



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENT & LAND COURT

ELC MISCELLANEOUS APPLICATION NO.204 OF 2015

REPUBLIC.....APPLICANT

-VERSUS-

NATIONAL ENVIRONMENT TRIBUNAL.....RESPONDENT

EXPARTE: HOMESCOPE PROPERTIES LIMITED

AND

NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY.....1ST INTERESTED PARTY

NAIROBI CITY COUNTY.....2ND INTERESTED PARTY

ALFETTA KOOME.....3RD INTERESTED PARTY

MUNENE GITONGA.....4TH INTERESTED PARTY

BEATRICE NJERU.....5TH INTERESTED PARTY

PATRICK MOKAYA.....6TH INTERESTED PARTY

JACQUELINE MARIE RESLEY.....7TH INTERESTED PARTY

DAVID SSEGAWA.....8TH INTERESTED PARTY

SALLY MUKWANA.....9TH INTERESTED PARTY

KHADIJA SHAMTE.....10TH INTERESTED PARTY

ERIC MURIUKI.....11TH INTERESTED PARTY

JULIUS MURIUKI.....12TH INTERESTED PARTY

RULING

Background:

The ex parte applicant Homescop properties Limited (hereinafter “the applicant”) is registered as the freehold proprietor of all that parcel of land known as L.R Number 2951/474 (Original Number 2951/56/7) which is situated at Kitisuru within Nairobi City County (hereinafter “the suit property”). The applicant acquired the suit property on 7/8/2014 from its wholly owned subsidiary, Luminous Company Limited. The applicant intended to develop the suit property by constructing thereon forty seven (47) town houses which it would then sell to members of the public. The suit property was at all material times agricultural land. In order to put it to the proposed use, the applicant applied to the 2nd interested party for change of user from Agricultural to Multi Dwelling Units (town houses). The applicant’s application for change of user was approved by the 2nd interested party on 8/11/2014. The building plans for the town houses which were to be constructed on the suit property were also approved by the 2nd interested party on or about 11/12/2014. After the applicant had obtained change of user and approved plans for the houses it wanted to put up on the suit property as aforesaid, the applicant applied to the 1st interested party on or about 21/1/2015 for Environmental Impact Assessment License(hereinafter “License”). The 1st interested party considered the Environmental Impact Assessment Project Report that was submitted to it by the applicant and granted to the applicant the License on 25/2/2015 thereby approving the development. As at the time the applicant obtained the said License from the 1st interested party, the applicant had sold four (4) of the houses it had proposed to put up on the suit property off-plan to among others, the 3rd to 6th interested parties.

Appeal against the EIA License for the project:

After the applicant had obtained all the necessary approvals, it commenced the implementation of the project. The 7th to 13th interested parties are residents of Kitisuru Kinanda, Valley which is in the neighbourhood of the suit property. The 7th to 13th interested parties were aggrieved with the development that the applicant intended to carry out on the suit property. In the circumstances, they decided to lodge an appeal to the respondent against the decision of the 1st interested party to issue the applicant with the License to proceed with the construction of the said 47 town houses on the suit property(hereinafter “the project” where the context so admits). According to the amended Notice of Appeal dated 15/5/2015 by the 7th to 13th interested parties, the decision that was appealed against was given as “**Issue of Licence Number: NEMA/EIA/PSL/1220 on 12/2/2015 for construction of 47 No. town houses on Land Reference Number 2951/474, Kitisuru, Nairobi; contrary to Zoning laws and policy guidelines...**”. In their amended statement of grounds of appeal the 7th to 13th interested parties put forward several grounds on the basis of which they challenged the License that had been issued by the 1st interested party to the applicant. Among the grounds were that; the issuance of the said License did not take into account the Nairobi City County Zoning regulations and guidelines, the License was procured by the applicant by making of a false statement in the Environment Impact Assessment Report (EIA Report) and that there was no public participation in the issuance of the said License. Upon receipt of the 7th to 13th interested parties’ appeal, the respondent wrote to the applicant on 17/4/2015 notifying it of the appeal and drawing its attention to the provisions of Section 129 (4) of the Environmental Management and Co-ordination Act, 1999(“EMCA”) which provides that, upon any appeal to the respondent under that section, the status quo of any matter or activity, which is the subject of the appeal shall be maintained until the appeal is heard and determined. Pursuant to the said provisions of EMCA the respondent directed the applicant in the same letter to stop the development that it had commenced on the suit property pending the hearing and determination of the 7th to 13th interested parties appeal.

On 11/5/2015, the applicant raised a preliminary objection in the said appeal on the jurisdiction of the respondent to entertain the 7th to 13th interested parties’ appeal. The applicant contended in its

preliminary objection that the respondent had no jurisdiction to entertain the 7th to 13th interested parties' appeal as it comprised of complaints arising from change of user of land and approval of building plans. The applicant contended further that the 7th to 13th interested parties had no *locus standi* to maintain the appeal and that the residents of the suit property were not consulted before the stop order was made by the respondent.

The respondent's decision on the preliminary objection:

In a ruling which was delivered on 10/7/2015 the respondent dismissed the applicant's preliminary objection and directed the parties to set down the appeal for hearing. The respondent in a detailed ruling considered all the issues that were raised by the applicant against the 7th to 13th interested parties' appeal and held that it had jurisdiction to determine the appeal on merit.

The application to this court:

The applicant was aggrieved by the decision of the respondent on the issue of its jurisdiction and moved this court for an order of certiorari to quash the letter dated 17/4/2015 which had been addressed to the applicant by the respondent to stop the construction of the 47 town houses on the suit property ("the project") pending the determination of the appeal by the 7th to 13th interested parties. The applicant also sought an order of prohibition to prohibit the respondent from hearing the Tribunal Appeal No. NET/146 OF 2015 by the 7th to 13th interested parties. The applicant's judicial review application was supported by a verifying affidavit of Mohamed Ahmed sworn on 14/7/2015 and the statutory statement of the same date. The application was brought on the grounds among others that, the respondent has no jurisdiction to determine disputes or complaints arising from change of user of land or approval of building plans which are regulated by the Physical Planning Act, Chapter 286 Laws of Kenya and that the 7th to 13th interested parties had no *locus standi* to lodge an appeal with the respondent as they had not objected to the issuance of the License by the 1st interested party to the applicant. The application was also based on the ground that the respondent had acted in breach of the rules of natural justice by purporting to stop the project without giving the forty seven (47) persons who had acquired leases over the suit property an opportunity to be heard.

The application was opposed by the 7th to 13th interested parties through grounds of opposition dated 14/8/2015. The 7th to 13th interested parties termed the application as frivolous, vexatious and an abuse of the process of the court. The 7th to 13th interested parties contended that the respondent's letter dated 17/4/2015 only conveyed to the applicant the provisions of section 129(4) of EMCA and as such the same was not a decision capable to being quashed by an order of certiorari. As concerns the order of prohibition, the 7th to 13th interested parties contended that the respondent has jurisdiction to entertain the appeal which the 7th to 13th interested parties had lodged before it and as such there is no basis for prohibiting the respondent from hearing and determining the said appeal. The 7th to 13th interested parties contended further that the respondent having held that it had jurisdiction to entertain the said appeal, the applicant's remedy if it was not satisfied with the said decision was to appeal against the same but not to bring an application for judicial review. The 2nd to 6th interested parties supported the application while the respondent did not respond to the same. On 18/8/2015 the parties agreed to argue the application by way of written submissions. The applicant, the 2nd interested party and the 7th to 13th interested parties filed their submissions and the same are on record.

I have considered the applicant's application together with the verifying affidavit and statutory statement that were filed in support thereof. I have also considered the affidavit that was filed by the 2nd interested party in support of the said application. Similarly, I have considered the 7th to 13th interested parties' grounds of opposition. Finally, I have considered the parties written submissions and the authorities that were cited in support thereof.

As I have mentioned earlier in this ruling, the applicant has sought two (2) reliefs in its judicial review

application. The applicant has sought an order of certiorari to remove to this court and quash the letter dated 17/4/2015 by which the respondent stopped the applicant from continuing with development on the suit property (“the project”) until the appeal that had been lodged by the 7th to 13th interested parties was heard and determined. In **Harlsbury’s Laws of England 14th Edition, page 150 at paragraph 147**, the authors have stated as follows regarding certiorari as a remedy;

“It will issue to quash a determination for excess or lack of jurisdiction, error of law on the face of the record or breach of the rules of natural justice or where the determination was procured by fraud, collusion or perjury.

What I need to determine is whether the contents of the letter dated 17/4/2015 which is the subject of the applicant’s prayer for certiorari amounted to a decision or a determination and if it did whether it falls under those decision or determinations set out above which are liable to be quashed. I am in agreement with the submission by the 7th to 13th interested parties that the contents of the said letter dated 17/4/2015 did not amount to a decision or a determination by the respondent which is liable to review by this court. The said letter a copy of which the applicant did not even lodge with the court contrary to the provisions of order 53 rule 7 of the Civil Procedure Rules notified the applicant of the appeal that had been lodged by the 7th to 13th interested parties against the License that had been issued by the respondent to the applicant and drew the attention of the applicant to the provisions of Section 129(4) of EMCA which provides as follows:-

“Upon any appeal to the tribunal under this section, the status quo of any matter or activity which is the subject of the appeal shall be maintained until the appeal is determined.”

The respondent reproduced that section in its letter aforesaid and directed the applicant to stop the project pending the hearing of the appeal by the 7th to 13th respondents. Under section 129 (4) of EMCA aforesaid, once an appeal is filed under that section, the status quo must be maintained which means that in case of development, the same must stop until the appeal is heard and determined. The stopping of development or maintenance of status quo occurs as a matter of law. The respondent has no discretion in the matter. In the instant case therefore, it was a requirement of law that the applicant stops the project on the suit property until the appeal was heard and determined. The stopping of the project was not occasioned by the respondent’s decision. In my view, the applicant’s grievance is against the provisions of section 129 (4) of EMCA rather than against the decision of the respondent. It is no wonder that the applicant has termed the provisions of that section unconstitutional. The applicant may have a valid constitutional issue with that provision of the law, what is before me however, is not a constitutional petition seeking an order to declare section 129(4) of EMCA unconstitutional but an application for an order to quash a purported decision by the respondent. I have said enough to show that the contents of the respondent’s letter dated 17/4/2015 did not amount to a decision capable of being reviewed by this court.

Assuming that I am wrong on my finding above and that the said letter did in fact convey to the applicant a decision by the respondent to stop the project, can that decision be reviewed by this court? I can see no ground upon which the decision can be reviewed. As I have stated above, the letter of 17/4/2015 was written pursuant to section 129(4) of EMCA. The section provided for the maintenance of status quo pending the hearing and determination of an appeal before the respondent. The decision by the respondent to direct the applicant to maintain the status quo as provided for in law was therefore lawful and was within its jurisdiction to make. There is no error at all on the face of the record of that decision. Section 129 (4) of EMCA does not provide that the respondent to the appeal should be heard before the status quo can be maintained. I believe this was for good reason because if that was to be the case then the respondent would run the risk of conducting other proceedings involving the same parties parallel to the appeal. I believe that the respondent and other interested parties would have their day in the appeal. In view of what I have set out above, I am not satisfied that the applicant has laid a basis for the granting of the order of certiorari sought in the application herein.

The disposal of this issue takes me to the second relief sought by the applicant which is an order of prohibition. In Halsbury’s Laws of High Court England, 4th Edition page 137, paragraph 128, an order of

