



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ELC JUDICIAL REVIEW NO. 7 OF 2020

IN THE MATTER OF: AN APPLICATION BY MARA NGENCHE SAFARI CAMP LIMITED FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

IN THE MATTER OF: ARTICLES 165 (6) & (7) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: SECTION 8 AND 9 OF THE LAW REFORM ACT (CAP 26) OF THE LAWS OF KENYA

IN THE MATTER OF: PART 3 OF THE TOURISM ACT NO. 28 OF 2011 LAWS OF KENYA

IN THE MATTER OF: SECTION 7 OF THE FAIR AND ADMINISTRATIVE ACT 2015

IN THE MATTER OF: OCUPATIONAL AND SAFETY ACT, 2007 AND ENVIRONMENTAL MANAGEMENT AND COORDINATION ACT, CAP 387 LAWS OF KENYA

IN THE MATTER OF: IN THE DECISION BY THE NAROK COUNTY GOVERNMENT AND THE MINISTRY OF TOURISM AND WILDLIFE TO DEMOLISH THE MARA NGENCHE SAFARI CAMP SITUATED IN THE MAASAI MARA GAME RESERVE SOUTH WEST OF NAROK DISTRICT

BETWEEN

REPUBLIC.....APPLICANT

AND

NAROK COUNTY GOVERNMENT.....1ST RESPONDENT

THE MINISTRY OF TOURISM AND WILDLIFE....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

AND

MARA NGENCHE SAFARI CAMP.....EX PARTE APPLICANT

JUDGEMENT

1. By its notice of motion application dated 11th September, 2020 and filed in court on even date, the ex parte applicant seeks the following orders: -

(a) That an order of prohibition does issue directed to the 1st and 2nd respondents their officers and any other authority acting on their instructions prohibiting them from demolishing, removing and/or interfering with the quiet possession of the ex parte applicant.

(b) That an order of prohibition does issue directed at the 1st and 2nd respondent prohibiting them from having any social media discussions regarding the demolition and/or removal of the ex parte applicant without following the due process.

(c) That an order of mandamus does issue to compel the 1st respondent to honour the terms of the lease dated 24th October, 2008 with the ex parte applicant.

(d) That an order of certiorari does issue to quash the discussions, decisions, directives and/or orders of 8th and 9th September, 2020 of the 1st and 2nd respondents to remove and/or demolish the ex parte applicant.

(e) That an order of mandamus does issue to compel the respondents to apologize and/or withdraw the said communications, tweets and/or posts from their respective verified social media handles and/or channel against the ex parte applicant.

(f) That the court be at liberty to make such further and other orders as it deems fit to meet the ends of justice.

(g) That the costs of this application be provided for.

2. The application is expressed to be brought under **Sections 1A and 1B of the Civil Procedure Act, Order 53 Rule (1) and (2) of the Civil Procedure Rules, 2010 Section 8 (2) and 9 of the Law Reform Act Cap 26** of the Laws of Kenya and all enabling provisions of the law.

3. The application is supported by the statutory statement and verifying affidavit of Minazali Rajabali Hessien Manji both dated 9th September, 2020. It is deposed in the verifying affidavit that the deponent is a director of the applicant and he has been duly authorized on its behalf to swear the said affidavit, that the applicant entered into a lease agreement with the 1st respondent on 24th October, 2008 and was issued with a lease for the property that it holds a valid licence and Business Permit to operate its premises and has been issued with a certificate of registration of work place by virtual of Occupational Safety and Health Act, that its camp has been in operation for the last 10 years offering hospitality and tourism services to local and international tourists and holds 12 tents accommodating 25 tourists per day and is usually full to capacity from Wednesday to Sunday due to heavy flow of tourist traffic for the weekends, that on 8th and 9th September, 2020 they learnt through various social media platforms of facebook and twitter from verified accounts of the Cabinet Secretary for Tourism and Wildlife Hon. Najib Balala through his handle @tunajibu that he had issued orders to the County Governor of Narok @Samuel Tunai to remove the applicant camp situated in Maasai Mara game Reserve, that he is aware that the Narok County Governor issued orders to various offices and entities to proceed and have camp demolished and destroyed as per the directive from the Ministry of Tourism and Wildlife, that the various tweets from the Cabinet Secretary for Tourism and Wildlife refer to an incident that occurred on the 14th of August, 2020 wherein the wildebeests deviated from the traditional route into Mara Ngeche Camp and were destroyed by the applicant's staff to protect both human life who were endangered and the animals lives which was going to have a devastating clash had the migration of the beasts proceeded through the camp, that the said tweet as accompanied by a video which was widely circulated on social media showing the applicant's staff re-directing the wildebeest from passing through the camp which was full to capacity with tourists that after the said incident that occurred on 14th August, 2020 the Administrator of the Maasai Mara Game Reserve visited the camp and carried out investigations on what had transpired and held that the actions of the applicant's staff was appropriate by deviating and re-directing the wildebeest back to their traditional route as their continued migration through the camp would have caused devastating loss of lives at the camp, loss of the animals lives, destruction of property and catastrophic consequence, that the applicant is fully compliant, licensed and does not in any way interfere with the ecosystem, environment or designated path of the wildebeests as alleged by the respondents, that on 9th September, 2020 at around 3.00pm, the representative from the respondents went to the camp with bulldozers and heavy machinery to carry out the directives and orders of the respondents to uproot, demolish and to remove the camp property without written confirmation or orders, that neither the 1st or 2nd respondents summoned the applicant to answer any of the queries regarding the said incident of 14th August, 2020 until the same reached the media on 8th September, 2020 of the 2nd respondent's intended action of demolishing the applicants established camp, that as a result of the respondent's aforesaid tweets from their verified handles of their ridicule and intended actions, the applicant has been subjected to scurrilous and defamatory allegations in nation media and social media platforms and the reputation and standing of the camp on the hospitality and tourism sector has been irreversibly damaged and stands to suffer even further harm and injury should the officers of the 1st and 2nd respondents proceed to act on the said decisions directive and/or orders to demolish and/or remove the camp and that the action of the two respondents are irrational, unreasonable and an abuse of power clearly motivated by malice to bad faith.

4. The application has been opposed by the 1st respondent vide its replying affidavit sworn at Nairobi on 25th September, 2020 by Elizabeth Sanangoi Lolchoki who is its County Secretary. The deponent has deposed inter alia that the Maasai Mara Game Reserve is located in Narok County and it covers an area of 1,500 square kilometres (583 square mile) and is demarcated by the Serengeti National Park in South, Loita Hills in the East, Esoit Oloololo escapement in the west and Aitong Hills in the North, that the said Game Reserve is part of the Serengeti ecosystems and extends from Northern Tanzania into Southern Kenya and that the two countries share the vast Serengeti plains, with the Wildlife free to roam between Kenya and Tanzania in search of good grazing or prey, that the Game Reserve comprises of open plains, woodlands and riverine forest and contiguous with the plains of the Serengeti National Park, the Reserve is without doubt a home for breathtaking array of wildlife. The deponent goes on to depose that Game Reserve is home to the Great Annual Migration which is considered the world's greatest wildlife spectacle on earth and the 8th wonder of the world.

5. It was also deposed that the 1st respondent is the custodian of the Maasai Mara Game Reserve and it exercised regulatory as well as administrative mandates activities undertaken therein. That the ex parte applicant operates a tourism camp facility at the intersection between the Talek River and Mara River within the Mara and thus the subject to regulation by the 1st respondent.

6. It was further deposed that sometime in early September, 2020, the 1st respondent's attention was drawn to an incident where wildlife were prevented from crossing the Mara River by employees of the ex parte applicant, that the incident occurred at the camp of the ex parte applicant which is erected on the river bank, that a video recording was widely circulated in social medial platforms giving rise to an unprecedented avalanche of commentaries condemning the incident and blaming the 1st respondent for allowing the ex parte applicant to erect a camp on wildlife crossing point. It was also deposed that owing to the ensuring public outrage and concerns by the 1st respondent on the consequences of the ex parte applicant's conduct on the overall welfare of the wildlife and the threat to the Great Annual Migration, a decision was made to establish the following facts:-

(a) When was the ex parte applicant's camp established?

(b) Was it approved by all relevant agencies?

- (c) Did it comply with all necessary regulatory conditions?
- (d) Is the camp erected on a wildlife migratory crossing point?
- (e) Under what circumstances did the botched attempted crossing occur?
- (f) Has a similar incident occurred in the past?
- (g) What action ought to be taken to redress the incident?

7. Lolchoki further deposed that the present court action is premature and speculative. The 1st respondent contends that the application invokes the court's intervention as a means to stifle the 1st respondent's mandate.

8. The application was canvassed by way of written submissions. The ex parte applicant and the respondent filed their submissions on 13th May, 2021 and 1st December, 2021 respectively. The 2nd and 3rd respondents did not file any response or submissions to the notice of motion application. The ex parte applicant identified the following issues:-

- (I) Whether the ex parte applicant was accorded a fair hearing and hence procedural fairness by the Respondents.
- (II) Whether the respondents acted in abuse of power
- (III) Whether the respondents' actions were unlawful, irrational and unreasonable; and
- (IV) Costs

9. On whether the ex parte applicant was accorded a fair hearing and hence procedural fairness by the respondents, the counsel submitted that evidently and demonstrably the decision to demolish or otherwise remove the ex parte applicant from its location was arrived at arbitrary and without according the ex parte applicant a fair hearing thus it was condemned unheard. The counsel pointed out that the ex parte applicant was not afforded the courtesy of a notice. Reliance was placed on **Article 50 (1)** of the **Constitution of Kenya 2010** and **Sections 4(3) (a) (b), (c),(d),(e),(f),(g) and 7 (2) (a) (v)** of the **Fair Administrative Action Act**. The latter demands that a decision maker do accord a fair hearing to any person whose rights or fundamental freedoms are likely to be adversely affected by the decision.

10. The counsel submitted that the resolution to demolish or remove the ex parte applicant from its lawful location without giving the latter a chance to be heard was contrary to the principles of natural justice which precludes a party from being condemned unheard.

11. The ex parte applicant further contends that failure to accord it a fair hearing as demonstrated in its application, is indicative of procedural impropriety on the part of the respondents.

12. Reliance was further placed on the cases of **Accounting Officer Kenya Ports Authority (ex parte) Versus Republic Procurement Administrative Review Board & 3 others (interested parties) [2019]eKLR, Onyango Oloo Versus Attorney General (1980-1989)EA 456, Pashito Holdings Ltd and Another Versus Paul Nderitu (1997)eKLR and Republic Versus Public Procurement Administrative Review Board; Shenzhen Insolvent Co. Ltd & Another (interested party) ex parte Kenya power & Lighting Co. Ltd (2019)eKLR.**

13. On whether the respondents acted in abuse of power, the counsel for the ex parte applicant submitted that despite the former having obvious power and mandate as regards wildlife conservation and protection of wildlife heritage in the Mara Game Reserve, the ex parte applicant was never consulted, notified or in any way engaged in the decision making process. The counsel added that as a result of non-failure to consult the ex parte applicant, it has been subjected to scurrilous and defamatory allegations in media and social media platforms and has had its reputation and standing irreversibly damaged and stands to suffer even further harm and injury should the officers of the 1st and 2nd respondents act on the impugned decision, directive and/or orders to demolish and/or remove the camp. The ex parte applicant relied on the cases of **Keroche industries Ltd Versus Kenya Revenue Authority (2007)eKLR and Republic Versus Kenya Revenue Authority ex parte Cosmos Ltd (2016)eKLR.**

14. On whether the respondents actions were unlawful, irrational and unreasonable, the ex parte applicant contends that the impugned decision having been made in reckless and indifferent contravention of both constitutional, statutory and common law tenets, then the same was made out of error. The ex parte relied on the cases of **Republic versus K.S Bunyasi, the Principal-Hospital Hill High School & 3 others Ex parte Awo (minds suing through his fathers and next friend Noje) and another (2019)eKLR, Judicial Service Commission Versus Mbalu Mutava & another(2015)eKLR and Ignatius Kabiru Mwariri & 14 others versus City Council of Nairobi & another (2014)eKLR.**

15. On its part, the 1st respondent framed two (2) issues for determination. The issues were: -

- (a) Whether the orders sought by the Ex parte applicant can issue considering the limited jurisdiction of this court in judicial review; and
- (b) What orders should be made as to costs

On whether the orders sought by the ex parte applicant can issue, the 1st respondent correctly submitted that this court sitting in this judicial

review is not concerned with the merits of a decision but rather the decision making process. In support of his submissions, the counsel relied on the case of **Municipal Council of Mombasa Versus Republic & another (2002)eKLR** where the Court of Appeal held thus

“.....judicial review is concerned with the decision-making process, not with the merits of the decision itself....The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision-maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself such as whether there was or there was not sufficient evidence to support the decision and that, as we have said, is not the province of judicial review.”

The counsel went on to cite the case of **Peninah Nandako Kiliswa versus Independent Electoral and Boundaries Commission & 2 others(2014)eKLR** where the Court of Appeal affirmed this position and which decision was adopted in the Supreme Court following a further appeal:

“.....it is axiomatic that in an application for judicial review, the High Court is not concerned with the merits of the impugned decision of an inferior tribunal; the court is merely concerned with the tribunal’s decision-making process, to ensure that it has not acted without or in excess of jurisdiction and that it has observed the rules of natural justice.”

16. The counsel further relied on the case of **Funzi Island Development Ltd & 2 others versus County Council of Kwale & 2 others (2014)eKLR and Ransa Co. Ltd versus Manca Francesco & 2 others (2015)eKLR**.

17. Flowing from the above, the counsel submitted that the ex parte applicant’s complaint is founded on the Cabinet Secretary’s twitter post of 8th September, 2020 where he tweeted:-

“I have discussed with Narok County Governor @SamuelTunai, about the camp built beside the Mara River, blocking the Wildebeest crossing. It’s very disturbing and we expect the Governor to take action and have the camp removed!”

The 1st respondent’s counsel went on to submit that according to the ex parte applicant, the tweet constituted a directive from the Cabinet Secretary to the Governor of the 1st respondent to demolish the ex parte applicant’s camp in the Mara and that the latter posits that the directive was issued without according it an opportunity to be heard.

18. It was also submitted that in light of the limited jurisdiction of this court in judicial review, the grant of blanket injunctive order such as the one sought by the ex parte applicant is disproportionate for the following reasons: -

(a) The said tweet by the Cabinet Secretary cannot be said to be a directive that would precipitate the invocation of the judicial review jurisdiction of this court or any other court. In fact, we dare say, in this country, Official Government business is not done through tweets. It is done through the Kenya Gazette, signed memorandum and letters. The said tweet by the Cabinet Secretary was not an official policy statement. The tweet was the Cabinet Secretary’s personal conduct and not an exercise of state power.

(b) Even if the said tweet was to be considered an official statement of the 1st respondent, a situation wholly denied, in no way can the said tweet be said to be a directive from the Cabinet Secretary to the Governor. In the first place, the Cabinet Secretary has no authority under any law to direct the chief executive officer of the 1st respondent recognized by the Constitution and in the County Government Act as to the performance of his functions.

(c) Be that as it may, when my Lord looks at the said tweet, you will notice that the actual operative words used in the tweet are **“we expect the Governor to take action and have the camp removed!”** simply put, all the cabinet secretary is saying is expressing his outrage as to what happened when wildebeests were diverted and further expressing a position asking the Governor to sought out the matter. Indeed, these concerns were not only expressed by the cabinet secretary but by the general public as well.

(d) Indeed, as was confirmed by the county secretary of the 1st respondent after it noticed the avalanche of the public outcry, the 1st respondent initiated an investigation into the matter. The ex parte applicant’s director at paragraph 14 of his verifying affidavit has indeed confirmed that representatives of the 1st respondent visited the camp to carry out investigation. The said Director however misrepresents the facts by alleging that certain findings were communicated to them by the 1st respondent’s representatives absolving the ex parte applicant of any wrongdoing. This position is not backed up by any document because no such finding exists however such averment is a confirmation that indeed by the time this suit was filed the 1st respondent had not taken any action or decision against the ex parte applicant but that preliminary investigations had been initiated.

(e) The public interest in the conservation of the Mara for posterity far outweighs any private interests of the ex parte applicant.

(f) It is not in doubt at as a result of the diversion of the wildebeests, there became apparent a threat to the Great Annual Migration phenomenal that if not addressed will not only be a death knell to the Mara as a global tourist destination but also an imperil to our national interest.

(g) There are existing trans-boundary obligations that compel the 1st respondent to ensure that any activities that interfere with the sustainable management of the Serengeti-Mara ecosystem are swiftly addressed. Thus, the 1st respondent ought not to be hampered in its statutory mandate to act in public interest should the situation so demand.

(h) If this court grants the orders sought by the ex parte applicant, this court will not only be excising jurisdiction prematurely for there is no decision made yet against the ex parte applicant but it will also be curtailing the 1st respondent.

19. As for the costs, the counsel submitted that the court should be guided by the principle that “costs follow the event”.

20. Having considered the rival submissions filed by the counsel on record for the parties, I am of the view that the only issue for determination is whether the application has met the threshold for the grant of judicial review orders.

21. At the outset it must be appreciated that judicial review is concerned with decision making process and not with the merit of the decision as was submitted by the counsel for the ex parte applicant.

22. It is common ground that there was the Cabinet Secretary’s twitter post of 8th September, 2020 whose contents I need not repeat herein. Even though the counsel for the ex parte applicants submitted that there was no evidence to show that the event complained of ever happened i.e. the representatives of the 1st respondent descending with bulldozers and heavy machinery to demolish the ex parte applicant’s camp, paragraphs 12 and 13 of the 1st respondent’s replying affidavit show that it undertook to carry a fact finding exercise so as to verify the incident that was widely circulated in social media platforms giving rise to unprecedented avalanche of commentaries condemning the incident of where wildlife was prevented from crossing the Mara River by the employees of the ex parte applicant. The 1st respondent is quick to point out that it is yet to reach a decision. Nowhere in the said replying affidavit deposed by Elizabeth Sanangoi Lolchoki, the County Secretary of the 1st respondent, is it shown that the ex parte applicant was given a hearing even as the fact finding exercise was ongoing. Suffice it to say, the 1st respondent ought to have given the ex parte applicant the opportunity to show why its camp could not be removed or demolished from the site where it is situated. In my view, failure by the respondents to grant the ex parte applicant the chance to be heard during the fact finding exercise and the resultant actions were unlawful, irrational and unreasonable and lacked procedural fairness.

23. Flowing from the above the question is whether this court can grant a blanket injunctive orders as sought by the ex parte applicant. I have looked at the notice of motion application dated 11th September, 2020. In my view prayers 2,3 and 5 of the application cannot be granted by this court while sitting in this judicial review matter. To grant the said prayers, the court would be delving into the merits of the decision of the respondents’ as opposed to decision making process. However, I am satisfied that prayers 1 and 4 can be granted.

24. The upshot of the foregoing is that the notice of motion application partially succeeds and in the circumstances, I hereby proceed to grant the following orders:-

(1) That an order of prohibition does issue directed to the 1st and 2nd respondents their officers and any other authority acting on their instructions prohibiting them from demolishing, removing and/or interfering with the quiet possession of the ex parte applicant.

(4) That an order of certiorari does issue to quash the discussions, decisions, directives and/or orders of 8th and 9th September, 2020 of the 1st and 2nd respondents to remove and/or demolish the ex parte applicant.

25. The circumstances of this matter demands that each party herein bear their own costs. I, therefore, order that each party will bear their own costs.

SIGNED, DATED AND DELIVERED AT NAROK VIA EMAIL THIS 26th DAY OF JANUARY, 2022.

MBOGO C.G,

JUDGE

26/1/2022

IN THE PRESENCE OF:

CA: TIMOTHY CHUMA