REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 445 OF 2015

IN THE MATTER OF APPLICATION FOR LEAVE TO FILE JUDICIAL REVIEW PROCEEDINGS IN THIS COURT UNDER ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW PROCEEDINGS FOR A PREROGATIVE WRIT OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF SECTIONS 8 & 9 OF THE LAW REFORM ACT CAP 26 AND ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

IN THE MATTER OF ARTICLE 10, 40, 47, 50, 159, 259(1) OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION ACT CAP 387 LAWS OF KENYA

BETWEEN

REPUBLIC ……..……..……APPLICANT

AND

NAIROBI CITY COUNTY……1st RESPONDENT

DIRECTOR/ASSISTANT DIRECTOR OF ENVIRONMENT

IN CHARGE OF ENVIRONMENTAL MONITORING, COMPLIANCE AND ENFORCEMENT.....2ND RESPONDENT

EX PARTE APPLICANT: PREMIER FOOD INDUSTRIES LIMITED

JUDGEMENT

Introduction

1. By a Notice of Motion dated 25th October, 2015, the *ex parte* applicant herein, **Premier Food Industries Limited Premier Food Industries Limited,** seeks the following orders:

a. **An Order of Certiorari to remove to this court and quash the decision of the Respondents to issue a Closure Notice dated 3rd December 2015, as against the Ex Parte Applicant served upon it on 8th December 2015 and interfere with the business of the Ex Parte Applicant.**
b. **An Order of Prohibition to prohibit and deter the Respondents, their agents, servants and/or employees, the OCPD Kasarani Police Division, the OCS Ruaraka Police Station, the Chief Baba Dogo, and the Sub County Administrator for Ruaraka Sub County and the Sub County Commander for Ruaraka from enforcing the Closure Notice dated 3rd December 2015,served upon the Ex Parte Applicant on 8th day of December 2015 and which is expected to take effect and full force on the 15th day of December 2015.**
c. **An Order of Prohibition to Prohibit and deter the Respondents, their Agents, Servants and or Employees, OCPD Kasarani Police Division, the OCS Ruaraka Police Station, the Chief Baba Dogo, and the Sub County Administrator for Ruaraka Sub County and the Sub County Commander for Ruaraka from threatening, intimidating, closing down and or in any way interfering with the business operations of the Applicant herein.**
d. **An Order of Mandamus directed at and compelling the Respondents to undertake an Environmental Impact Assessment of the Applicant's Premises before any action on closure of the Factory is made.**
e. **Costs of the application be provided for.**

***Ex Parte* Applicant's Case**

2. According to the applicant, in the course of business, on the 8th day of December 2015, the Applicant was served with a Closure Notice dated 3rd December 2015, whose effect would crystallize in seven (7) days after successful service of the Closure Notice. The said Notice, it was averred directed that the Applicant should within seven (7) days of the service thereof stop the operations of all factory activities which are associated with discharging factory waste water; stop any liquid discharge into the public sewer line; undertake the environmental report and evaluate the environment impacts resulting from the pollution caused by the factory waste discharges; liaise with the Nairobi City Water & Sewerage Company services to provide a permanent solution pertaining to the said pollution; immediately undertake appropriate environmental mitigation measures to restore the affected families at Riverside estate; and submit a letter of commitment to the chief officer for environment and forestry sub-sector of Nairobi City County within 48 Hours from the date of receipt of the notice to the effect that the Applicant would comply with the requirements herein. The said notice, it was averred was copied to the OCPD Kasarani Police Division, the OCS Ruaraka Police Station, the Chief Baba Dogo, the Sub County Administrator for Ruaraka Sub County and the Sub County Commander for Ruaraka who were to ensure compliance with the said Closure Notice.
3. It was averred that whereas the said Notice mandatorily required the Applicant to stop any liquid discharges into the public sewer, the said requirement is not only illegal and unreasonable but also unenforceable and impractical. To the applicant, based on legal advice, if the public sewer is blocked, then the same cannot be the Applicant's responsibility since it is under the preserve of the Nairobi City Water and Sewerage Company, the owners of the said public sewer. In the applicant's view, the Notice fails to appreciate the roles of the various arms of government since it is aimed at perverting the course of justice and usurping the functions of an arm of government not within its mandate.
4. The applicant asserted that it had over the years procured as required by law a valid effluent discharge license annually and in this instance for the period 1st January, 2015 to 31st December, 2015 issued by the Nairobi City Water and Sewerage Company allowing it to discharge its effluent to the Sewer Network. The applicant however denied that it was discharging its effluent to the environment and that it was not the cause of flooding in the residential houses of Glucola Estate that is apparently polluting Mathare River. The applicant case was that the effluent that is discharged to the Nairobi City Water and Sewerage Company is treated before being disposed and

therefore the allegation by the Respondents that the Applicant discharges waste to the environment is not correct at all.

5. It was the applicant's position that there is no evidence submitted supporting the allegation that the Applicant's actions or lack thereof have or are affecting families and the extent of the said damage. To it, the Notice in question fails to appreciate that the discharge into the public sewer is not only a legal requirement but also a contractual one with Nairobi City Water and Sewerage Company which the Applicant subscribes to by remitting annual premiums in order to be allowed to discharge the effluent to the sewer line.
6. Accordingly, the applicant contended that the Respondent's Notice of Fore-Closure on the basis of the discharge of the effluent to the public sewer is not only illegal, unreasonable, inordinate and draconian but also beats logic as the Applicant will be left in a state of limbo as to where effluent from its factory will be discharged. It was its contention that as a responsible corporate citizen it has over the years complied with any Notice issued to it from the Respondents or otherwise and has engaged the right offices to sort whatever issue is raised and has always alerted the Nairobi City Water and Sewerage Company of any issues that have been raised regarding the said sewer and who in return have made promises to look into the issues raised.
7. The applicant disclosed that on receiving the Notice of 16th September 2015 it, through its officers, went to the Nairobi City Water and Sewerage Company and raised the concerns with them and they promised to look into the matter and revert. The applicant's was that upon alerting the Nairobi City Water and Sewerage Company Ltd as the Owners of the said Sewer, it is for them to rectify whatever concerns there is regarding the public sewer. It was averred by the applicant that on receiving the Closure Notice it wrote to the Respondents and informed them of its position on the matter; that it is not responsible for the pollution in the environment and that all its effluent is discharged into the Public Sewer and that it has raised the matter with the relevant party. The applicant further instructed its Advocates on record Messrs Wekesa & Simiyu who made an appeal to the National Environment Tribunal as per the instructions given in the Notice and the said Tribunal indicated that it has no Jurisdiction to determine the matter as its jurisdiction is limited by section 129 of the ***Environmental Management and Co-Ordination Act Cap 387 Laws of Kenya*** (hereinafter referred to as "EMCA").
8. According to the applicant, it has occupied the said premises for over thirty (30) years and being a responsible corporate citizen has never had an issue with polluting the environment around the premises or affecting the community around the premises, therefore the Notice herein has no basis at all. Further, the Applicant has employed over three hundred (300) people to run the operations of the factory; therefore a Closure Notice that has no basis legally or otherwise will not only affect its business operations but will also adversely affect over three hundred (300) families that seek and derive their livelihood from the Applicant's operations. It was disclosed by the applicant that on an annual basis the Applicant ensures that it submits its Self Environmental Audit Report pursuant to the ***EMCA***, 1999 and Environmental Impact Assessment/Environmental Audit Regulations 2003 and which recommendations of the said assessment report have been well accepted over the years with no rejections from the National Environmental Management Authority (hereinafter referred to as "NEMA").

Respondents' Case.

9. In response to the application, the respondents contended that the notice of motion as drawn is fatally defective and brought under the wrong provisions of the law. To the Respondents, the issues raised in the notice of motion can only be canvassed in another court and not the judicial review court since judicial review proceedings are only concerned with the process of decision making and not the merit of the decisions made which is what the ex parte applicant is aggrieved by.
10. It was the Respondents' case that in judicial review proceedings the respondent will not be able to adduce the evidence in its hands to prove that the decision made is not capricious and that there were grounds supporting the decision. In their view, it is clear that there are conditions given by the respondent to the applicant and if the ex parte applicant would comply the closure need not to take place.
11. The respondents averred that no rules of natural justice have been breached and the respondent is

not bent or breaching any as a chance to be heard has been accorded. The Respondent therefore asserted that the application is an outright abuse of court process and should be struck out instantly.

12. According to them, it is the ex parte applicant who should undertake to do an Environmental impact Assessment Report to prove that the conditions stipulated in the contested notice have been fulfilled and not vice versa. Further it is the respondent's mandate to regulate operations of factories, hotels and catering operations within its jurisdiction and hence the requirements complained of in ground 3 of the application are justified. In the respondents' view, the orders sought cannot be issued as coined as they will amount to prohibiting the respondent from carrying its mandate and a mandatory order can only be issued in the clearest of cases which is not the case in the instant application.
13. It was contended that the ex parte applicant had not demonstrated a clear case for issuance of injunctive orders in judicial review proceedings. In the respondents' view the issues relating to employment are irrelevant in these proceedings as employment opportunities have nothing to do with the decision making process. Similarly, the financial loss likely to be suffered can be averted if only the ex parte applicant complies with the conditions in order to continue operating the factory.
14. The respondents asserted that the ex parte applicant had not exhibited any document and/or report from the public health officer to show that the suit premises have been inspected and in order. It was asserted by the respondents that the notice complained of is not *ultra vires* the ***EMCA*** but instead compliments the same. The respondents averred that an effluent discharge license could have been obtained when requirements met but a period of more than 6 months is enough to violate the requirements making it necessary to have an enforcement.

Determinations

15. I have considered the application, the affidavits both in support of and in opposition to the application and the submissions filed as well as the authorities relied upon.
16. It is important to remember that Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the judge disagrees with what the public body has done, but whether there is some recognisable public law wrong that has been committed. Whereas private law proceedings involve the claimant asserting rights, judicial review represents the claimant invoking supervisory jurisdiction of the Court through proceedings brought nominally by the Republic. See **R vs. Traffic Commissioner for North Western Traffic Area ex parte Brake [1996] COD 248.**
17. The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to to uplift the quality of public decision making, and thereby ensure for the citizen civilised governance, by holding the public authority to the limit defined by the law. Judicial review is therefore an important control, ventilating a host of varied types of problems. The focus of cases may range from matters of grave public concern to those of acute personal interest; from general policy to individualised discretion; from social controversy to commercial self-interest; and anything in between. As a result, judicial review has significantly improved the quality of decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint it is a sufficient tool in causing the body in question to remain accountable.
18. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate

to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through the taking into account of an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See **Reid vs. Secretary of State for Scotland [1999] 2 AC 512.**

19. In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** it was held that:

> **"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters…The court should not act as a Court of Appeal over the decider which 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."**

20. In **Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60.***
21. Judicial review, it has been held time and again, is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285.
22. The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court. See Chief Constable of the North Wales Police vs. Evans (1982) I WLR 1155.
23. In this case, the Respondents contended that the applicant's factory had been inspected in relation to factory waste water (effluent) which was being discharged into the environment and was subsequently flooding the Residential houses of Glucola Estate and ending up polluting Mathare River. The said notice referred to an earlier notice which had been issued. The applicant on the other hand has disputed these allegations and contended that it has at all times complied with the law. Here, it is clear that there are facts alleged by both the parties which remain unresolved. Such disputed facts, it is my view cannot be resolved on cold-print affidavits but may require viva voce evidence to be taken and if necessary even a visit to the *locus in quo*. Such a procedure is normally not available in judicial review proceedings where the determination is based on affidavits. Accordingly, this Court cannot be expected to make a determination as to whether applicant is guilty of discharging effluent to the environment or not. That is a matter which is better dealt with by specialised bodies established by the relevant legislation to investigate the same and make appropriate decisions.
24. The applicant has however contended that the impugned decision was made by the respondents without it being afforded an opportunity of being heard. The Respondents however contended that the impugned notice dos not amount to a decision as contemplated under Order 53 rule 2 of the ***Civil Procedure Rules***. This position calls for a determination of what amount to a decision for the

purposes of judicial review proceedings. What is a decision for the purposes of judicial review? It has been held that a decision is a deliberate act that generates commitment on the part of the decision maker toward an envisaged course of action of some specificity. Going by this definition, it is my view that the letter dated 3rd December, 2015 which in effect found that the applicant was culpable of some wrong doing and directed the applicant to undertake certain remedial actions at the pains of facing the closure of its factory was clearly a decision. See ***Public Administration,* A Journal of the Royal Institute of Public Administration, By PH Levin,** at page 25.

25. Article 47 of the Constitution provides as follows:

> ***(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***
>
> ***(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.***

26. That the Respondents action was an administrative one is not in dispute. The Respondent was therefore under a duty to ensure that its action was expeditious, efficient, lawful, reasonable and procedurally fair. In my view, before the Respondent can determine whether a person is discharging effluent o the environment or not hence ought to abate the same, the Respondent ought comply with section 4(3) of the ***Fair Administrative Action Act, 2015*** which provides as follows:

> ***(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision***
>
> ***(a) prior and adequate notice of the nature and reasons for the proposed administrative action;***
>
> ***(b) an opportunity to be heard and to make representations in that regard;***
>
> ***(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;***
>
> ***(d) a statement of reasons pursuant to section 6;***
>
> ***(e) notice of the right to legal representation, where applicable;***
>
> ***(f) notice of the right to cross-examine or where applicable; or***
>
> ***(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.***

27. The respondent was therefore required to give the applicant prior notice of what was complained against the applicant ad an opportunity to be heard on the said complaint before the decision was made either way. Although in the impugned notice, the respondent has referred to "an earlier notice", the purported notice is not exhibited in the replying affidavit. In light of the allegation by the applicant that the respondent did not afford it an opportunity of being heard before the notice was issued, it was incumbent upon the respondent to adduce evidence showing that they complied with the rules of natural justice as envisaged under Article 47 of the Constitution as read with the provisions of the ***Fair Administrative Action Act*** aforesaid. In this case there is no such evidence on record.

28. With respect to procedural fairness, it was held in **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300** that procedural impropriety is one of the grounds upon which a Court would be entitled to grant judicial review orders and according to the court:

"Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

29. Therefore the respondents were obliged to afford the applicant a hearing before they made its decision which decision, undoubtedly, threatened the economic interests of the applicant. As was held by the Court of Appeal in **Onyango Oloo vs. Attorney General [1986-1989] EA 456** the Court of Appeal expressed itself as follows:

"The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice.....A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...Denial of the right to be heard renders any decision made null and void *ab initio.*"

30. Therefore before the Respondents can determine whether or not a person is guilty of environmental degradation, it is my view and I so hold that in the interest of fairness such a person ought to be afforded an opportunity of being heard thereon.
31. Having considered the application herein, I find that the respondents acted un-procedurally hence their decision was tainted by procedural impropriety and the same cannot stand.

Order

32. In the result I find merit in the Notice of Motion dated 25th October, 2015 and I grant the following orders:

a. **An Order of Certiorari removing into this court for the purposes of being quashed the Respondents' decision dated 3rd December 2015 directed to the ex parte applicant also known as the Closure Notice which decision is hereby quashed.**
b. **As the said decision has been quashed the same is incapable of being implemented hence there is no need to grant the order of prohibition in the manner sought in prayer (b) herein.**

c. **With respect to an Order of Prohibition as sought in prayer (c) to grant the same as sought would amount to a permanent order prohibiting the respondent from carrying out their statutory mandate and this Court cannot do so.**
d. **With respect to prayer (d) whereas this Court has the jurisdiction to grant an order of mandamus, it cannot compel the respondents to exercise their power in a specific way.**
e. **The applicant will have the costs of these proceedings.**

33. Orders accordingly.

Dated at Nairobi this 26th day of July, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Otieno for Mrs Kariuki-Owesi for the Applicant

Cc Mwangi