REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 426 OF 2015

IN THE MATTER OF FAIR ADMINISTRATIVE ACTIONS ACT

AND

IN THE MATTER OF NAIROBI COUNTY GOVERNMENT

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS

OF JUDICIAL REVIEW IN THE NATURE OF MANDAMUS,

CERTIORARI AND PROHIBITION

AND

KENAFRIC INDUSTRIES LIMITED ……...……...……...……APPLICANT

VERSUS

NAIROBI CITY COUNTY …….....1ST RESPONDENT

RICHARD MASINDE…….....2ND RESPONDENT

JUDGMENT

1. This judgment was to be delivered on 10th April, 2017 at 2.30 pm but owing to urgent pre-election disputes that the court was handling, the judgment was rescheduled to today and an appropriate notice posted to all the parties involved for today. By notice of motion dated 11th December 2015 and filed in court on 14th December 2015 vide leave granted on 4th December 2015, the exparte applicant Kenafric Industries Ltd seeks from this court orders:

1. That an order of certiorari do issue to bring into the High Court for purposes of being quashed the decision of the Ag Assistant Director Environment in charge of Environment Monitoring Compliance and Enforcement made on 25th November, 2015 and all consequential orders and acts.

2. An order of prohibition restraining the respondents, their servants, agents or otherwise from

entering into the premises of Kenafric Industries Limited and closing the factory activities.

3. An order of mandamus directed at and compelling the respondents to undertake an Environment Impact Assessment of the applicant's premises before any action on closure of the factory is made:

4. An order of prohibition restraining the respondents from receiving, entertaining, proceeding with or in any manner dealing with the complaint on the wage of the applicant's and discharge of waste water (efficient) after or before the applicant's premises have been surveyed by National Environment Management Authority .

5. Such further and other reliefs as the Honourable court may deem just and expedient to grant:

6. Costs of and incidentals to this application be provided for.

2. The application is supported by an affidavit sworn by **Ketan Shah** and the grounds on the face of the application; the statutory statement and annextures to the verifying affidavit.

3. The brief facts of the case are that the applicant is a limited liability company and one of the largest manufacturing industries in Kenya. It is situate in the Industrial Area of Nairobi City County. That on or about the 20th day of May 2015 the respondent's officers visited the applicant's premises and inspected the water effluent treatment facility and in their report dated 19th June 2015 confirmed that the system met the required legal environment standards.

4. However, that on 25th November 2015 and without prior notice of inspection and or conducting any inspection the 2nd respondent descended in the premises of the applicant and issued a closure notice of the factory.

5. That on 26th November 2016 the applicant wrote to the respondent's protesting the closure of the factory but that todate there has been no response.

6. According to the applicant, it had complied with all the Environment Legal requirements and despite all approvals that had been shown to the respondents, the agents of the respondent have violated the legitimate expectations of the applicant and abused it to transgress in the undisputed matters and created issues which they are neither competent nor qualified and authorised to undertake, allegedly at the behest of the neighbouring families yet there has been no inspection of the applicant's premises upon which a rational or reasonable decision can be made.

7. The applicant claims that the respondent's actions are illegal and are at the behest of its competitors aimed at clogging the trading and manufacturing process of the applicants with the sole intention of pressurizing the applicant to give bribes.

8. It is further claimed that the respondent's action is against the applicant's legitimate expectation and that the respondents are purporting to arbitrarily enforce the National Environmental Management Authority Act contrary to known legal principles of fairness and fair hearing. That the notice to the applicant to close its factory is intended to force the applicant to concede to illegal practices by the 2nd respondent and that the applicant stands to suffer grave harm and prejudice and will be unable to meet its financial obligations and close its business in the face of oppressive demands made by the respondents which would lead to closure of the factory and loss of thousands of jobs.

9. That the applicant had not violated any law prior to the issuance of the closure notice which notice was unprocedural and marred with bad faith.

10. The motion was opposed by the respondents who filed grounds of opposition dated 16th December

2015 on 17th December 2015 contending that: The application lacks any merit to warrant a grant of an order of Judicial Review in so far as it is grounded on the Enforcement Notice of 25th November 2015; The applicant is guilty of non disclosure of material facts to court; That the enforcement notice is in respect of a construction of a boundary wall and other unapproved structures in the suit property as opposed to discharge of effluent; That the applicant is seeking to divert the attention of the court from the real issues in dispute and does not merit the orders sought.

11. The respondent further contends that the application is premature, misconceived and bad in law and that there is non compliance with Section 13(1) of the Physical Planning Act Cap 286 Laws of Kenya which requires that any person aggrieved by a decision of the Director concerning any physical development plan or matters connected therewith, may within sixty days of receipt by him of notice of such decision, appeal to the respective Liaison Committee in writing against the decision in such manner as may be prescribed.

12. It was therefore contended that the application is hopelessly misconceived, frivolous, totally devoid of merit and malafides for the reason inter alia, that the applicants followed the wrong procedure in that it should have instituted an appeal to the Liaison Committee.

13. The respondent further contended that the court has no jurisdiction to grant the application dated 11th December 2015 by virtue of Section 13(1) of the Physical Planning Act which provides for a more efficient and effective remedy to the applicants.

14. Further, that there is no authority given to the applicant to erect the disputed building on the suit property and that any development within the jurisdiction of the respondent must seek approval from the respondent.

15. The respondent maintained that the applicant has no right of audience before the court because he has refused to comply with the Physical Planning Act which requires approval by the County Government before any construction is undertaken.

16. In addition, the respondent states that under Section 30(3) of the Physical Planning Act, it is illegal to construct or deal in any development without an approved development plan hence a person who is in breach of the law cannot purport to derive an interest capable of being protected by law.

17. In the respondent's view, there is no requirement under the law for a hearing before issuance of an enforcement notice but that after issuance of notice, the person objecting can be heard at that stage of objection.

18. The respondent invoked Sections 29 and 30 of the Physical Planning Act which empowers it regulate the use and development of land, buildings within its jurisdiction hence it's actions are said to be within the confines of the law.

19. According to the respondent, Section 38 of the Physical Planning Act empowers the respondent to issue an enforcement notice which will be effectual after the expiration of such period as may be prescribed in the notice hence the respondent followed the right procedures prescribed by the law and that therefore the grant of the orders sought by the exparte applicant will highly prejudice the respondent's statutory powers under the Physical Planning Act.

20. The respondent urged the court not to grant any of the orders sought.

21. The parties; advocates filed written submissions which they canvassed by way of oral highlights. The exparte applicant filed its submissions on 12th July 2016 whereas the respondents filed theirs on 26th July 2015.

22. I will consider all submissions and cited authorities in line with the highlights which basically

reproduced the respective parties grounds in favour of and against the notice of motion.

23. According to the applicant, as argued by Mr Mogeni advocate on its behalf, the subject matter is the notice dated 25th November 2015 to close the applicant's factory by the respondent on account of factory waste water(effluent) being discharged into the environment and subsequently flooding the residential houses at Riverside Estate, ending up polluting Gitathuru River.

24. It was submitted that no inspection or notice of activities was issued prior to closure notice, which is in violation of Article 47 of the Constitution and the Fair Administrative Action Act.

25. It was further submitted by Mr Mogeni that the closure of the exparte applicant's factory was unwarranted, unreasonable, illegal and contrary to Wednesbury Principles hence the notice should be quashed.

26. In addition, it was submitted that the respondent's actions were without jurisdiction and that the grounds of opposition filed are irrelevant in that they do not address the issues raised in the motion since the applicant has not challenged any notice issued under the Physical Planning Act. Further, that neither do the submissions by the respondent address the impugned notice and that factual depositions have not been controverted.

27. It was submitted that the factory employs over 1000 employees and that no hearing was accorded to the applicant before closure of the factory notice was issued. Counsel urged the court to issue the orders sought with costs.

28. Reliance was placed on **Associated Provincial Pictures House Ltd V Wednesbury Corporation [1948] 1KB 223** on the test for unreasonableness, and bad faith on the part of the respondent; **Joram Mwenda Guantai v Chief Magistrate Nairobi [2007] 2 EA 170; Mexner & Another v Attorney General [2005] 2 KLR 189; Kuria & 3 Others vs Attorney Generao [2002] 2 KLR 69; Mutemi Kithome Vs District Land Adjudication Officer Mwingi [2006] 1EA 166** and **Municipal Council of Mombasa v Republic** and **Umoja Consultants Ltd Civil Appeal No. 185 of 2001** on the scope of Judicial Review.

29. On the part of the respondent, Mr Ilako submitted in opposition contending that the City County is bound by the Physical Planning Act and that the applicant had refused to obey the law and was seeking court's protection. He relied on **Chanadin V City Council of Nairobi & Another [2009]e KLR** where the court emphasized that citizens must obey the law and that constitutional provisions should not be used as a shield against the proper administration of justice unless it can be part in bringing about the actions complained of.

30. It was submitted that there is a Liaison Committee set up which parties should appeal to if they are dissatisfied with decisions of the respondent, which process is faster and effective hence the court should allow the County to serve its people.

31. Reliance was placed on **Moses Maroko V Frakash Maunital Barot & Another [2014] eKLR** where the court maintained that the Liaison Committee has technical competences that the local authorities tap on in case of need when considering the applications before them hence the requirement for exhaustion of the approval process set out in the Physical Planning Act. Further, that an enforcement notice of 25th November 2015 can only be challenged through the Physical Planning Liaison Committee hence the applicant has no right of audience before this court; and that the supporting affidavit is full of hearsay hence it has no probative value. Reliance was place on **Life Assurance Corporation of India v Paneser [1967] EA 614** where Sir Charles Newbold emphasized that affidavits are intended to be of probative of the facts which the party is filling.

32. The respondents maintained that the application before the court is premature and misconceived and urged the court to dismiss it with costs.

33. In a rejoinder, Mr Mogeni counsel for the applicant submitted that they had not raised any complaint regarding powers of the respondent under the Physical Planning Act and or its non compliance. Further, that there was abuse of power hence the court must intervene. That notice to close the factory does not refer to any noncompliance hence there is no reason why the notice of 28th November 2015 was issued and that the respondent had not adduced any defence to counter the challenge hence the notice which was illegal must be quashed.

Determination

34. This court has considered the application by the applicant, and the grounds of opposition filed by the respondent. I have also considered the written, oral submissions and authorities cited by both parties' advocates. The main issue for determination is whether the application herein is properly before the court and if so, what orders should this court make?

35. On whether the application is properly before the court, the respondent argues that the applicant should have challenged the notice through the Physical Planning Liaison Committee as required by Sections 13, 29,30 and 38 of the Physical Planning Act and that the Liaison Committee is a technical committee which handles such disputes not the court. It was further contended that the applicant did not disclose to court that it had disobeyed the law as per the notice of 25th November 2015 which was an enforcement notice under Section 30(1), (ii) of the Physical Planning Act. "To construct a collapsed wall."

36. On the other hand, the applicant believes that the respondent is diverting the court's attention to the issues before the court which concern closure of its factory on 25th November 2015 for noncompliance with effluent discharge regulations and not failure to construct the collapsed wall.

37. The material placed on record shows that indeed there are two notices issued by the respondent on 25th November 2015 namely, the one signed by Richard K. Masinde Ag Assistant Director of Environment in charge of Environment Monitoring Compliance and Enforcement (EMCE) and served by Nyambura Mathu Environment Officer, witnessed by Joash Kaserah, Inspector; and the notice dated the same day issued by unidentified person which latter is an enforcement notice under Section 30(1),(11) of the Physical Planning Act for construction of a boundary wall within the Riparian Way leave by 2nd December 2015.

38. However, the former notice concerns closure of factory activities by the Department of Environment and forestry on account of pollution and more specifically, discharging of factory water (effluent) into the residential houses at Riverside Estate, ending up polluting Gitathuru River, contrary to Articles 42, 69 of the Constitution and Section 3(1) of Environment Monitoring Compliance Authority and Regulation 4 of the Environment Monitoring Compliance Authority (Water Quality) Regulations, 2006.

39. Against the closure notice is the challenge herein pursuant to the leave granted by Honourable Korir J on 4th December 2015 by consent of both parties' advocates, which consent was adopted by the court and the parties' advocates did append their signatures to the court record in affirmation of their consent, as shown on page 7 of the handwritten proceedings.

40. In the consent, the parties agreed that the substantive motion was to be filed within 7 days from the date of the consent order, which was 4th December 2015. It follows that the main motion was to be filed on or before 11th December 2015. However, the same was filed on 14th December 2015, three days after the 7th day.

41. 11th December 2015 was a Friday and a working day whereas 12th December 2015 which was a Saturday was a public holiday. It follows, therefore, that there is no reason why the main motion was not filed by 11th December 2015 and instead filed on 14th December 2015 which was a Monday after expiry of the period granted by the court. No leave of court was sought and or obtained to file the notice of motion outside the 7 days granted to the applicant by consent of all the

parties.

42. In my humble view, this court would only have jurisdiction to hear and determine the notice of motion dated 11th December 2015 and filed in court on 14th December 2015 if the motion was filed within the timelines given by the court as per the consent of the parties, who considered the matter to be so urgent that shorter timelines were appropriate.

43. This is so because albeit Order 53 of the Civil Procedure Rules gives to the applicant who has obtained leave to file the substantive motion to do so within 21 days from the date of leave, nonetheless, the court having granted a shorter period as agreed by the parties' advocates in their consent wherein they even proposed the number of days for filing of the response and submissions, failure to comply with the time frame renders the substantive motion as filed out of the 7 days incompetent. In **United Housing Estate Limited vs Nyals (K) Limited Civil Application No. Nairobi 84 of 1996** the Court of Appeal stated:

> ***" a party who obtains an order of a court on certain specified conditions can only continue enjoying the benefits of that order if the conditions attaching to it are scrupulously honoured and in the event of a proved failure to comply with the attached condition, the court has the inherent power to recall or vacate such an order."***

44. What the above holding is saying is that a party cannot unilaterally decide not to comply with the conditions attached to the exercise of discretion in his or her favour on the ground that he or she ought to have access to justice.

45. In this case, the applicant should have filed the motion by 11th December 2015 or sought for enlargement of time as stipulated in Order 50 Rule 6 of the Civil Procedure Rules, notwithstanding the expiry of the stipulated time frame. In **Wilson Osolo V John Ojiambo Ochola & Another CA NO. 6 of 1995** the Court of Appeal held that:

> ***"although there was no provision for extension of the six months period under Section 9(3) of the Law Reform Act after the order of decision being challenged, but that where the motion was filed after grant of leave, it had to be filed within 21 days of such leave or on an application for extension of time for filing as stipulated in the then Order 49 of the Civil Procedure Rules now Order 50 Rule 6 of the Civil Procedure Rules. However, where the court grants such shorter period, then the parties must comply with the timelines given by the court."***

46. In **John Ongeri Mariaria & 2 Others Vs Paul Matundura** Civil **Application No. Nairobi 301 of 2003 [2004] 2 EA 163,** the Court of Appeal stated:

> ***"Legal business can no longer be handled in such a sloppy and careless manner. Some clients must learn at their costs that the consequences of careless and leisurely approach to work must fall on their shoulders…..whereas it is true that the court has unfettered discretion, like all judicial discretion must be exercised upon reason not capriciously or sympathy alone…… justice must look both ways as the rules of procedure are meant to regulate administration of justice and they are not meant to assist the indolent."***

47. In the circumstances, this court cannot ignore the consent of the parties recorder by the court on 4th December 2015 which was endorsed by the court directing on when and how the substantive motion would be filed and responded to, and unless there was another order enlarging the time frame within which the substantive motion ought to have been filed, failure to comply with the consent rendered the motion as filed highly and fatally incompetent and incapable of being cured by Article 159 of the Constitution which stipulates that justice shall be administered without undue regard to procedural technicalities.

48. Honourable Odunga J in **Republic vs Cabinet Secretary Information Communication &**

Technology & Another Exparte Celestine Okuta & Others [2016] e KLR faced with a similar situation held that:

> " ***In my view, court orders are serious decisions that can only be excused based on material placed before that court and cannot be ignored on the ground that they are technicalities.***
>
> ***In my view, the law is that technicalities of procedure ought not to automatically lead to termination of proceedings and that the court must have the power to save the same where material exist before the court to justify non-compliance. However where there is none and where in fact the applicant adopts an incorrect position of the law to justify his inaction, such omission cannot be exercised."***

49. It therefore follows that where the motion was not filed within the 7 days stipulated in the endorsed consent of the parties as adopted by the court on 4th December 2015, to delve into the merits of the motion is an absolute waste of precious Judicial time and resources, in these proceedings.

50. Accordingly, I find and hold that the notice of motion dated 11th December 2015 and filed on 14th December 2015 is incompetent as it is incapable of being adjudicated upon by the court and therefore the order that commends itself for me to issue is to strike out the notice of motion as filed .

51. As the discovery of the incompetence of the application was made by the court which is deemed to know the law, I order that each party shall bear their own costs of these Judicial Review proceedings both at the leave stage and at the substantive stage.

Dated, signed and delivered in open court at Nairobi this 25th day of May, 2017.

R.E. ABURILI

JUDGE

In the absence of all parties' advocates

CA: George