



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS (JUDICIAL REVIEW DIVISION)

MISCELLANEOUS CIVIL APPLICATION NO. 102 OF 2017

IN THE MATTER OF: AN APPLICATION BY TAHERALI HASSAN ALI AND ZOEB EZZI FOR LEAVE TO APPLY FOR JUDICIAL REVIEW UNDER SECTION 8 &9 OF THE LAW REFORM ACT CHAPTER 26 OF THE LAWS OF KENYA AND ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010 LAWS OF KENYA

AND

IN THE MATTER OF: AN APPLICATION FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF: THE NATIONAL ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION ACT, CHAPTER 387 LAWS OF KENYA

AND

IN THE MATTER OF: THE OCCUPATION OF THE UNITS ERECTED ON ALL THAT PROPERTY KNOWN AS LAND REFERENCE NUMBER 12715/290

AND

IN THE MATTER OF: CRIMINAL CHARGES PREFERRED AS AGAINST TAHERALI HASSAN ALI AND ZOEB EZZI IN KIBERA CRIMINAL CASE NUMBER 4174 OF 2016 (R VS TAHERALI HASSAN ALI & ANOR)

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

NATIONAL ENVIRONMENT MANAGEMENT

AUTHORITY.....1ST RESPONDENT

CHIEF MAGISTRATE'S COURT, KIBERA

EXPARTE: TAHERALI HASSAN ALI AND ZOEB EZZI

ORDER

1. I was in the course of drafting the judgement which was scheduled for delivery on 21st September, 2017 when I came across a curious paragraph in the replying affidavit of the 1st Respondent being paragraph 13 thereof which states as follows:

THAT the project site location (Machakos County) and the choice of Court that the exparte applicants have taken for these proceedings being the High Court at Nairobi as opposed to the Machakos or even Nairobi ELC is suspect and am advised by E.K Gitonga advocate that the 1st respondent should raise a preliminary issue on a point of law.

2. There were other paragraphs in the said affidavit which with due respect to the advocate who drew the same have no place in an affidavit which should contain only factual averments. Instead of making such a reckless averment in an affidavit, Counsel ought simply to have applied that the matter be heard in Machakos. I must point out that such reckless averments are, with due respect to counsel, becoming common in this country.

3. Having considered the depositions in the affidavit, it is my view that in order for the decision herein not to be seen to have been influenced by the said misplaced averments, let this matter be heard and determined by another Court. It is regrettable that a matter which should have been determined has to be delayed due to uncalled for averments in an affidavit which if due diligence had been exercised by counsel would have been avoided.

4. I am however not in agreement that this matter falls within section 13 of the ***Environment and Land Court Act*** since the substratum of these proceedings revolve around whether the criminal proceedings amount to abuse of the Court process.

5. In the premises I direct that this matter be heard by the High Court sitting in Machakos.

6. It is so ordered.

Dated at Nairobi this 21st day of September, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Njenga for Mr Luseno for the applicant

Mr E K Gitonga for the Respondent

CA Ooko