



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW**

**MISCELLANEOUS APPLICATION NO. 660 OF 2017**

**IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES**

**AND**

**IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT**

**AND**

**IN THE MATTER OF ARTICLES 129(1) (2) AND 153 (A) OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF GAZETTE NOTICE NO. 2334 OF 2017**

**AND**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE OF JUDICIAL REVIEW PROCEEDINGS.**

**BETWEEN**

**FELIX MUCHIN**

**T/A FESTIG COOL SIP LIMITED.....APPLICANT**

**VERSUS**

**NATIONAL ENVIRONMENTAL**

**MANAGEMENT AGENCY.....1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF CRIMINAL**

**INVESTIGATIONS.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. By a chamber summons dated 11th November 2017 the exparte applicant **Felix Muchina T/A Festig Cool Sip Ltd** seeks from this court leave to apply for:

i. Judicial Review order of **certiorari** to bring into this court and quash the 1<sup>st</sup> respondent's decision made on 10<sup>th</sup> October 2017 in Nairobi Application No. NEMA (PBC539/1095, "*Application for Primary Industrial Plastic Packaging*") purporting to reject the applicant's application to package his product in plastic packaging.

ii. The applicant also seeks leave to apply for **prohibition** prohibiting the 1<sup>st</sup> respondent from interfering with and or halting operations and or services provided by the applicant and or his business pending hearing and determination of this application;

iii. that leave so granted to operate as stay of implementation of the ruling letter date 10<sup>th</sup> October 2017 and decree from the said decision;

iv. costs; and

v. any other relief that the court deems fit and just to grant in the circumstances.

2. The application is predicated on the grounds set out on the face of the chamber summons and in the statutory statement and verifying affidavit sworn by Felix Muchina.

3. Basically, the applicant laments that he operates a business of packaging and distributing drinking water using plastic packaging, similar to the packaging used for milk, which is cost effective, affordable and accessible to the common mwananchi as opposed to the costly plastic bottles which cost more.

4. That when he filed an application with NEMA seeking for exemption from using plastic packaging following the 27<sup>th</sup> August 2017 ban, his application was rejected vide a letter of 10<sup>th</sup> October 2017. He is afraid that any appeal will be rejected because the same persons who rejected his application will deliberate on his appeal which will render his business to collapse and so he sought this court's intervention to exempt him from the ban and if the court orders that he exhausts the appeal, a conservatory order should issue.

5. The application is opposed by the 1<sup>st</sup> respondent who filed a preliminary objection dated 30<sup>th</sup> November 2017 contending that this court has no jurisdiction to hear and determine matters of Environment as stipulated in Articles 162(2)(b),165(5) of the Constitution and Sections 13 of Environment and Land Court Act, Section 130 of EMCA Cap 386 and Section 129 of the EMCA Cap 386.

6. Further, that the applicant has sued a wrong party which is nonexistent, urging the court to dismiss the application.

7. The application was argued this morning orally with Mr Mogaka submitting on behalf of the applicant and Miss Githaiga representing the 1st respondent.

8. Mr Mogaka reiterated the contents of the chamber summons, grounds and as supported by the statutory statement and the verifying affidavit, urging the court to allow his client to continue packaging drinking water in plastic packaging.

9. In response, Miss Githaiga opposed the chamber summons relying on her client's preliminary objection as reproduced above and urging the court to dismiss the application.

## **DETERMINATION**

10. I have considered all the foregoing and in my humble view, the issue for determination is whether this court has jurisdiction to hear and determine this matter.

11. Article 165(3) (a) of the Constitution confers on the High Court unlimited original and appellate jurisdiction in civil and criminal matters.

12. However, Article 165(5) (b) of the Constitution expressly bars the High Court from hearing and determining disputes falling within the jurisdiction of the courts contemplated in Article 162(2) of the Constitution.

13. Article 162(2)(b) of the Constitution establishes the Environment and Land Court to hear and determine disputes relating to environment and the use and occupation of, and title to, land. Parliament did, pursuant to Article 162(3) of the Constitution, enact the Environment and Land Court Act, 2011 and conferred on it jurisdiction and functions.

14. Section 13(1) of the Environment and Land Court Act is on jurisdiction of the court and under Section 13(7) thereof, the court has power to grant orders including prerogative or Judicial Review orders.

15. The dispute before me relates to plastic packaging of drinking water by the applicant which is subject to approval by the National Environmental Management Authority and the applicant claims that he applied for exemption from the Authority but he was declined on 10<sup>th</sup> October 2017 on the grounds that there exists other feasible and eco-friendly alternative packaging materials. He was asked to seek alternative packaging which does not contravene gazette Notice No. 2334.

16. The applicant is aggrieved by that rejection which he is challenging by way of certiorari and prohibition.

17. Plastic packaging is a matter that lies entirely in the jurisdiction of National Environmental Management Authority and any person aggrieved by the decision of the Authority can appeal to the NEMA Tribunal(NET) as stipulated in Sections 129 and 130 of the EMCA.

18. The applicant by implication in his affidavit, has filed an appeal before the tribunal but he is not confident that he will get justice there and that it might take long for the appeal to be decided by which time he will have been out of business.

19. An appeal or a challenge of the decision of the NEMA Tribunal lies to the Environment and Land Court not to this court.

20. With all the above in mind, I have no doubt in mind that this court is divested of any jurisdiction to hear and determine the matter before it whether as an appeal or by way of Judicial Review.

21. The court that has jurisdiction assuming the matter is properly placed before it, and subject to Sections 9(2),(3) and (4) of the Fair Administrative Action Act, 2015 on exhaustion of alternative remedies is the Environment and Land Court and not the High Court.

22. And as jurisdiction is everything without which this court acts in vain, I must accordingly down my tools, uphold the preliminary objection filed herein dated 30<sup>th</sup> November 2017 and strike out the exparte applicant's chamber summons dated 11<sup>th</sup> November 2018 with no orders as to costs.

**Dated, signed and delivered in open court at Nairobi this 11<sup>th</sup> day of December, 2017.**

**R.E. ABURILI**

**JUDGE**

**In the presence of:**

Mr Mogaka for the applicant

Miss Githaiga for the Respondents

Court Assistant: George