



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

J.R. MISC. CAUSE NO. 5 OF 2015

**IN THE MATTE OF AN APPLICATION TO APPLY FOR UDICIAL REVIEW ORDERS OF
CERTIORARI AND PROHIBITION**

AND

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

ACT CAP 26 LAWS OF KENYA

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE

RULES, 2010

AND

IN THE MATTER OF ARTICLE 40 AND 47 OF THE CONSTITUTION OF KENYA

BETWEEN

REPUBLIC.....APPLICANT

AND

THE GOVERNOR, COUNTY GOVERNMENT

OF KILIFI.....1st RESPONDENT

**CHIEF OFFICER WATER, NATURAL RESOURCES,
FORESTRY, ENVIRONMENT AND SOLID WASTE
MANAGEMENT.....2nd RESPONDENT**

RULING

The notice of motion dated 19.10.2015 seeks the following orders: -

1. An order of certiorari to remove into this Honourable Court and quash the Stop Order dated 14th October 2015 and issued by the 2nd respondent halting the implementation of a duly licensed and authorized expansion of salt mine project;

2. An order of prohibition directed at the 1st and 2nd respondents, their employees, officers, agents and persons working under their instructions restraining them from implementing the Stay Order dated 14th October

'2015; and

3. An order of prohibition directed at the 1st and 2nd respondents, their employees, officers, agents and persons working under their instructions restraining them from interfering with the implementation of the applicant's expansion project in any way whatsoever.
4. Costs of and incidental to this application provided for; and
5. Such further and other reliefs that this Honourable Court may deem just and expedient to grant.

The application is supported by the affidavit of HASMITA PATEL sworn on 19.10.2015 and a further affidavit of the same person sworn on 26.4.2016. The respondents filed a notice of preliminary objection dated 26.11.2015. The interested parties filed a replying affidavit sworn by CHARLES CHARO GOHU on 3.11.2015. Parties agreed to determine both the preliminary objection and the application jointly and by way of written submissions. No replying affidavit was filed by the 1st and 2nd respondents. The notice of motion was filed pursuant to leave having been granted by this court.

In its written submissions, the ex-parte applicant submit that its claim is quite clear. It is the registered owner of land Reference Number 13427 measuring 2,034 hectares or thereabout located in Kilifi County. The applicant has constructed a salt processing plant on its land. It applied for the expansion of its-plant and obtained all the relevant authorities. An application was made to the National Environment Management Authority (NEMA) and the said authority gazetted the project on 20.2.2015 inviting members of the public to make their comments. A further notice to the members of the public was made through advertisement on 23.2.2015. A NEMA licence to implement the project was issued on 17.4.2015. All the requisite fees payable to the Kilifi County Government were paid on 19.6.2015.

The applicant contends that a certificate of compliance with the licence was to be issued after the developments were complete. The office of the 1st respondent was issued with a notice to expand the works/plant on 17.8.2015. It is further submitted that a notice to stop the works was issued on 14.10.2015 by the second respondent. On 18.10.2015 the first respondent visited the premises and issued an order to stop the works.

It is the applicant's contention that there was no fair administrative process. No prior or adequate notice was issued. No reasons for the stoppage were given. No opportunity to appeal the stoppage order was available to the applicant. The applicant was not accorded an opportunity to be heard.

It is further stated that the respondents are relying on alledged complaints by members of the public. There is no evidence to prove such complaints. The alledged complaints cannot deny the ex-parte applicant's constitutional rights. Counsel relies on the case of **REPUBLIC V COUNTY GOVERNMENT OF MOMBASA EX-PARTE OUTDOOR ADVERTISING ASSOCIATION OF KENYA [2014] eKLR** where the court held that public interest should not be used to contradict written law.

On the issue of the preliminary objection, counsel for the ex-parte applicant maintains that this court has jurisdiction to determine the application. Article 23 (2) (f) of the Constitution and Section 3A of the Civil Procedure Act gives this court the powers to deal with the current dispute. Leave was properly granted to the applicant to commence the proceedings.

Counsel for the 1st and 2nd respondent contend that this court lacks the requisite jurisdiction to entertain and determine the matter as the dispute relate to the use and occupation of land as well as title to land. This is the exclusive jurisdiction of the Environment and Land Court. [The ELC]. Section 13 of the Environment and Land Court Act confer exclusive jurisdiction to hear and determine disputes concerning land. The Environment and Land Court is empowered to grant prerogative orders under Section 13 of its

Act.

With regard to the main notice of motion, the respondents submit that the ex-parte applicant's business involve the extraction of salt. Numerous complaints from members of the public living within the vicinity of the expanded works were received by the first respondent. It is further submitted that although the applicant was issued with a NEMA licence it did not obtain the approval of the Kilifi County Government Public Health Department as well as the Water, Forestry, Environment and Natural Resources Department. The Government's decision to direct issuance of the stop orders was informed by public interest following several complaints by members of the public. Counsel relies on the case of **REPUBLIC V REGISTRAR OF TITLES AND ANOTHER, EX-PARTE DAVID GACHIRI MURIITHI AND ANOTHER [2014] eKLR** (Miscellaneous application No. 95 of 2010, J.R. Nairobi)

Counsel also submit that the Governor made a site visit to the expansion works. This demonstrates that the Governor took reasonable and logical steps which later on informed his decision. The Governor made inquiries from persons on the ground. It's not every instance which calls for a right to be heard. Counsel relies on the case of **LLYOD V MACMALION (1987) A.C. 625**.

The other issues being raised by the respondents are that this case is not suitable for Judicial Review Orders. The respondents have a duty to ensure that exploitation of resources is in line with a clean and healthy environment. The ex-parte applicant did not comply with the conditions under the NEMA licence. No approval of the works was obtained from the Kilifi County Government.

The interested parties did not file any submissions. I will take it that they are relying on their replying affidavit.

The main issues being raised by both the main application and the preliminary objection are: -

- i. Whether this court has jurisdiction to determine the dispute.
- ii. If the answer to the first issue is in the affirmative, whether the ex-parte applicant has made its case deserving the orders being sought.

The first issue deals with the respondents' preliminary objection while the second one deals with the notice of motion by the ex-parte applicant. The preliminary objection is premised on three points as follows: -

- i. That this court lacks jurisdiction to hear and determine this matter *ab initio*.
- ii. That the said motion, together with the application for leave to commence these proceedings dated 19.10.2015, the Statutory Statement of even date, the Verifying Affidavit thereof and all other court filings made by the ex-part applicant in this matter should all be struck out for being a nullity *ab initio* and
- iii. That the leave to commence these proceedings granted on 19.10.2015 together with the further stay order issued pursuant thereto be and are hereby discharged accordingly.

Counsel for the respondents mainly dealt with the issue of jurisdiction and did not dwell on the other issues of leave and the ex-parte applicant's documents. I do take it that the interested parties' position is that the dispute involves the right to work on one's land and that such disputes are a preserve of the land court. The application herein is brought under two statutes. The Law Reform Act, Cap 26 Laws of Kenya and the Civil Procedure Act, Cap 21 Laws of Kenya. I do acknowledge that both statutes were enacted before the coming into effect of the Environment and Land Court Act Number 12 of 2012. Section 8 (2) of the Law Reform Act empowers the High Court to make an order of mandamus, prohibition or certiorari. The reference under that Section is the High Court. Similarly, Section 2 of the Civil Procedure Act defines the court as the High Court or a subordinate court acting in the exercise of Civil Jurisdiction. Order 53 of the Civil Procedure rules provides for the procedure of applying for Judicial Review Orders.

The application is to be made to the High Court.

The ex-parte applicant contends that its expansion works were abruptly stopped by the respondents without being given a prior notice or hearing. It further contends that its constitutional rights were violated. It is incurring financial losses due to the stop order issued by the respondents. There is no dispute as to the ownership of the land. The National Environmental Management Authority (NEMA) issued a licence for the works. NEMA seems not to be complaining. The project was advertised for members of the public to make their comments. I do find that the ex-parte applicant's case deals with the manner in which its work was stopped. The ex-parte applicant is of the view that the works were stopped arbitrarily yet it had obtained all the requisite approvals. This dispute does involve land but a business being undertaken on the land. If NEMA had complained that the conditions in its licence are not being complied with, then it would be an environmental issue to be dealt with by the Environment and Land Court. There is no report from the respondents indicating that the expansion works are contrary to NEMA's licence.

It should be clear to litigants that not every dispute which involve land should be heard by the environment and Land Court. Succession disputes involve the distribution of deceased peoples' estate. Part of the estates usually involve land. There is no requirement that succession cases be heard by the land court. Majority of human activities take place on land. Even those charged with criminal cases such as trespass or affray, face cases where the dispute occurred on the land. Where people fight over the ownership of land, the criminal element involves the ownership of the land being the reason for the fight. Should such cases be heard by our colleagues in the Environment and Land Court. In essence therefore, most activities occur on the land. Where the Government compulsorily acquires a citizen's land and compensation is delayed, the dispute relates to land but the core issue is the compensation. We should learn how to differentiate between what belongs to the historical High Court and what belongs to the Environment and Land Court. Recently, litigants have formed a habit of raising the issue of jurisdiction between the two courts not necessarily for good reasons. Counsel for the respondents have happily cited the case of **REPUBLIC V REGISTRAR OF TITLES AND ANOTHER, EX-PARTE DAVID GACHINA MURIITHI** (supra). That case was determined by Justice Odunga in 2014. The Judge does not deal with land cases. Counsel for the respondents are not complaining that Justice Odunga ought not to have determined the dispute as it involved a prayer for an order of certiorari relating to the revocation of the ex-parte applicant's title. We should be sincere on this issue of jurisdiction.

The preliminary objection also deals with the issue of leave and the documents filed by the applicant. The applicant did sought leave of the court before instituting of these proceedings. The only anomaly I have noted is that the application for leave was dated 19.10.2015. This court granted leave on 22.10.2015. The substantive application was filed the following day 23.10.2016 but is also dated 19.10.2016. It can be taken that the application was anticipated as it was dated on 19.10.2015 even before leave had been, granted. I do find that there is no prejudice on the part of the respondents. The respondents have not made any issue in relation to the applicant's documents.

In the end, I do find that the preliminary objection lacks merit. It does not determine the dispute at the preliminary stage. The procedure for seeking Judicial Review Orders was duly followed. The court found it fit to grant leave to the applicant. No issue has been raised as to whether the applicant deserved the leave or not. The preliminary objections is hereby dismissed with costs to the respondent.

The next issue relates to the notice of motion by the applicant. The pleadings show that the applicant has been carrying on salt extraction business on its land. The applicant wanted to expand its plant. The interested parties have averred at paragraph 5 of their affidavit that they were invited to table their views before an Environmental Impact Assessment Study Report could be prepared. The interested parties further confirm that their views were factored in the subsequent Environmental Impact Assessment Report submitted to NEMA.

The record shows that NEMA issued the applicants with a licence on 17.4.2015. On 23.6.2015, one J.M. Makau, an officer from Kilifi County Government, wrote to the sub-County Administrator at Magarini and indicated that the ex-parte applicant's proposal to extend its works was **recommended subject to the**

submission of an Environmental Impact Assessment Report to NEMA and obtaining a certificate of compliance from the concerned County Government office after completion of the developments.

The stop order dated 14.10.2015 reads as follows: -

TO,

THE MANAGING DIRECTOR KRYSTALLINE SALT LTD

RE: STOP ORDER

We understand that you were advised by NEMA-Kilifi to carry out an Environmental Impact assessment on the expansion of the salt mine; however there is no report which has been received by this office for review.

The office of the Governor Kilifi County has received several complaints on the expansion activity.

The governor has therefore STOPPED all expansion activities IMMEDIATELY until further notice.

This letter therefore serves as an official document to enforce the order.

Please furnish us with the report for review and and to help us in sound decision making.

The record shows that on 20.2.2015 through Kenya Gazette notice Number J 200, NEMA gazetted the Environmental Impact Assessment Study Report for the applicant's works. A similar gazette notice was published on 27.2.2015. On 17.8.2015 the applicant wrote to the Kilifi County Government indicating that it had received the NEMA licence. The letter reads as follows: -

This is to inform you, that we have received the NEMA licence to proceed with our expansion project at Marereni, L.R. No. 13427. Please find attached the NEMA licence for your quick reference. We will commence the construction work soon and are currently being guided by the conditions in the NEMA licence, however kindly feel free to guide us on any requisite approvals that we may require from yourself.

This is for your information and kind guidance and co-operation.

The above letter was received at the office of the Governor. County Government of Kilifi on 21.8.2015 and a stamped "**received**". The letter enclosed a copy of the NEMA licence.

The application herein deals with the Stoppage Order dated 14.10.2015. The applicant is seeking an order of certiorari to quash the stoppage order. The Black's Law dictionary defines Judicial Review in the following terms: -

- 1. A court's power to review the actions of other branches or levels of government; especially, the courts' power to invalidate legislative and executive actions as being unconstitutional.**
- 2. The constitutional doctrine providing for this power.**
- 3. A court's review of a lower court's or an administrative body's factual or legal findings.**

The interested parties' position is that despite their objection to the issuance of an Environmental Impact Assessment licence, NEMA proceeded to issue the licence. It is also stated that it is upon the applicant to prove that it is complying with the conditions of the licence. The respondents maintain that there were complaints from members of the public. No single letter detailing the complaints was filed. No minutes or memorandum documenting the complaints was produced. The applicant annexed photographs showing the Governor at the premises in the company of other County officials. There is no specific complaint as

to which licence condition the applicant has breached. There is no written communication to the applicant complaining about its expansion programme. What are the complaints by the members of public'?

What is the environmental concern? It should not be lost that the activity involves the expansion of existing works. This is not a fresh project.

The decision taken by the two respondents to stop the works amount to an administrative action. Being the Governor of Kilifi County, the 1st respondent found it fit to stop the works. The stop order is dated 14.10.2015. This was a few days before the Governor visited the site as per the report by the Star Newspaper of 19.10.2015. It was incumbent upon the respondents to first write to the applicant registering specific complaints on the works. The Governor has no powers to visit private businesses and stop operations without following the law. Article 47 of the Constitution provides for fair administrative action. A decision to stop the works was made without hearing the applicants or giving them notice. The stoppage order refers to an Environmental Impact Assessment Report. The report was published twice in the Kenya Gazette on 20.2.2015 and 27.2.2015.

The stoppage order also refers to the Governor having received several complaints on the expansion activity. It is not indicated from whom the complaints were received. How does the court conclude that indeed complaints were received without any formal complaint. NEMA is the authority authorised by the Law to deal with the environment issues arising from such projects. The respondents did not liaise with NEMA to find out whether the project had been licenced or whether the project complied with the law. Public interest should not be an excuse to infringe on private rights. If not controlled, public interest can be used to justify mob justice. There is no evidence of processions against the project. There is no evidence that the project is an environmental risk or is being undertaken outside the applicant's land.

The Governor did not indicate what the complaints from the members of public were. If there were concerns being raised on the project, the applicant could have been called upon to rectify those areas. The contention that the applicant did not obtain licences or permission of the County Government cannot hold. This was not a new project. It was a project meant to expand the existing plant. There is no evidence that the applicant's project spilled over to other peoples' land or that it was affecting the existing environmental set up.

Judicial Review proceedings are meant to check on the actions of people endowed with certain responsibilities. The court is being called up to stop or quash a decision that infringes on the applicant's rights. I do find that the applicant's complaints are genuine. All legal processes to start the project were followed. It took almost one year to comply with the relevant conditions before the project commenced. When the Governor stopped the project, heavy machinery was on site as shown in the photographs. The project was abruptly stopped without giving the applicant notice or a hearing. That decision is excessive and cannot be allowed to stand in a free and democratic society.

In the end, I do find that the application dated 19.10.2015 is merited and is granted as prayed. An order of certiorari shall issue as per prayer one (1) of the application. Similarly, orders of prohibition shall issue in terms of prayers two (2) and three (3) of the application. I do further direct that the applicant should comply with NEMA licence conditions while undertaking its expansion project. The preliminary objection is dismissed with costs. Costs for the application to the applicant.

Dated and delivered in Malindi this 19th day of May, 2016.

S.J. CHITEMBWE

JUDGE