



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

JUDICIAL REVIEW MISC. APPLICATION NO. 7 OF 2017

IN THE MATTER OF AN APPLICATION BY SUSTAINABLE ENERGY SYSTEMS LIMITED FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION AGAINST THE DECISION OF THE KENYA FOREST SERVICE RESCINDING THE SPECIAL USE LICENSE DATED 15TH APRIL 2013 OVER THE NGONG HILL FOREST RESERVE

AND

IN THE MATTER OF THE DECISION OF THE KENYA FOREST SERVICE TO RESCIND THE SPECIAL USE LICENSE DATED 15TH APRIL 2013 OVER THE NGONG HILL FOREST RESERVE CONTAINED IN ITS LETTERS DATED 3RD OF AUGUST 2017 AND REFERENCED AS LIC/I/KFS/VOL.XII/95

BETWEEN

SUSTAINABLE ENERGY SYSTEMS LIMITED.....APPLICANT

VERSUS

THE KENYA FOREST SERVICE.....DEFENDANT

RULING

Is the subject matter appropriate for this court to decide at all? Is this court the right one?

Sustainable Energy Systems Limited through the legal series of Ms Mwaniki Gachoka & Co. Advocates has made an application by way of a notice of motion filed in court on 22/11/2017. The application is brought pursuant to section 8 of the Law Reform Act (Cap 26) of the Laws of Kenya, Order 53 Rule 3 (1) (2) of the Civil Procedure Rules and the inherent powers of the court; seeking the following orders:

- (1) That this court be pleased to issue an order of certiorari to quash/set aside the decision of the Kenya Forest Service rescinding and/or cancelling the special use license dated 15/4/2013 over the Ngong Hill Forest Reserve issued in favour of Sustainable Energy Systems Limited.**
- (2) That this court be pleased to issue an order of prohibition against the Kenya Forest Service from implementing and/or giving effect to its decision rescinding and/or cancelling the special use license dated 15/4/2013 over the Ngong Hill Forest Reserve issued in favour of Sustainable Energy Systems Limited.**
- (3) That cost of this application be provided for.**

The said application has been supported by the verifying affidavit of one Dr. Gakio Wanyoike and the grounds on the face of the notice of motion. The Respondent filed a notice of preliminary objection as to the jurisdiction of the court.

The grievance by the applicant as set out in the notice of motion can be summarized:

(a) The *ex parte* applicant was awarded a special license by the Kenya Forest Service through the license agreement dated 15/4/2013 to undertake development and operation of wind farms in Ngong Hills Forest Service within Nairobi Conservancy.

(b) To achieve this objective the special use license is for a renewable term of thirty (30) years from 15/4/2013.

(c) The Kenya Forest Service has illegally, irregularly and/or unlawfully purported to cancel and/or rescind the license agreement between the parties, and has terminated the special use license through its letter to the Applicant dated 3/8/2017 and further has refused, failed and/or neglected to allow amicable settlement as contemplated under the license agreement.

(d) The basis of the said license agreement and the Applicant's legitimate expectation, the Applicant has incurred costs and expenses of over USD 1 million in obtaining pre-requisite approvals, feasibility studies and related expenses and further secured a financial facility of USD 70 million to finance construction and maintenance of the project.

(e) The Applicant herein filed an appeal challenging the Kenya Forest Service's actions before the National Environmental Tribunal in Tribunal Appeal Net No. 215 of 2017. However, the said tribunal is not properly constituted for lack of chairperson and thus incapacitated.

(f) It is imperative that this honourable court invokes its inherent jurisdiction to hear and determine this application expeditiously otherwise the applicant stands to suffer substantial and irreparable loss.

(g) The cancellation will imminently take effect unless the court intervenes and issues appropriate order of stay.

In determining this issue on the prospectus of the aforesaid affidavits, the materials annexed in support of the *ex parte* application. The Constitution of Kenya confers authority to exercise such jurisdiction as prescribed under Article 165 (3) (a) (b) (c) (d) (e) (6).

The high court being a creature of the constitution can only have such authority in appropriate cases. That is why in the same constitution under Article 165 (a) (b) it is stipulated that it shall not exercise jurisdiction in respect of matters:

(a) Reserved for the exclusive jurisdiction of the supreme court under this constitution; or

(b) Falling within the exclusive jurisdiction of the court contemplated in Article 162 (2). This Article creates and establishes courts with the status of the high court to hear and determine disputes relating to;

(c) Employment and labour relations; and

(d) The Environment and the use, and occupation of, and title to land.

The architecture of the constitution has asserted the basic structure of our courts and legal system. The power of judicial review has been vested in both the high court and courts under Article 165 (2) and (3) of the Constitution. On matters pertaining to environment and the use and occupation of land was expressly

ordered to be done by the Environment and Land Court. It is not open to the high court to issue award in the nature of certiorari, prohibition or mandamus on matters arising out of the jurisdiction specifically reserved for the ELC. The power conferred under Article 162 (a) (b) together with the corresponding jurisdiction as established by parliament in the respective statutory provisions is exercisable only by such courts.

In order to support this contention the following decisions are relevant;

In the persuasive authority from the Supreme Court of Nigeria in the case of *State v Onagoruwa [1992] 2 NWLR 221 – 33 at 57 – 59* the court held:

“Jurisdiction is the determinant of the vires of a court to come into a matter before it. Conversely, where a court has no jurisdiction over a matter, it cannot validly exercise any judicial power thereon. It is now common place, indeed a well beaten legal track, that jurisdiction is the legal right by which courts exercise their authority. It is the power and authority to hear and determine judicial proceedings. A court with jurisdiction builds on a solid foundation because jurisdiction is the bedrock on which court proceedings are based.”

In our local jurisdiction this matter has been a subject of litigation in the superior courts. In the case of *Samwel Macharia & Another v Kenya Commercial Bank & 2 Others Application No. 2 of 2012 eKLR* it was held:

“A court’s jurisdiction flows from either the constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. The issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction the court cannot entertain any proceedings.”

In *Boniface Waweru v Mary Njeri High Court Misc. No. 639 of 2005* the court stated thus:

“Jurisdiction is the first test in the legal authority of a court or tribunal and its absence disqualifies the court or tribunal from determining the question.”

In the case of *Owners of the Motor Vessel ‘Lillian’ S v Caltex Oil (Kenya) Ltd [1989] KLR*, the Court of Appeal held that, **“the question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter obliged to decide the matter right away on the material before it. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in the respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”**

Before i make known my decision on this *ex parte* application it is pertinent at this juncture to give an executive summary of the case as deduced from the affidavits. In the instant *ex parte* application the terms and conditions of the license agreement are outlined in the said document dated 15th June 2013. Under the terms the main purpose of permitting the license was to entitle the *ex parte* applicant to undertake generation of electric power from wind energy in Ngong Hills Forest Block in Kajiado Forest Zone. It was also stipulated that in the event of a dispute on any of the terms, conditions and obligations parties shall **“use their best efforts to settle the dispute, question, or disagreement.”**

To this end they shall consult and negotiate with each other in good faith and recognizing their mutual interest, attempt to reach a just and equitable solution satisfactory to both parties. Where the licensee is aggrieved by the decision of the service on the implementation of this agreement;

(1) It may within thirty (30) days after being notified of the decision, appeal to the board of the service against the decision.

(c) Notwithstanding the above provisions with respect to dispute resolution, any party aggrieved under this agreement may upon thirty (30) days notice refer the matter to the National Environment Tribunal pursuant to section 63 (2) of the Forest Act 2015.

Based on the above both parties acting together in the decision making process have violated the provisions of Clause 12 (a) (b) and (c) of the license agreement.

As regards the absence of the chairman to the National Environment Tribunal its instructive to note that parties could have approached the Environment and Land Court which hears appeals and superintendence's the tribunal.

The primary objection raised by the *exparte* applicant is that in the given facts the Respondent should not have issued a notice to terminate the license. At the outset the whole substance can be characterized as falling within the scope of Environment and Land Law.

The applicant shall rely at the trial on all relevant provisions of the Forest Conservation and Management Act No. 34 of 2016. In addition the applicant shall rely on the terms in the special licence dated 15/4/2013 and regulations governing dispute resolution mechanisms.

Relying on the above judgements of the superior courts i hold that this court has the power to take *suo moto* cognizance to the issues within the sphere of the constitution and the statute on jurisdiction.

With respect to this *exparte* application the jurisdictional facts do not enable this court to assume jurisdiction in the matter. I do not think it is correct to say that the Environment and Land Court has no jurisdiction to grant writs of certiorari, prohibition or mandamus in matter pertaining to land and environment. It is further agreed by both parties that in the event of any dispute with regard to the rights, liabilities and obligations in the license agreement the same shall be dealt under Clause 12 on dispute resolution. The departure from various alternative dispute resolution mechanisms under Clause 12 and the filing of this petition has not been explained by the parties.

Having said so i down tools in regard to entertain this *exparte* application for want of jurisdiction.

Dated, signed and delivered in open court at Kajiado on 15/12/2017.

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R. NYAKUNDI

JUDGE

Representation:

Ms Mumia for the Applicant

Ms Maina for the Respondent

Mr. Mateli Court Assistant