



**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**

2023/HP/1632

{Civil Jurisdiction}

IN THE MATTER OF:

**ORDER 53 RULE 3 OF THE
RULES OF THE SUPREME COURT WHITE
BOOK, {1999 EDITION} VOLUME 1 AND 2**

AND IN THE MATTER OF:

AN APPLICATION FOR JUDICIAL REVIEW

AND IN THE MATTER OF:

**THE DECISION OF THE KITWE CITY COUNCIL
DEPARTMENT OF DEVELOPMENT PLANNING
CONTAINED IN ITS ENFORCEMENT NOTICE
OF 31ST JULY 2023 ADDRESSED TO THE
APPLICANT {HEREINAFTER CALLED "THE
DECISION"}**

IN THE MATTER OF:

**AN ORDER OF PROHIBITION BARRING
AND/OR STOPPING KITIWE CITY COUNCIL
FROM ISSUING ANY FURTHER
ENFORCEMENT NOTICES IN RESPECT OF THE
APPLICANTS PROPERTY KNOWN AS STAND
NO> 674 KITWE**

AND IN THE MATTER OF:

**AN APPLICATION FOR AN ORDER OF STAY
OF THE DECISION PENDING HEARING AND
DETERMINATION OF AN APPEAL AGAINST
THE DECISION OF THE KITWE CITY COUNCIL
DEPARTMENT OF DEVELOPMENT PLANNING**

AND IN THE MATTER OF:

**AN APPLICATION FOR AN ORDER OF
MANDAMUS DIRECTING THE KITWE CITY
COUNCIL PLANNING DEPARTMENT TO**

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REVOKE ITS ENFORCEMENT NOTICE DATED
31ST JULY 2023

IN THE MATTER OF:

AN APPLICATION FOR AN ORDER OF
MANDAMUS DIRECTING MINISTER TO
ESTABLISH AND CONSTITUTE THE
PLANNING APPEALS TRIBUNAL FOR THE
COPPERBELT PROVINCE AS PROVIDED BY
SECTION 62{1} OF THE URBAN AND
REGIONAL PLANNING ACT NO. 3 OF 2015

BETWEEN:

POWER LEE LIMITED

APPLICANT

AND

KITWE CITY COUNCIL

1ST RESPONDENT

THE ATTORNEY GENERAL

2ND RESPONDENT

RULING

LEGISLATION REFERRED TO :

1. *Section 62{1} of the Urban and Regional Planning Act No. 3 of 2015.*
2. *Rules of the Supreme Court Practice 1999 edition under Order 53/14/19*
3. *Effective Use of Judicial Review - Peter Bibby*

CASES REFERRED TO :

1. *Nyampala Safaris {Z} Ltd and Others v Zambia Wildlife Authority and Others {2004} ZR 49*
2. *Associated Picture Houses Ltd V Wednesbury Corporation [1948] 1 KB 233*

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3. *William Harrington v Attorney General Appeal No. 60 of 2016 [2019] ZMSC 14*
4. *Council of Civil Service Unions v Minister for the Civil Service [1984] 3 WLR 1174*

1.0 **INTRODUCTION**

- 1.1 This is an application by the Applicant for judicial review of the 1st Respondent's decisions as a Planning Authority to serve the Applicant with an Enforcement Notice dated 31st July 2023 pursuant to the Urban and Regional Planning Act giving the Applicant seven {7} days to cease all works on the property known as Stand No. 674 Kitwe, without providing the Applicant the opportunity to remedy the alleged breach within a stipulated period of time and without consideration that the alleged breach which was not fatal or life threatening to require and order for a demolition.
- 1.2 Secondly the Applicant seeks judicial review of the 1st Respondent's decision as a Planning Authority, to suspend planning permission in the absence of a breach by the Applicant to warrant a suspension/cancellation of the Applicant's operations as the Applicant has been in full compliance of all conditions and all statutory requirements relating to planning permission and developments, have been paid.
- 1.3 Thirdly, the Applicant seeks judicial review of what it contends is the irrational decision by the 1st Respondent, through the Department of Development Planning to demolish any structures on the Applicant's land, as planning and building permission were applied and paid for and inspections were conducted by officers from the 1st Respondent itself.

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- 1.4 The Applicant in accordance with judicial review applications had sought leave to apply for judicial review, pursuant to Order 53 Rule 3 of the Rules of the Supreme Court of England, [The White Book] on 15th September 2023, which leave was granted by this Court on 31st September 2023.
- 1.5 Leave having been so granted, the Applicant filed an Originating Notice of Motion for judicial review before this Court to be heard in Chambers on 29th September 2023. The said motion was supported by an Affidavit in Support, in which the facts giving raise to the judicial review were outlined.
- 1.6 In filing the Notice of Motion for judicial review, the Applicant seeks an order of prohibition barring and/or stopping the 1st Respondent from the issuance of further enforcement notices in respect to the Applicant's property known as Stand No. 674 Kitwe; the Applicant in addition seeks an order for Mandamus directing the 1st Respondent's department of planning to revoke its enforcement notice dated 31st July 2023. Thirdly, an order of Mandamus, directing the Minister to establish and constitute the Planning Appeal Tribunal for the Copperbelt Province as provided by Section 62{1} of the Urban and Regional Planning Act No. 3 of 2015.
- 1.7 The 1st Respondent in response filed its Affidavit in Opposition of Originating Notice of Motion for judicial review proceedings on 13th October 2023.
- 1.8 The substantive hearing of the said notice of motion was heard by this Court on 28th November 2023. At the said hearing the Applicant referred the Court to the documents upon which it would

rely on in its application, which aside for the affidavit in support of the originating notice of motion, equally included the Applicant's Affidavit in Reply to the 1st Respondent's Affidavit in Opposition, dated 20th October 2023.

- 1.9 The 1st Respondent equally stated that it would rely on the documents filed into Court in support of its opposition to the Applicant's Motion herein.

2.0 SUMMARY OF APPLICANT'S FACTUAL POSITION

- 2.1 The Applicant is the title holder for the property known as Stand No. 674 Kitwe in the Copperbelt, which property he purchased from a previous title holder, with the intention of developing the land for commercial purposes.
- 2.2 Following the purchase of the said land, the Applicant proceeded to apply for planning permission as provided for by the Urban and Regional Planning Act No. 3 of 2015 and all payments incidental to the planning permission were paid by the Applicant.
- 2.3 The Applicant in line with the provisions of the Act, caused to be issued a notice to the public inviting members of the public to submit their objections if any to the erection of any structures on the said land.
- 2.4 The Applicant in addition applied for the change of land use from play park to commercial use, which intention to apply for the said change of use land, was published in a notice to the public by the

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Kitwe City Council, inviting any possible objection to the same from the public, dated 10th April 2022.

- 2.5 According to the Applicant, it did not receive any response from the 1st Respondent regarding its application for change of use from play park to commercial use despite several reminders for the same.
- 2.6 On 31st July 2023, the Applicant was presented with an enforcement order by the 1st Respondent through the department of Development Planning, to demolish any structures erected on the parcel of land in issue.
- 2.7 The Applicant states that the 1st Respondent proceeded to demolish a guard house constructed by the Applicant, even whilst the Applicant had written a letter of appeal to the Minister and the same was served on the 1st Respondent.
- 2.8 The Applicant states that despite being desirous to appeal against the 1st Respondent's decision, the Planning Appeals Tribunal on the Copperbelt Province is yet to be established and constituted and there is therefore no Planning Appeals Tribunal that sits on the Copperbelt region.
- 2.9 The Applicant further stated that on the 4th August 2023, it wrote to the minister by way of an appeal against the decision of the 1st Respondent. According to the Applicant, it made a further follow up vide a subsequent letter to the Minister and the same was delivered to the Minister on 31st August 2023 and the office of the Minister has to date not responded to any of the letters written by the Applicant.

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- 2.10 The Applicant as a result of the aforementioned, has come before this court contending that the 1st Respondent's decision to demolish the said structures among others was ultra vires and further that the 1st Respondent's decision to suspend the planning permission was irrational and procedurally improper.
- 2.11 The 1st Respondent in response states in its Affidavit in Opposition of Summons for Order to discharge Order to Stay 1st Respondent's decision and the applicant's free use and enjoyment of Stand No. 674 Kitwe filed on 1st November 2023. Namely that the Applicant in applying for planning permission from the 1st Respondent, was not granted the same as planning permission was denied, due to the fact that the proposed development was contrary to the designated use of land on the lay out plan.
- 2.12 The said affidavit whose deponent is Dorcas Nsalange further states that despite not being granted planning permission, the Applicant was discovered developing the property without the said requisite planning permission. The deponent went on to depose that the 1st Respondent served the Applicant with an enforcement and demolition notice.
- 2.13 That in response to the said enforcement order, the Applicant was prompted to request the Minister of Local Government to constitute the Planning Appeals Tribunal to hear their appeal. The deponent went on to depose that the Applicant applied for leave to commence judicial review proceedings and upon being granted leave to commence judicial review proceedings and Stay of the 1st Respondent's decisions and thus allowed free use and enjoyment of Stand 674 Kitwe.

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- 2.14 The deponent stated that the Applicant was now using the Stay granted by the Court as a sword and not a shield as the Applicant following the grant of leave, did proceed to commence works on the said Stand 674 Kitwe by the felling of trees and excavations. Action which according to the 1st Respondent, is effectively changing the designated use of the land and enabling the Applicants to carry out the works without any supervision by the 1st Respondent.
- 2.15 As the Court had already granted the leave to commence judicial review proceedings the 1st Respondent reinstated its application for interim injunction pending the hearing and determination of the judicial review proceeding. This Court granted the interim injunction.
- 2.16 On the 28th November 2023 both parties appeared for the judicial review hearing and both sides relied on their respective affidavit in support and proceeded to augment on their respective positions.

3.0 APPLICANT'S SUBMISSIONS

- 3.1 Counsel for the Applicant informed the Court that following the grant of leave by this court for the Applicant to commence judicial review proceedings on 15th September 2023, the Applicant filed its Originating Notice of Motion for judicial review and supporting affidavit for the motion on 29th September 2023 and went on to indicate that the notice of motion and the affidavit evidence shall be the main documents that the Applicant shall rely upon in the judicial review action.

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- 3.2 Counsel went on to inform the Court, that the Applicant shall place heavy reliance on the notice of application for judicial review filed into Court on 15th September 2023. By way of summary, Counsel pointed out that the decision in respect of which relief is sought, were highlighted in the said Notice. The court was directed to the reliefs sought by the Applicant, which are itemized from paragraph 1 to 16 in the said Notice, as well as the grounds for which relief is sought, which are equally detailed and itemized in the said Notice of Application. The Court was also referred to the Applicant's Affidavit in Reply to the 1st Respondent's Affidavit in Opposition to the originating notice of motion, which affidavit in reply is dated 20th October 2023.
- 3.3 The Applicant implored this court to intervene in the decisions of the 1st Respondent in its capacity as a public body herein.

4.0 1ST RESPONDENT'S SUBMISSIONS

- 4.1 The 1st Respondent in response submitted that it relies on its Affidavit in Opposition of originating notice of motion for judicial review proceedings, filed on 13th October 2023 and its skeleton arguments equally filed on 13th October 2023. The 1st Respondent through its Counsel stated that aside from the above-mentioned documents, it wished to rely on the documents submitted in support of its preliminary issue as well as those submitted in support of its application for an interim injunction.
- 4.2 The jest of the 1st Respondent opposition is that there was no procedural impropriety by the local authority. The 1st Respondent

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denied the fact that the mere payment of the requisite fees for planning permission entailed that planning permission had been granted. This was because according to the 1st Respondent, planning permission has to be in a prescribed form and has to be approved by the Council at a meeting.

- 4.3 It was the 1st Respondent's submission that the application did not go through the process and that it was never tabled before Council. The 1st Respondent further submits that though the Applicant applied for planning permission, the same was not granted, following investigations over the said property being conducted.
- 4.4 It was the 1st Respondent's further submission that the reason why the Applicant's planning permission could not be taken before the Council, was the realization that the Council did not sit at any point to pass a resolution to allocate land to Mr. Larvena Bwale, who was the previous owner of the property in question and from whom the Applicant purchased the property in contention.
- 4.5 The 1st Respondent Counsel in refuting Mr. Larvena Bwale's claim that the 1st Respondent at a Council meeting purportedly resolved to recommend the allocation of/stand number 674 Kitwe to him, under Minute No. PWD/68/05/11 read out an excerpt of the said Council meeting under Minute No. PWD68 0511, to illustrate to the Court, that there was no such recommendation made under the aforementioned minute number. The said Minute PW/68/05/11 reads as follows:

4.5 (a) "RECOMMENDATION LETTERS TO MINISTRY OF LANDS

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The committee was reminded vide minute No. PWD/14/02/11 and PWD/09/02/11 on the request by the Ministry of Lands to attach extracts of minutes to recommendation letters.

Members heard that the Ministry had further instructed the Council to start attaching extracts of minutes for regularization of plots for all areas in the City were {sic} regularization was being done among others Chamboli, Mindolo and Mukuba Natwange.

- 4.6 Counsel submitted that contrary to the Applicant's claim, nowhere in the above excerpt that she read to the Court, was it indicated that a resolution was passed allocating land to Mr. Larvena Bwale, the purported previous title holder of the property in contention, from whom the Applicant purportedly purchased the said property from.
- 4.7 It was the 1st Respondent's main point of contention that the property in question and upon which the Applicant sought to begin construction is an open space. Counsel referred the Court to exhibit "DN1" in the 1st Respondent's Affidavit in Reply to Affidavit in Opposition for an interim injunction, which shows the land at the centre of the dispute as being an open space and that at no point was there a Council resolution by the 1st Respondent converting the land into any other use than the designated use, which is that of an open space.
- 4.8 It appears that the Applicant is contending that the said property which it acquired from Larvena Bwale is a commercial property as

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is stipulated on the lease attached to the certificate of title marked exhibit "LH2". In such contention, the Applicant appears to be arguing that the said property is amenable to development as it is designated as a commercial property. to which the 1st Respondent's response is that, there was never any change of use from open space to commercial use in respect of the stand 674 Kitwe.

- 4.9 The 1st Respondent further submit that the previous owner of Stand 674 Kitwe did not follow procedure on acquiring the property and therefore could not pass good title to the Applicant. It is their contention that the minutes in which the Council allegedly met to consider the allocation of land to Larvena Bwale are not same as the ones that the 1st Respondent have. This anomaly, according to the 1st Respondent was reported to the police to investigate an allegation of forgery.
- 4.10 The police report from the fraud division is exhibited as "SM2" states that a report for the case of forgery was made to Zambia police by the 1st Respondent to the effect that unknown persons forged a full council meeting minute in which it was purported that Larvena Bwale was offered land by Kitwe City Council {the 1st Respondent herein} at stand number 674 in Parklands Kitwe, when according to the 1st Respondent that was not the case.
- 4.11 The 1st Respondent therefore contend that since Larvena Bwale fraudulently obtained the certificate of title, he could not pass good title to the Applicant. According to the 1st Respondent, it was not even aware that that the land was allegedly allocated to Larvena Bwale and that the said purported allocation only came to their attention when the applicant begun developing, the land.

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- 4.12 In refuting the Applicant's contention that it was a bona fide purchaser for value, the 1st Respondent's retort to this assertion, was that for one to be a bona fide purchaser for value, there was need to show that the transaction was done in good faith, that there was consideration paid and that due diligence was carried out. To further buttress this point, the 1st Respondent argued that had the Applicant conducted a physical inspection, as opposed to merely making a search at the ministry of lands registry, it would have discovered that the land in question was in actual fact an open space and not a commercial plot.
- 4.13 In response to the Applicant's contention that the 1st Respondent failed to follow procedure when issuing the enforcement notice, Counsel for the 1st Respondent pointed the court to section 65{1} of the Urban and Regional Planning Act, which stipulates the procedure on how to treat an applicant who has commenced development without planning permission. Counsel thus argued that the 1st Respondent did adhere to the provisions of the said section and that furthermore, the Applicant have not furnished the court, with any permit that was granted by itself as the local authority, to grant them planning permission.
- 4.14 It was the 1st Respondent's further submission that planning permission is only granted once it goes through the Plans Works Development and Real Estate Committee and is therefore not granted administratively as section 20 of the Local Government Act stipulates.
- 4.15 The 1st Respondent fortified its submission by stating that section 52{1} of the Urban and Regional Planning Act stipulates that

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planning permission shall be granted by way of Development Permits and further these permits shall be in a prescribed form. The 1st Respondent pointed out that the Applicant had not furnished the court with any permits in the prescribed form, nor had it furnished the court with its application or any documentation to show that planning permission was granted.

4.16 In conclusion, the 1st Respondent submitted that its decision to issue an enforcement notice was justified as it was clear that the construction works by the Applicant were commenced in the absence of planning permission and went against the layout plan and the designated use to the said land in question. The 1st Respondent thus implored this Court not to exercise its discretion and grant the Applicant's prayer, as that would amount to this court substituting its power to that of the local authority. It was thus the 1st Respondent's prayer that the reliefs sought by the Applicant should not be granted.

5.0 APPLICANT'S REPLY

5.1 The Applicant in reply, maintained that it was not and is not incumbent on the Applicant to inquire into the indoor management of the 1st Respondent when the Applicant sought to purchase land from the previous title holders.

5.2 In refuting the 1st Respondent's assertion that the Council minutes purportedly recommending the allocation of land to Larvena Bwale, the Applicant submitted that if indeed there was an issue with the

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minutes' authenticity, that the 1st Respondent should have been dealt with the 1st and 2nd title holders and not with the Applicant.

- 5.3 It was the Applicant's submission that the issues surrounding the initial ownership of the land in dispute, has no relevance on the current proceedings. Counsel for the Applicant went on to point to the Court, and in doing so, drew the Court's attention to exhibit marked "SM2a", exhibited in the 1st Respondent's Affidavit in Opposition, dated 13th October 2023, which is the Zambia police report, and in which the Applicant pointed out, the said report indicated that the said council meeting minutes were signed by the then Town Clerk, a Mr. Bornwell Luanga. To drive this point home, Counsel for the Applicant proceeded to point out that the said exhibit went on to indicate that the previous title holder, Larvena Bwale, did not commit any crime or forgery,
- 5.4 The Applicant therefore submitted that the said exhibit, which is the police report, be read in full and given its complete context.
- 5.5 In response to the 1st Respondent's submission regarding the change of land use, the Applicant submitted that there was an advertisement in the newspaper of nationwide circulation and that no objection was made, either by the 1st Respondent itself, nor by any member of the public to which the notice was addressed.
- 5.6 It was further submitted, that the said public notice, exhibited and marked "LH5" in the Affidavit in Support of Originating Notice of Motion, was generated by the 1st Respondent themselves in line with the provisions under the law. It was therefore the Applicant's submission on this point, that from all the evidence before Court,

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as well as receipts from the 1st Respondent, that the procedure was indeed followed by the Applicant and that the requirements under the Urban and Regional Planning Act were all satisfied.

- 5.7 It was the Applicant's concluding submissions that exhibit "LH3", attached to the Applicant's Affidavit in Support of Originating Notice of Motion, that the applicant had a clean title, the same having passed from Larvena Bwale, to Green Bay Mining Ltd and subsequently to the Applicant herein.
- 5.8 Counsel for the Applicant emphasized that the dispute before this Court, is not one of ownership, but rather an inquiry into the propriety of the 1st Respondent, in effecting decisions as against the Applicant, despite according to the Applicant, it following all laid down procedure with the assistance of the Respondent themselves.
- 5.9 In conclusion, the Applicant went on to submit that the enforcement notice by the 1st Respondent, was issued illegally and in an irregular manner and that for this reason, the Applicant has come before this Court, seeking orders of Certiorari and Mandamus to quash the decisions of the 1st Respondent on the Applicant's applications, and compel the 1st Respondent to establish and constitute the Planning Appeals Tribunal.
- 5.10 The Applicant went on to emphasize of the Court's jurisdiction to intervene in a public body's decisions and to reverse and quash those decisions, thus compelling such public body to act in line with procedure and the law.
- 5.11 The Applicant concluded its submissions by indicating that the 1st Respondent's decisions when holistically considered, remain illegal,

irrational and procedurally improper, as the Applicant has a legitimate obligation to protect its business and investments.

5.12 It was the Applicant's prayer, that the relief sought in the judicial review proceedings as contained in the itemized documents before this Court, should be granted in the interests of justice and good order.

6.0 COURT'S ANALYSIS AND DECISION

6.1 This Court has reviewed all documents filed on behalf of both parties, heard oral arguments given by counsel on behalf of both parties.

6.2 In analyzing the evidence and facts before me in these judicial proceedings, I must state from the outset, that my role is not to substitute the 1st Respondent's decision that it made in its capacity as a public body. Therefore, in arriving at a decision in these proceedings, my role is not to delve into the merits of the 1st Respondent's decisions. Rather my role is to ascertain whether in coming to that decision, the local authority, the 1st Respondent in this case, followed the correct procedure.

6.3 Following on this, it is not the mandate of this Court in reviewing the 1st Respondent's decision, to substitute the said decision with this Court's own decision. The case of **NYAMPALA SAFARIS [Z] LTD AND ANOTHER V ZAWA AND OTHERS [2004] ZR 49¹** is authority for saying that Judicial Review is concerned with the decision-making process and not the merits of the decision.

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Rather therefore, in conducting judicial review, the Court will seek to ascertain whether in coming to its decision, there was on the 1st Respondent's part, firstly procedural impropriety, in that whether there was failure by the 1st Respondent, to observe, not only the rules of natural justice, but also failure to comply with procedural rules, expressly laid down in the applicable law.

6.4 Secondly, whether the 1st Respondent in arriving at its decision to issue the demolition notice and thereafter an enforcement order, did so illegally and thirdly whether the said decision was made irrationally and fourthly, whether the same decision was so unreasonable that no right-thinking person applying their mind to the situation would have arrived at such a decision.

6.5 The Applicant in applying for this court to judicially intervene, by way of judicial review, is contending that the 1st Respondent in arriving at the decision it did against the Applicant namely:

1. ***The 1st Respondent's decision in its capacity the Planning Authority, to serve the Applicant with an Enforcement Notice dated 31st July 2023 pursuant to the Urban and Regional Planning Act, giving the Applicant seven {7} days to cease all its works on the property in issue, without providing the Applicant an opportunity to remedy the alleged breach within a stipulated period of time amounts to procedural impropriety.***
2. ***That the decision by the 1st Respondent as Planning Authority to suspend planning permission in the absence of a breach by the Applicant, to warrant the***

suspension/cancellation of its operations, was illegal, as the Applicant had fully complied with all conditions and had paid all statutory requirements relating to planning permission and development permits.

3. *That the 1st Respondent's action through the Department of Development Planning, to demolish any structures on the Applicant's land was irrational and/or unreasonable, as the Applicant had applied for planning and building permission, and paid for the same permission and that inspections were conducted by the 1st Respondent's officers.*

6.6 These were the parties' arguments and submissions.

6.7 This Court in deciding whether or not the 1st Respondent as a Local Authority and thus acting in its capacity as a public body, does not sit as an appellant court, to dissect and critique the reasoning of the 1st Respondent as to how it came to that decision.

6.8 Indeed, the learned authors of the Rules of the Supreme Court Practice 1999 edition under Order 53/14/19 aptly summed up the law and purpose of Judicial Review, wherein they state:

- 6.8(a) *“The remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision-making process itself. ‘It is important to remember in every 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 has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question.’...[per Lord Hailsham L.C in the case of Chief Constable of North-Wales Police v Evans [1982] ALL ER 141, HL]

Thus, a decision court or a public authority maybe quashed {by an order of certiorari made on an application for judicial review } where that court or authority acted without jurisdiction, or exceeded its jurisdiction, or failed to comply with the rules of natural justice in a case where those rules are applicable, or where there is an error of law on the face of the record, or the decision is unreasonable in the Wednesbury sense... The court will not, however, on a judicial review application act as a “court of appeal” from the body concerned; nor will the court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within that body’s jurisdiction, or the decision is Wednesbury unreasonable. The function of the court is to see that lawful authority is not abused by unfair treatment. If the court were to attempt itself the task entrusted to that authority by the law, the court would under the guise of

preventing the abuse of power, be guilty itself of usurping power...”

6.9 This court’s authority when it comes to hearing and determining judicial review applications, is therefore, confined within the above stated parameters.

6.10 Lord Greene MR in **ASSOCIATED PICTURE HOUSES LTD V WEDNESBURY CORPORATION [1948] I KB 233²** stated thus:

6.10(a) *“The courts can only interfere with an act of executive authority if it be shown that the authority has contravened the law. It is for those who assert that the local authority has contravened the law to establish that proposition. It is not to be assured prima facie, that responsible bodies like the police in this case will exceed their powers. But the court whenever it is alleged that the police contravened the law, must not substitute itself for that authority.”*

6.11 The Applicant herein alleges that the 1st Respondent’s action of serving it with an Enforcement Notice pursuant to the Urban and Regional Planning Act, was ultra vires of their powers as they proceeded to issue an enforcement notice on unfounded allegations of non-compliance by the Applicant without any reason or justifiable cause.

6.12 I will deal with this first allegation made by the Applicant. The starting point in tackling this allegation, which is basically alleging that the 1st Respondent acted outside the powers conferred upon it

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by the law, is to look at the relevant provision of the Urban and Regional Planning Act No. 3 of 2015. The relevant section being section 65 which stipulates as follows:

6.12 (i) {65 } *Where a local planning authority determines that development has been carried out without a grant of permission under this Act or that the conditions to which a grant of planning permission for a development permit was made have not been complied with, the local planning authority shall instruct a planning inspector to carry out an inspection of the relevant land or buildings.*

(ii)(2) If it appears to a planning inspector that any use of land should be discontinued, that any condition should be imposed on the continuation of the use of land or that any building or works should be altered or removed, the planning inspector may issue an enforcement notice, in the prescribed manner and form, to the owner or occupier of the land—

(iii)(a) for the discontinuation of the use of the land or the carrying

(iii) out of the works on the land;

(v)(b) imposing such conditions as may be specified in the enforcement notice on the continuation of the land use

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(vi)(c) requiring such steps as may be specified to be taken for the alteration, removal or demolition of all or part of the building or works; or

(vii)(d) requiring the restoration of the land to its condition before the development took place.

(viii)(3) An enforcement notice shall take effect from the date of service of the enforcement notice on the owner or occupier of the land to which it relates.

(viii)(4) An owner or occupier of land on whom an enforcement

notice is served who is aggrieved by the enforcement notice may,

within a period of twenty-eight days from the date of service of the

enforcement notice, appeal to the relevant planning appeals tribunal.

(x)(5) Where, within the period specified in subsection (4), an appeal is made to a planning appeals tribunal by a person on whom the enforcement notice was served, the operation of the enforcement notice shall be suspended pending the final determination or withdrawal of the appeal.

(xi)(6) A planning appeals tribunal shall determine an appeal within sixty days from the date of receipt of the appeal.

(xii)(7) Where a planning appeals tribunal fails to make a decision within the period specified under subsection (6), an appeal shall be made to the Minister for determination.

- 6.13 According to section 65{1} above, a local authority or public body is empowered to issue an enforcement notice where it has been established that a party has carried out development on land without the requisite planning permission having been acquired by such party.
- 6.14 In the instant case, the Applicant contends that it applied for planning permission and duly paid the required fees for the said application. The 1st Respondent on the other hand, state in its arguments that the mere payment of fees to the Council for the application of planning permission does not entail that planning permission has been granted. This is because according to the 1st Respondent, planning permission has to be in a prescribed form and has to be approved by the Council at a meeting.
- 6.15 It is the 1st Respondent's contention that the said application did not go through process, as the same was never tabled before the Council. The reason given by the 1st Respondent, for the application not having gone through determination process, namely being tabled before the Council, was that because the property in question is designated as a play park or an open space.

- 6.16 The Applicant produced in its application for judicial review, a notice to the public and the same is marked "LH5" and attached to the Affidavit Verifying Facts sworn by Li Hang dated 15th September 2023, and argued that since the said notice was issued by the 1st Respondent themselves notifying the general public of the Applicant's intention to apply for planning permission for change of use land of Stand 674 Kitwe and inviting any possible objections to the same intended change of use and the Applicant having seemingly not received any objection, that sufficed as automatic acquisition of planning permission. However, this was refuted by the 1st Respondent, and successfully I might add. The 1st Respondent indicated that the granting of planning permission was in a prescribed form and an applicant was not automatically granted planning permission, simply on the basis that there were no tabulated objections from members of the public arising from the said published notice.
- 6.17 I have canvassed the record and all the documents filed by the Applicant in support of its application before this court and I have not come across any documentary evidence establishing that indeed the Applicant was duly granted planning permission in respect of the property in question.
- 6.18 What I have seen however is an enforcement notice in the prescribed form issued by the 1st Respondent and addressed to the Applicant. The said notice is marked exhibit "LH7" and attached to the Affidavit Verifying Facts and sworn by one Li Hang a director in the Applicant company. The said enforcement notice, titled 'Demolition of Illegal Structure at plot 674 Kitwe, stipulates the

malfeasance that had been committed, as the ‘constructing of a structure without obtaining planning permission from Kitwe City Council’. The said notice gave a 7-day ultimatum to demolish the structure as well as the penalty for failure to comply with the notice. This to me appears to be procedural compliance and fairness on the part of the 1st Respondent, in that it followed the correct procedure as laid out in the law. The said notice was in full conformity with the provisions of the Urban and Regional Planning Act. This court cannot fault the 1st Respondent in the issuance of the enforcement notice.

6.19 As rightly stated by the 1st Respondent, the law requires that before anyone, landowners included, wishes to develop land in Zambia, planning permission has to be obtained. Section 49{1} of the Urban and Regional Planning Act states as follows:

“A person shall not carry out any development on land, change the use of land or subdivide any land without planning permission.”

6.20 The language is couched in mandatory terms and leaves no room for discretion. In the absence of any evidence to establish that indeed the Applicant had acquired the requisite planning permission in respect of the land in question, this Court cannot fault the 1st Respondent’s decision to issue the enforcement order.

6.21 I find that the 1st Respondent, did not act ultra vires when it issued an enforcement notice against the Applicant herein. It is this court’s finding that the 1st Respondent was acting within the provisions of both sections 49{1} and 65 of the Urban and Regional

Planning Act when it issued the enforcement notice against the Applicant, for the simple reason that the Applicant did not have in its possession, planning permission duly granted by the local authority, namely the 1st Respondent, neither as it produced any evidence before this court to prove its assertion.

6.22 It is trite that he who alleges must prove. For the allegation of the 1st Respondent having acted ultra vires of its powers, the Applicant must establish that it had been granted planning permission and that in spite of it being granted planning permission, the 1st Respondent issued an enforcement notice. There being no evidence of having been granted planning permission, the 1st Respondent acted within the confines of the law.

6.23 I now turn to the Applicant's second allegation against the 1st Respondent. The Applicant contends that the 1st Respondent's decision to suspend planning permission in the absence of breach by the Applicant to warrant a suspension/cancellation of its operations in the face of the Applicant's full compliance of all conditions and it having paid all statutory requirements relating to planning permission and development permits, was irrational and procedurally improper.

6.24 In a nutshell what the Applicant is contending is that the 1st Respondent suspended the applicant's planning permission and such decision was done without fairness in that the rules of natural justice were disregarded or that such decision was unreasonable in Wednesbury sense. In addressing my mind to this assertion, I pose the question, how can the 1st Respondent suspend planning permission, that was never granted in the first place? As observed

in addressing the first allegation by the Applicant, the Applicant did not have the requisite planning permission to begin with. There was nothing for the 1st Respondent to suspend, as the Applicant began the development of the land without acquiring planning permission.

6.25 Procedural impropriety is concerned with failure to observe not only the rules of natural justice, but also failure to comply with procedural rules expressly laid down in the applicable law.

6.26 This court having found that the Applicant was not granted planning permission by the 1st Respondent, the assertion by the Applicant that the 1st Respondent's suspension of the planning permission is otiose. This is because, one cannot suspend something that was never in existence to begin with.

6.27 The Applicant further contends that the 1st Respondent's issuance of the enforcement notice was illegal. For a decision to be illegal, it must contravene or exceed the terms of the power which authorizes the making of the decision or the pursuit of an objective other than that for which the power to make the decision was conferred. This is what the Supreme Court held in the case of **WILLIAM HARRINGTON V ATTORNEY GENERAL APPEAL NO. 60 OF 2016 [2019] ZMSC 14³**.

6.28 In the case of **COUNCIL OF CIVIL SERVICE UNIONS V MINISTER FOR THE CIVIL SERVICE [1984] 3 WLR 1174⁴**, Lord Diplock stated that:

“By ‘illegality’ as a ground for judicial review, I mean that the decision maker must understand correctly the

law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justifiable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.”

6.29 This court is not convinced that the 1st Respondent by issuing the Enforcement Notice failed to give effect to the law, let alone failed to understand correctly the law that regulates its decision-making power. To the contrary, by issuing the said enforcement notice, the 1st Respondent gave effect to the law as it was mandated to do. Had the 1st Respondent gone onto the property, ‘guns blazing’ demolishing the structures without issuing an enforcement notice, the narrative would have been entirely different. As it stands, the issuance of the enforcement order by the 1st Respondent, was within the purview of the law that regulated its decision-making power and the 1st Respondent has thus availed proper effect to the law. Hence the ground of illegality equally fails, the 1st Respondent’s action of issuing the enforcement order was thus not illegal as alleged by the Applicant.

6.30 The Applicant has also alleged as irrational, the 1st Respondent’s decision, through the department of Development Planning to demolish any structure on the land in contention. As already stated above, the 1st Respondent was acting within the confines of the law when it issued the enforcement notice in the wake of the Applicant having not obtained planning permission and the law allowed for the demolition of such structures constructed in the absence of

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planning permission, granted in the prescribed form. And indeed, the notice gave 7 days within which the 1st Respondent could act.

- 6.31 The Applicant contends that it was not given the opportunity to remedy the wrong. However, as was stated in Peter Bibby's book titled Effective Use of Judicial Review:

“Judicial review will be granted only if the failure complained of is unlawful. A body exercising public power inevitably has a range of discretion. The proper exercise of such discretion is not unlawful. The lawful range of discretion in the exercise of public power is wide. The court will not intervene unless the exercise of discretion is so unreasonable, that no reasonable person could ever have exercised the discretion in the way complained of. That wide discretion is the basis for the frequent stated position that judicial review is not concerned with the merits of the decision made in the exercise of public power, instead, it is only concerned with procedure.”

- 6.32 The Applicant had begun the development of land without the requisite planning permission, meaning it had abrogated the provisions of the law. The enforcement notice itself, was a forewarning for them to remedy the wrong through the giving of 7 days to demolish the said structure. The Applicant had already abrogated the provisions of the law, through the development of the land, without planning permission. The only way to remedy that was through the demolition of the offending illegal structure. The 1st Respondent was not obligated to wait for the Applicant to

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proceed to obtain planning permission retrospectively. The wrong had been done, the consequence of which was the issuance of an enforcement notice.

6.33 Having said that, I now, which to turn to the glaring issue of the absence of a planning appeals tribunal. I deliberately quoted the entire section 65 of the Urban and Regional Planning Act No. 3 of 2015, including the part which speaks of a party's right to appeal to the appeals tribunal when aggrieved by the issuance of an enforcement notice.

6.34 As informed by Counsel for the 1st Respondent, when this Court put the question to her, there is currently no appeals tribunal in place within the 1st Respondent's structure. A clear abrogation of section 65 {4} of the said Act. I wish to take this opportunity to state that the Courts as gatekeepers of the law, take exception to the blatant disregard of the law by those public bodies who are meant to set an example in ensuring that the provisions of the law are adhered to. The 1st Respondent is hereby directed to ensure that an appeals tribunal is set up expeditiously. Laws are enacted to be followed and there must be no inertia when it comes to compliance with clear provisions of the law.

6.35 Having stated that the 1st Respondent was within its legal mandate, the discretion whether or not to afford the offender of the law to make amends is not an absolute right. Hence the wide discretionary powers given to a public body.

6.36 The courts as gatekeepers of the law, does not arbitrarily give judges unfettered right to wander into the public body's domain in

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the name of judicial review, especially when such public authority has not acted outside its preserve.

6.37 I would accordingly dismiss the application for judicial review and uphold the injunction granted against the Applicant whether by itself or by its servants or agents or otherwise howsoever restraining it from further excavating, cutting down of trees, carrying out construction works.

6.38 Leave to appeal is hereby granted.

Delivered this 10th day of January, 2024.



**M.M WINA
HIGH COURT JUDGE**