



**Republic v National Environment Tribunal & another; Marble Inn
Developers Limited (Exparte Applicant); Bayusuf & 5 others (Interested
Parties) (Environment and Land Judicial Review Miscellaneous Application
E003 of 2023) [2023] KEELC 21493 (KLR) (15 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21493 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND JUDICIAL REVIEW
MISCELLANEOUS APPLICATION E003 OF 2023**

SM KIBUNJA, J

NOVEMBER 15, 2023

BETWEEN

REPUBLIC APPLICANT

AND

NATIONAL ENVIRONMENT TRIBUNAL 1ST RESPONDENT

OFFICE OF THE ATTORNEY GENERAL 2ND RESPONDENT

AND

MARBLE INN DEVELOPERS LIMITED EXPARTE APPLICANT

AND

ABDULHAKIM AHMED BAYUSUF INTERESTED PARTY

KUTBUDINSADIQALI DUNGARAWALLA INTERESTED PARTY

SALIM HASSANALI BHALLOO INTERESTED PARTY

ALI ZUBEDI INTERESTED PARTY

KISHOR MEGHJI GUDKA INTERESTED PARTY

FARHIYA ABDI YUSSEF INTERESTED PARTY

RULING

[Prayers (d) & (e) of Chamber Summons under Certificate of Urgency dated 23rd October 2023 and
Notice of Motion under Certificate of Urgency dated the 26th October 2023]



1. Marble Inn Developers Ltd, the applicant, moved the court through the chamber summons under certificate of urgency dated the 23rd October 2023 seeking for five prayers marked (a) to (e), inter alia leave to initiate judicial review proceedings for the orders of certiorari and prohibition; that leave granted to apply as stay of execution or implementation of the exparte injunctive orders issued on the 11th October 2023 by the 1st respondent “preventing the applicant from proceeding with and carrying out any deleterious or destructive activities particularly excavating or carrying out construction on its own property being Plot Number 7812/Section 1/Mombasa Mainland pending further orders of this honourable court” and costs be provided for. The court granted leave to file for the two judicial review orders on the 25th October 2023 and directed the chambers summons to be served for inter partes hearing on prayers (d) and (e) for leave to operate as stay and costs. The matter was fixed for further directions on the 6th November 2023.
2. On the 26th October 2023, the applicant filed the notice of motion of the same date seeking for inter alia that the leave granted on 25th October 2023 to operate as stay of proceedings and execution of the orders issued on the 11th October 2023 and 16th October 2023 and all other consequential orders and or proceedings from the National Environment Tribunal, pending the hearing and determination of the main judicial review proceedings. The application is premised on the ten (10) grounds on its face and supported by the affidavit of Nasir Ali Osman, director of the applicant, sworn on the 26th October 2023 in which he inter alia deposed that prayers (d) and (e) of the application dated the 25th October is coming for inter partes hearing on 6th November 2023; that on the 24th October 2023 the applicant received another order dated 19th October 2023 issued by the 1st respondent directing them to stop any further construction; that the tribunal orders have been issued ex parte, in bad faith and meant to intimidate the applicant; that the applicant has been prevented from accessing their property and its urgent that the prayer for leave granted to apply for judicial review orders to operate as stay of execution of the tribunal orders of 11th October 2023 and 19th October 2023 and all other consequential orders or proceedings in NET No. 43 of 2022, to be granted on the 27th October 2023, the court directed that the application to be served for inter partes hearing on the 6th November 2023.
3. The 1st respondent opposed the chamber summons dated the 23rd October 2023 through the replying affidavit sworn by Belinda Akello, the secretary, sworn on the 1st November 2023 deposing inter alia that the tribunal has the power under section 129(4) of EMCA to issue injunction order of 11th October 2023 as it did, and the subsequent order to compel compliance of 19th October 2023.
4. The 1st interested party also opposed the chamber summons dated the 23rd October 2023 through the replying affidavit sworn on the 2nd November 2023 inter alia deposing that the interested parties had filed ELC Constitutional Petition E006 of 2023 to stop the applicant’s destructive construction on LR No. 7812/Section 1/ Mombasa Mainland; that the petition was struck out upon the applicant objecting to the court’s original jurisdiction on the 20th September 2023; that the interested parties moved the National Environment Tribunal [1st respondent], for an order under section 129 of EMCA to stop the applicant from continuing with the impugned construction; that the temporary injunction order was granted, but the applicant however continued with the construction in total disobedience with the tribunal order; that contrary to the applicant’s claim that 1st respondent has no jurisdiction to issue injunctions, the tribunal has vast powers to issue restraining orders, and the application should be dismissed forthwith.
5. The above two applications came up for hearing on the 6th November 2023 when Ms. Julu, Mr. Kemei and Mr. Bwire the learned counsel for the applicant, respondents and interested parties respectively, made their oral submissions for and against the prayers sought, that the court has carefully considered.



6. The following are the issues for the court's determinations in respect of the remaining prayers in the chamber summons application dated the 23rd October 2023 and the notice of motion dated the 26th October 2023, all under certificate of urgency of even dates:
- a. Whether the leave to the applicant apply for judicial review orders granted on the 25th October 2023 should operate as a stay of execution or implementation of the orders of 11th October 2023 issued in NET No. 43 of 2023 pending further orders of this court.
 - b. Whether the leave granted on the 25th October 2023 to the applicant to apply for judicial review orders should "operate as a stay of execution or implementation of the exparte orders issued on 11th October 2023, 16th October 2023 and all consequential orders and or proceedings" in NET No. 43 of 2023 "pending the hearing and determination of the main application for judicial review as ordered on 25th October 2023 or any further orders from this honourable court."
 - c. Who pays the costs in each of the two applications?

7. The court has carefully considered the grounds on the two applications, affidavit evidence, oral rival submissions and come to the following determinations:

- a. That from the pleadings in this instant matter and the documents relating to NET No. 43 of 2022 that have been availed to the court, the parties in both matters are the same and the issues therein revolves about the applicant's development on Plot No. 7812/Section 1/Mombasa Mainland. The parties in these matters were also parties in Mombasa ELC Const. Petition No. E006 of 2023 that was struck through the ruling delivered on the 20th September 2023 by this court. The County Government of Mombasa was the 3rd respondent in that petition but is not a party in the other two matters.
- b. That when directing the applicant to serve the chamber summons for inter partes hearing on the prayers not granted exparte on the 25th October 2023, the court acted in accordance with Order 53 Rule 1(4) of Civil Procedure Rules provides that;

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“(4) The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise:

Provided that where the circumstances so require, the judge may direct that the application be served for hearing inter partes before grant of leave. Provided further that where circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days.”

The court is aware the applicant at ground number (6) of the notice of motion dated the 26th October 2023 and paragraph number (7) of the supporting affidavit sworn on the even date faulted the court on the directions given on the 25th October 2023 taking the view that prayer (d) for leave to operate as stay needed to be heard within seven days. That may be understood to be in accordance to the second proviso above that states “Provided further that where circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days.” It is important to appreciate that the orders and proceedings the applicant wanted stayed



are orders and proceedings of a legally established dispute resolution mechanism under the EMCA, which statute also provides for the right to approach this court on appeal over the orders issued by the tribunal. There was no prejudice to be suffered by any parties by the prayers being set down for directions and or hearing on the 6th November 2023 as the parties were actively involved in the proceedings before the NET and or had liberty to move the tribunal in accordance with the law.

- c. Being aware of this court's orders in the ruling of 20th September 2023 in Mombasa ELC CONST. Petition No. E006 of 2023 that struck out the petition by the interested parties herein, upon upholding the applicant's herein preliminary objection on the court's original jurisdiction, then I agree with the position and submissions by the respondents and interested parties, that what the applicant should do is to participate effectively in the proceedings before the 1st respondents to the end, and if dissatisfied with the final decision thereof, consider coming back to this court on appeal. Participating in the proceedings before the tribunal may include seeking for review, setting aside and or varying of the *ex parte* orders that have been issued, in accordance with the applicable provisions of the law. I do not wish to say more at this stage as I have been notified of the parallel proceedings before the 1st respondent between the same parties and over the same issues. It is however important that the parties remember and be guided by the courts position on the doctrine of exhaustion. As of now, it suffices to state that the proceedings in NET No. 43 of 2022 and Mombasa ELC Const. Petition No. E006 of 2023 paints the applicant to be a party who is approbating and reprobating on the issue of jurisdiction at will, by taking inconsistent positions in the two legal proceedings with the other parties over the impugned development on Plot No. 7812/Section 1/Mombasa Mainland. This may lead to the undesired result of having a multiplicity of suits over the same subject matter and between the same parties, and thereafter conflicting decisions.
- d. The court has noted that though prayer (c) of the notice of motion dated the 26th October 2023 seeks for among others staying of "orders issued on the 11th October 2023, 16th October 2023 ..." [underlining mine], the order attached is dated the 19th October 2023 and related to an application dated the 16th October 2023. There is therefore no order issued by the 1st respondent dated the 16th October 2023, and the court cannot consider staying a non-existent order.
- e. With the above determinations I find no merit in prayer (d) of the Chamber Summons dated the 23rd October 2023, and that prayer is hereby rejected. The costs in that application will abide the outcome of the main judicial review proceedings.
- f. In respect of the application dated the 26th October 2023, I find no merit in the prayers sought that were based on prayer (d) in the chamber summons dated the 23rd October 2023 being granted. In view of the finding in (e) above, the application dated 26th October 2023 also fails and is hereby dismissed. The costs in the application to also abide the outcome of the main judicial review proceedings.
 1. That flowing from the above determinations, the court finds and orders as follows on both applications:
 - a. That prayer (d) of the chamber summons dated the 23rd October 2023 is hereby dismissed.
 - b. The notice of motion dated the 26th October 2023 is also hereby dismissed.



- c. The costs in the chamber summons and notice of motion to abide the outcome of the main judicial review proceedings to be filed in accordance with the leave granted on the 25th October 2023.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 15TH DAY OF NOVEMBER, 2023.

S. M. Kibunja, J.

ELC MOMBASA.

IN THE PRESENCE OF :

Applicant: M/s Julu

Respondents: Mr. Kemei

Interested Parties: Mr. Bwire and M/s Wawire for Khagram for 2nd & 5th

Interested Parties.

WILSON – COURT ASSISTANT

S. M. KIBUNJA, J.

ELC MOMBASA.

