Republic v National Environment Management Authority (NEMA); Endmor Steel Millers Limited & another (Interested Parties); Syokimau Residents Association & 3 others (Exparte Applicants) (Environment and Land Miscellaneous Application E012 of 2021) [2023] KEELC 16318 (KLR) (20 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16318 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E012 OF 2021

CA OCHIENG, J

MARCH 20, 2023

IN THE MATTER OF THE ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION ACT NO. 8 OF 1999

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

AND

IN THE MATTER OF TRIBUNAL APPEAL NO. NET 003 OF 2019

AND

IN THE MATTER OF LEAVE FOR THE ORDERS OF MANDAMUS UNDER ORDER 53 OF THE CIVIL PROCEDURE RULES, SECTIONS 8 AND 9 OF THE LAW REFORM ACT CAP 26 AND FAIR ADMINISTRATION ACT, 2015 OF THE LAWS OF KENYA

BETWEEN

REPUBLIC ..... APPLICANT

AND

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY (NEMA) ..... RESPONDENT

AND

ENDMOR STEEL MILLERS LIMITED ..... INTERESTED PARTY

NATIONAL ENVIRONMENT COMPLAINTS COMMITTEE .... INTERESTED PARTY

AND

SYOKIMAU RESIDENTS ASSOCIATION ..... EXPARTE APPLICANT

NAZIR HUSSEIN HAKADA ..... EXPARTE APPLICANT

JOHN MUTINDA MWANZIA ..... EXPARTE APPLICANT

FRANKLIN MAINA GATHERU ..... EXPARTE APPLICANT

JUDGMENT

1 What is before Court for determination is the *Ex parte* Applicants' Notice of Motion Application dated the 2nd June, 2022 where they sought for the following Orders:

1. An order of *Mandamus* compelling the Respondent to carry out tests with regard to stack emissions, ambient Air quality emissions and noise emissions from the factory of the 2nd Interested Party in compliance with the orders of the National Environmental Tribunal contained in the Judgment issued on 18th December, 2020 in NET Tribunal Appeal No. NET 3 of 2019.
2. Costs of the Application be provided for.

2 The Application is premised on the Statutory Statement dated the 14th June, 2021 and Verifying Affidavit sworn by one Juliet Isaac Wamiri representing the 1st Applicant which is a residential association comprising residents within Syokimau area whereas the 2nd-4th Applicants neighbour the Respondent's factory. The instant Application emanated from a Judgment issued by the National Environmental Tribunal (NET) on 18th December, 2020 requiring the Respondent to *inter alia*, carry out tests on stack emissions, ambient air quality emissions and noise emissions from the factory of the 1st Interested Party to determine if they are within permissible levels following the findings made by the Tribunal that the air and noise emissions were not within permissible levels.

3 In the Affidavit sworn by one Juliet Wamiri, the chairlady to the 1st Applicant, she deposes that the residents had on several occasions complained about the noise and air pollution from the 1st Interested Party culminating with the issuance of a closure notice on 4th January, 2019 by the Respondent against the said factory. She explains that the 1st Interested Party had appealed against the closure notice to the National Environmental Tribunal (NET) to which the Tribunal made findings that as at July 2020, the emissions for Sulphur dioxide and Nitrogen for reheating furnace as well as noise from the factory were beyond the maximum permissible levels. She states that the Tribunal had in a view of offering a logical conclusion allowed the factory to proceed on full capacity for 60 days within which NEMA, in consultation with the Applicants, should partake the stack, noise and air measurements to confirm compliance with the statutory requirements. Further, that the said orders in part (c) stated that if the factory was found to be non-compliant at the end of the 60 days, the factory shall stand closed pending further orders from the Respondent and the Tribunal. She avers that the Applicants are yet to be engaged by the Respondent on any tests yet, the orders are still binding. She insists that the matter was of utmost urgency since the health of the residents was at stake, citing a toxological report on the effects of Nitrogen dioxide, Sulphur dioxide, particulate matter and Carbon monoxide on human health.

4 In opposition, the Respondent filed a Replying Affidavit sworn by one Mamo B. Mamo, its Director General where he deposes that the Tribunal had intended that the Respondent would carry out further tests at its discretion/liberty, citing limb (d) of the Judgment which stated that if the Respondent failed to carry out the measurements as ordered, the Appellant (1st Interested Party herein), shall be deemed to have complied with the statutory set levels but the Respondent shall be at liberty to conduct any further tests to ensure that there is compliance with the law. He argues that the said provision in the

orders was discretionary and that it cannot be a ground for an order of mandamus. He explains that the Environmental Management and Co-ordination (Air Quality) Regulations at Regulation 52 and 58 require that air quality measurements be undertaken by an operator owner of a facility (not the Respondent) and then the Respondent takes up the monitoring either in person or through designated agency, in a bid to safeguard the Respondent from being both a data collector of the same for approvals. He explains that during the proceedings at NET, the Respondent had outsourced an independent laboratory to conduct the measurements of noise and air quality and filed the report at NET, a process which is not cheap and requires budgetary provisions and cannot be done in so close succession. He contends that the 1st Interested Party is due to submit the subject report when seeking for a renewal of their provisional emissions licence before 7th October 2022. He reiterates that the Applicants are free to engage gazetted laboratory consultants should they be unwilling to wait for the statutory timelines.

5 The 1st Interested Party in opposition to the instant Application filed a Replying Affidavit sworn by Gabriel Kiama, its Operations Manager, where he deposes that since the Applicants were challenging the verdict of 19th December, 2020, they ought to file an Appeal against the said verdict and not institute a Judicial Review. He contends that the Applicants had not exhausted other avenues before applying for Judicial Review as is the laid down procedure. He explains that they were issued with an Emissions Licence on 7th October, 2021 after inspection by the Respondent and that the same had not yet expired. He argues that the instant Application is immature and a nullity. He reiterates that the Applicants who were mere Interested Parties in the NET matter, did not raise any Counter-claim.

6 The Application was canvassed by way of written submissions.

Submissions

Ex parte Applicants' Submissions

7 In their submissions, the *ex parte* Applicants reiterated their averments as per the instant Application, Statutory Statement and Verifying Affidavit. They cited with approval the renowned case of *R v Principal Secretary, Ministry of Internal Security & Another Ex-parte Schon Noorani & Another* [2018] eKLR where the principles for the grant of orders of *mandamus* were well enunciated. They submitted that the Respondent had not denied the existence of the Judgment by NET dated the 18th December, 2021 vide NET No. 3 of 2019 where the court directed it to carry out further measurements of stack emissions, ambient air quality emissions from the factory belonging to the 1st Interested Party to confirm compliance with *Environmental Management and Co-ordination (Noise and excessive vibration pollution) (Control) Regulation 2009 and Environmental Management and Co-ordination (Air Quality) Regulations*, 2014. They argued that even in the absence of the Tribunal's orders, the Respondent is mandated under the EMCA to ensure that proponents such as the 1st Interested Party comply with the provisions of the Act and Regulations. They contended that the Respondent is a state organ under statutory obligation of monitoring and assessing activities of any industry in order to ensure that the environment is not degraded. They further submitted that the Respondent had refused to take the decision as required under the *Fair Administrative Action Act*, which defines 'failure' in relation to the taking of a decision to include refusal to take the decision. They cited with approval the case of *Martin Nyaga Wambora & 4 Others v Speaker of the Senate and 6 Others* [2014] where the court emphasized the need to obey court orders. They further relied on the case of *Wambua Maithya v Wambua Maithya Pharmaceutical Society of Kenya & 2 Others (Interested Parties)* where the court emphasized the fact that court orders are not made in vain and ought to be complied with and a party who encounters challenges in obeying the same ought to report back to court. They reiterated that an order of the Tribunal had not been set aside or varied and that an order of *mandamus* is

the most extensive remedy in nature, as held in Civil Appeal Case No. 266 of 1996: *Kenya National Examination Council v Republic Ex parte Geoffrey Gathenji Njoroge* (1997) eKLR.

Respondent's Submissions

8 In its submissions, the Respondent explained the broad grounds on which the court can exercise Judicial Review. It insisted that there exists no cause of action that warrants Judicial Review. It was the Respondent's contention that Clause (d) of the orders by the Tribunal was a default clause that settled the matter in that if the Respondent failed to conduct the measurements as ordered, the Appellant (1st Interested Party herein) would be deemed to have complied with the law. It further stated that conducting further tests was discretionary and not a mandatory requirement. It suggested that the alternative would have been for the Applicants to file an incident report from whence a fresh inspection would be mounted and compliance sought. The Respondent reiterated that the obligation of conducting the subject measurements lies with the owner or operator of facility as outlined under Regulation 52 of the EMCA, *Environmental Management and Co-ordination (Air Quality) Regulations* 2014. Further, that it was only mandated with monitoring the air quality by itself or through an agency as per Regulation 58 of the aforementioned regulations. It reaffirmed that the obligation of conducting the air quality measurements mandatorily lied on the operator/ owner whereas its' obligation was only discretionary. It was of the opinion that principles of good environmental governance would not be promoted if it collected data and also reviewed the same for approvals. It reiterated that there was hence no omission or commission on its part to warrant judicial review and that the Authority is willing and able to carry out its functions as provided for by EMCA and all other enabling laws**.** To buttress its averments, it relied on the following decisions: *R v National Land Commission Ex-parte Krystalline Salt Limited* (2015); *Zachariah Wagunza & Another V Office of the Registrar, Academic Kenyatta University & 2 Others* (2013) eKLR; *R v National Environment Management Authority Ex parte NEMA; Republic V Council of Legal Education & Another Ex parte Sabiha Kassamia & Another* (2018) eKLR; *Kenya Wildlife Service v Joseph Musyoki Kalonzo* (2017) eKLR; *Sony Holdings Ltd v Registrar of Trade Marks & Another* (2015) eKLR and *Peter Bogonko v National Environment Management Authority* (2006) eKLR.

1st Interested Party's Submissions

9 The 1st Interested Party in its submissions insists that the *ex parte* Applicants have not met the threshold for grant of an order of *mandamus*. It argued that there was no public duty which the Respondent failed to do and the orders of the Tribunal were discretionary as there was no order compelling the Respondent to carry out any tests. It contended that if the Applicants were dissatisfied with the orders of the Tribunal, they ought to have appealed against it and not file a Judicial Review. It averred that Judicial Review was not an appellate procedure but about the decision-making process. It reiterated that the role of the court in Judicial Review is supervisory. To support its arguments, it relied on the following decisions: *Kenya National Examination Council v R Ex Parte Geoffrey Gathenji Njoroge & 9 Others* (1997) eKLR; R v NEMA, CA 84/2010 and *R v Chief Magistrates' Court at Milimani Law Courts DPP & 2 Others: Ex parte Applicant: Pravin Galot* [2020] eKLR.

Analysis and Determination

10 Upon consideration of the instant Notice of Motion Application including the Statutory Statement, respective Affidavits, annexures and rivalling submissions, the only issue for determination is whether the *ex parte* Applicants are entitled to orders of mandamus as sought.

11 Lord Diplock in the case of *Council for Civil Service Unions v Minister for Civil Service* [1985] A.C. 374, at 401D clearly set the standards of Judicial Review when he stated that:-

> Judicial Review has I think developed to a stage today when...one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'...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...By 'irrationality' I mean what can now be succinctly referred to as "Wednesbury unreasonableness'...it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it...I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision."

12 While in the case of *Republic v Kenya National Examinations Council ex parte Gathenji & 8 Others* Civil Appeal No 234 of 1996, the Court of Appeal highlighted circumstances under which a party can seek an order of mandamus, and cited with approval, Halsbury's Law of England, 4th Edn. Vol. 7 p. 111 para 89 and stated thus:

> The order of mandamus is of most extensive remedial nature and is in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right and it may issue in cases where although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed."

13 While Section 7 of the *Fair Administrative Actions Act* provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to—

(a) a court in accordance with Section 8; or

(b) a Tribunal in exercise of its jurisdiction conferred in that regard under any written law.

Subsection (2) provides that a court or tribunal under subsection (1) may review an administrative action or decision on any of the grounds listed in the said Section.

14 The *ex parte* Applicants have sought for orders of Mandamus seeking to compel the Respondent to enforce an order from the National Environment Tribunal NET No. 003 of 2019. I note Order (d) of the said Judgement of the Tribunal which forms the fulcrum of this suit, stated thus:

> If the Respondent (read NEMA) fails to carry out the measurements as ordered in (b) above, the Appellant shall be deemed to have complied with the *Environmental Management and Co-ordination (Noise and Excessive Vibration Pollution Control) Regulations*, 2009 and the *Environmental Management and Co-ordination (Air Quality) Regulations*, 2014 but the Respondent shall be at liberty to carry out further tests to ensure that there is compliance with the law."

15 The *ex parte* Applicants argue that the Respondent has failed to carry out the tests on the 1st Interested Party's plant hence orders of mandamus should issue. The Respondent and 1st Interested Party argue that since this was a Judgment from NET, the ex parte Applicants who were Interested Parties in the NET appeal should have filed an Appeal to this Court instead of seeking orders of mandamus. The Respondent argued that Clause (d) of the orders issued at the Tribunal was a default clause that settled the matter in that if it failed to conduct the measurements as ordered, the 1st Interested Party herein would be deemed to have complied with the law. Further, conducting further tests was discretionary. It suggested that the ex parte Applicants should have filed an incident report from whence they would mount a fresh inspection and seek compliance. It insisted that the obligation for it to conduct the subject measurements lies with the owner or operator of facility as outlined under Regulation 52 of the EMCA, *Environmental Management and Co-ordination (Air Quality) Regulations* 2014. Further, that it is only mandated with monitoring the air quality by itself or through an agency as per Regulation 58 of the aforementioned regulations. It was of the view that principles of good environmental governance would not be promoted if it collected data and also reviewed the same for approvals.

16 In the case of *Director of Planning and Architecture County Government of Mombasa v Makupa Transit Shade Ltd* [2019] eKLR, the Court of Appeal held thus:-

> ...where there is 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 a matter is exceptional, it is necessary for the court to examine carefully the suitability of the statutory tribunal appeal. In the context of a particular case and ask itself whether the statutory body had the powers to determine the issues at hand. It is common ground that the issue at hand in this matters was about physical planning and execution of a development plan regarding land reclamation. The issues were purely matters of land reclamation, planning and development that are covered under the Physical Planning act. For the foresaid reasons we are persuaded the respondent ought to have followed and exhausted the alternative mechanism provided by Parliament under the Physical Planning Act before engaging the High Court."

17 Further, in the case of *Republic V National Environmental Management Authority Ex parte Hakika Transport Services Limited* [2012] eKLR the court held, inter alia:

> "Prayer (d) is a request that this Court issues an order of mandamus to compel and/or direct the Respondent to renew and or re-issue an Environmental Impact Assessment Licence or authority to the Applicant. The law gives NEMA the discretion to issue, revoke, suspend or cancel an Environmental Impact Assessment Licence (Sections 58 and 67 of EMCA). Of course that discretion must be exercised within the dictates of the law. However, the discretion is with NEMA and an order of mandamus cannot be issued to command or compel it to reach a specific decision or carry out the discretion in a specific way."

18 In the current scenario, the ex parte Applicants seek to compel NEMA to carry out the tests as indicated in the impugned Judgment from NET. From a reading of the Judgment whose excerpt I have cited above, I note the orders NET issued were discretionary. Further, they were issued about two years ago and the *ex parte* Applicants have not explained the current situation as pertains to the plant. To my mind, I find that the ex parte Applicants have failed to demonstrate how there was procedural impropriety by NEMA to exercise its discretion and test the emission or noise pollution. Further, they

have not indicated if they filed a complaint in respect to noise pollution and emissions but NEMA failed to act.

19 Regulation 52 of the EMCA, *Environmental Management and Co-ordination (Air Quality) Regulations* 2014, provides that:

> (l) A person, owner of operator of a facility listed under the Fourth Schedule shall ensure that measurement of emissions and occupational exposure levels are carried out in accordance with the methods of test set out in the Eleventh Schedule.
>
> (2) The analysis of all measurements in paragraph (l) above shall be carried out by laboratories designated by the Authority."

20 From a reading of this provision, I note it is actually the owner or operator of a facility who is obliged to undertake subject measurements which is in dispute herein.

21 While Regulation 58 of the EMCA, E*nvironmental Management and Co-ordination (Air Quality) Regulations* 2014, stipulates that:

> The Authority may monitor ambient air quality or request a relevant lead agency to undertake the monitoring on its behalf."

22 From this legal provision, it is clear that the Respondent is indeed mandated with monitoring the air quality by itself or through an appointed agency. From the arguments of the ex parte Applicants, I find that they have failed to demonstrate which public duty the Respondent failed to undertake. Further, I note the decisions from NET are appealable to this Court and the Applicants have not indicated if they did so. I opine that since the orders of the Tribunal were discretionary as there was no order compelling the Respondent to carry out any tests, an order of mandamus cannot issue.

23 Based on the facts as presented while associating myself with the decisions cited above, I do not find any omission or commission on the part of Respondent as set out in EMCA that warrants an order of mandamus. I further do not find any 'irrationality' or 'unreasonableness' on the part of the Respondent nor that it failed to observe basic rules of natural justice to warrant the orders as sought.

24 In the foregoing, I find the Notice of Motion Application dated the 2nd June, 2022 unmerited and will proceed to dismiss it.

25 Each party to bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 20TH DAY OF MARCH, 2023

CHRISTINE OCHIENG

JUDGE