> August, 2015 seeking for the following Judicial Review writs:

(a) An order prohibition do issue to prohibit the Respondents its officers, servants and/or agents from entering Plot No. 180/IV/MTOMODONI(MTWAPA) original CR7199 and/or executing, proceedings with, enforcing and/or causing to be enforced or executed the purported notice to

**stop construction works as contained in its letter dated 7<sup>th</sup> July 2015.**

**(b) An order of Certiorari do issue to Quash the purported and/or illegal irregular and unprocedural decision and/or declaration by the Respondent purporting that construction of the boundary wall is illegal as the Respondent did not grant approval and/or development permission as contained in the Respondent's letter dated 7<sup>th</sup> July 2015.**

**(c) An order of Mandamus do issue to compel the Respondent its officers, servants and/or agents to:-**

**(i) Withdraw the purported and/or illegal, irregular and unprocedural notice to stop construction works dated 7<sup>th</sup> July 2015.**

**(ii) Cease and desist from further harassing, intimidating and/or interfering with the Ex-parte Applicant's right to user and quiet enjoyment of PLOT NO. 180/IV/MTOMODONI (MTWAPA) Original 7199 and any developments thereon pursuant to the approval granted by the Respondent.**

**(d) The costs of and occasioned by this motion and for obtaining leave thereto be borne by the Respondent.**

2. The Motion is premised on the Ex-parte Applicant's statement and Affidavit.

#### **The Ex-parte Applicant's case:**

3. It is the Ex-parte Applicant's case that she is the widow of the late Alarakha Khamisa Aloo who died in the year 2014 and who is the registered proprietor of parcel of land known as 180/IV/Mtomodoni (Mtwapa); that she is the executrix of the Estate of the deceased and that the Respondent has issued an illegal, irregular and unprocedural notice directing the Applicant to stop constructing a boundary wall on Plot No. 180/IV/MN (the suit property).

4. According to the Ex-parte Applicant, the Respondent intends to demolish the wall despite having granted approval and issued to the Applicant development permission for the construction of the perimeter wall.

5. It is the Applicant's case that the Respondent has utterly and blatantly flouted the rules of natural justice by purporting to condemn the Applicant unheard; that the issuing of the illegal, irregular and unprocedural notice to demolish the boundary wall is unreasonable and irrational and that the Respondent has acted ultra vires its statutory powers.

#### **The Respondent's case:**

6. The Respondent filed a Notice of Preliminary Objection and a Replying Affidavit.

7. In the Notice of Preliminary Objection, the Respondent averred that this court does not have jurisdiction to entertain this dispute; that the Applicant does not have the locus standi for want of Probate or Letters of Administration and that the Motion should be dismissed with costs on those grounds alone.

8. In the Affidavit, the Respondents' Chief Officer deponed that the suit property is in the name of the late Alarakhia Khamisa Aloo, now deceased; that the Applicant has not shown that she has letters of administration and that consequently, the Applicant does not have the requisite locus standi to prosecute this suit.

9. The Respondents' Chief Officer deponed that the enforcement notice was issued pursuant to Section 38(3) of the Physical Planning Act; that the Applicant should have filed an Appeal to the Local Liaison Committee after which an appeal would be made to the National Liaison Committee and that this court has jurisdiction only on appeal from the National Liaison Committee on matters arising from the Act.

10. It is the Respondent's case that the Applicant does not have architectural and engineering plans for the perimeter wall; that it is not feasible to make an application and obtain development permission on the same day and that the Respondent did not have knowledge of the approvals.

#### **Submissions:**

11. The Applicant's counsel submitted that the Appeals process detailed in Section 33 of the Physical Planning Act is limited to an appeal against a decision by the local authority to either grant or refuse to grant development permission; that the provisions do not relate to a grievance against an illegal decision made by a local authority and that the Motion seeks to challenge the notice of 7<sup>th</sup> July 2015.

12. On the issue of whether the Applicant has the locus standi, the Applicant's advocate submitted that the allegation is not an undisputed fact and therefore not a preliminary objection.

13. The Respondent's counsel submitted that this court does not have jurisdiction to hear the dispute. Counsel relied on the **Court of Appeal case of Mohamed Ali Salim & 2 Others Vs Municipal Council of Mombasa, Civil Appeal No. 106 of 2010** where it was held that where a statute has provided a mechanism for resolution of disputes, the procedure laid down in that statute ought to be strictly followed and exhausted.

#### **Analysis and findings:**

14. According to the Ex parte Applicant's Affidavit, she is the widow and executrix of the Estate of the late Alarakhia Khamisa, the registered proprietor of plot No. 180/IV/Mutomodoni (Mtwapa).

15. It is her deposition that she has instituted these proceedings in her capacity as the Executrix of the Estate of the late Alarakhia and also in her own capacity as a heir in the said Estate.

16. The Applicant has annexed a copy of the last will and testament of the late Alarakhia dated 19<sup>th</sup>

August 2012.

17. Other than the Will, the Applicant has not annexed the full letters of administration or letters of administration *ad litem* to show that she has the locus standi to bring these proceedings on behalf of the registered proprietor of the suit property.

18. It is trite law that where proceedings are brought in the name of or on behalf of the deceased, one must seek the leave of the court to do so by obtaining letters of administration *ad litem* or full letters of administration.

19. In the absence of the letters of administration, I find and hold that the Applicant does not have the locus standi to challenge the decision of the Respondent of 7<sup>th</sup> July, 2015.

20. In any event, even if the Respondent issued to the Applicant approval for the development of plot number 180/IV/MN vide its letters dated 27<sup>th</sup> November 2014, there is no evidence placed before this court to show that the Applicant complied with the conditions therein before she begun the construction of the perimeter wall.

21. Indeed, the letter of 27<sup>th</sup> November 2014 clearly states that “all developments shall be carried out in accordance with the approval design(s) and building plans.” The Applicant has not produced the designs that were approved by the Respondent.

22. Section 38(1) of the Physical Planning Act provides that when it comes to the notice of a local authority that the development of land is being carried out without the required development permission having been obtained, or that any of the conditions of a development permission granted has not been complied with, the local authority may serve an enforcement notice on the owner, occupier or developer of the land.

23. Where an enforcement notice is served, an appeal may be lodged to the relevant liaison committee. Any person aggrieved by the decision of the liaison committee may appeal against such a decision to the National Liaison Committee and thereafter to the High Court.

24. Those are the procedural issues that the Applicant should have complied with before filing the current suit.

25. Having failed to appeal against the decision of the Respondent viz-a-viz the service of an enforcement notice, to the liaison committee, this court cannot grant to the Applicant the prayers sought.

26. For those reasons, the Ex-parte Applicant's Notice of Motion dated 4<sup>th</sup> August, 2015 be and is hereby struck out with costs.

Dated and delivered in Malindi this 11<sup>th</sup> day of **March**, 2016.

**O. A. Angote**

**Judge**  


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