



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. APPLICATION NO. 145 OF 2011

**IN THE MATTER OF: LOCAL GOVERNMENT ACT [CAP 265 LAWS OF KENYA] AND THE
ENVIORNMENT (MANAGEMENT & CO-ORDINATION) ACT, [No.5 of 1999] AND THE
REGISTRATION OF TITLES ACT [CAP 281 LAWS OF KENYA] AND THE CONSTITUTION
OF KENYA AND LAW REFORM ACT [CAP 26, LAWS OF KENYA] AND CIVIL
PROCEDURE ACT [CAP 21, LAWS OF KENYA]**

AND

**IN THE MATTER OF: NEMA LICENCE NO. NEMA/CP/PR/1/1171 FOR RESIDENTIAL
DEVELOPMENT ON PLOT NO. 3593/1/MN**

BETWEEN

THE REPUBLIC.....APPLICANT

VERSUS

**NATIONAL ENVIORNMENTAL MANAGEMENT AUTHORITY
(NEMA).....RESPONDENT**

AND

1. MICHAEL HUGHES

2. NAIMI SHA

3. GEORGE P. NESBITT

4. JAMES WILDE AND MARIA WILDE

5. BROWN ONDEGO AND IRIS ONDEGO

6. T M KUDRATI

7. ROHIT DEVANI AND NILA DEVANI

8. PAUYL JULIAN FAY AND PENNELOPE ANNE HOLDING

9. BULKON BUILDERS LTD

10. SIORENZO CASTELLANO

11. HILESH SHAH AND SAPNA SHAH.....INTERESTED PARTIES

RULING

Introduction

The Pleadings

1. The Pleadings herein comprise -

(a) a Chamber Summons dated and filed on 2nd December 2011, for leave to apply for orders of **Certiorari** to quash the Respondent authority's decision of 28th November, 2011 ordering the stoppage of construction works on LR No.3593/1/MN after it had earlier granted its approval per letter of 24th October 2011,

(b) by the same Chamber Summons, the Applicant also sought an order of **prohibition** to prohibit the Respondent from interfering with the approval in respect of development on the said property.

(c) The ex parte Applicant also sought an order that the leave granted do operate as a stay against the Respondent's and the named interested Parties from interfering with development works taking place on the property pursuant to the approval aforesaid No. NEMA/CP/PR/1/1171.

2. Though the Court granted leave to commence judicial review proceedings for the said orders of **certiorari** and **prohibition**, the question of whether the leave granted should operate as a stay was to be determined after hearing **inter partes**.

3. However before the hearing **inter partes** of the question whether the leave granted should operate as a stay, the Respondent filed grounds of opposition to the entire application. The Interested Parties filed a Preliminary Objection on a point of law objecting to the application by way of judicial review, rather than through a statutory appeal as provided by section 129 of the Environment Management and Coordination Act 2000 (EMCA)

4. Following a hearing of the question whether the leave ought to operate as a stay, and the Preliminary objection, the court in its Ruling dated and delivered on 24th September 2012, dismissed the Preliminary objection raised by the Interested Parties and the Respondent. The court also declined to grant the ex parte Applicant's prayer for an order that the leave granted do operate as a stay. Instead, the court directed that the main Motion be heard **inter partes**.

The Notice Of Motion

5. By the time the Preliminary Objection was argued and determined, the ex parte Applicant had filed its Notice of Motion dated 22nd December, 2011, and sought the orders following –

(1) that an order of Certiorari be granted to quash the Respondent's decision contained in a letter dated 28th November, 2011 ordering Coral Drive Luxury Homes Ltd to stop construction works on property LR No.3593/1/MN notwithstanding the Respondent's approval of the same issued on 24th October, 2011, vide Ref. No. NEMA/CP/PR/1/1171,

(2) that an order of prohibition be granted to prohibit the Respondent from interfering with the Respondent's approval No. NEMA/CP/1/1/1171 dated 24th October, 2011 and was issued by the Respondent to Coral Drive Luxury Homes Ltd in respect of development on property LR No.3593/1/MN,

(3) that an order of judicial review be granted against the Interested Parties from interfering with the development works taking place on property LR No.3593/1/MN as authorized with Approval No. NEMA/CP/PR/1/1/1171.

(4) that the costs of the application be provided for.

6. The Notice of Motion (the Application), was premised upon the grounds in the Statutory Statement, and the Affidavit of E. Muriu Kamau sworn and attached to the Chamber Summons for leave referred to above,

7. In opposing the aforesaid Application the Interested Parties filed a Replying Affidavit of George P. Nesbitt, the third Interested Party sworn and filed on 13th December 2011. The Application was also opposed by the Respondent through the Replying Affidavit of Martin Shimba, the Respondent's Senior Compliance and Enforcement Officer sworn and filed on 1st July 2014 and attaching a copy of a report dated 14th March 2014 to the effect that the ex parte Applicant's project had been abandoned.

The Applicant's Case

8. The ex parte Applicant's case is entirely hinged upon the construction or interpretation to be placed upon the contents of the Respondent's letter Ref. No. NEMA/CP/PR/1/1/1171 dated 24th October 2011, granting the ex parte Applicant "approval" subject to:-

(1) General Conditions

(2) Construction Conditions

(3) Operational Conditions

(4) Notification Conditions and

(5) Decommissioning Conditions.

9. The said letter required the ex parte Applicant to confirm in writing within thirty (30) days that the conditions shall be complied with prior to the commencement of the project to enable the Authority (the Respondent) process the Environmental Impact Assessment Licence.

10. By letter No. CV/EK/034/08 dated 22nd November, 2011, under the signature of one E. Muriu Kamau Group Chairman of the ex parte Applicant, the ex parte Applicant confirmed that the ex parte Applicant [would be] **"complying with the stated conditions and hereby request for the EIA Licence."**

11. However by a letter Ref. NEMA/CP/PR/1171/10 dated 28th November 2011 and stated to be issued following a site visit on 22nd November 2011, the Respondent informed the ex parte Applicant following the visit, it was **"noted that certain Environmental concerns have not been addressed. You are therefore required to expand coverage of the consultation exercise to include the immediate/adjacent neighbours to the proposed project before the project implementation."**

12. The ex parte Applicant argues that this letter should be quashed on the grounds **inter alia**, that all necessary approvals had been obtained from all relevant government agencies and that the Respondent should not be subject to complaints made by the Interested Parties.

13. In their written submissions, Counsel for the ex parte applicant argued **inter alia** that the Respondent acted illegally and failed to grant the Applicant fair hearing, and acted contrary to the Applicants legitimate expectation, and that the court's discretion should be exercised in favour of the Applicant so as to ensure that one hundred plus (100+) families which are expected to gain from the ex parte Applicant's project are not denied shelter, and this would also be in the public interest, as against the interest of eleven

(11) or less individuals.

The Respondent's Case

14. The Respondent's case is **firstly** that the Court has no jurisdiction to determine this matter by way of judicial review, because the dispute should have been referred to the National Environmental Tribunal established under section 125 of the EMCA; that the remedy does not lie before the judicial review court. Counsel relied on the decision of the Court of Appeal in **REPUBLIC vs. NEMA [2011] eKLR** where the court said at p.15 of its judgment –

“ that where there was an alternative remedy and especially where Parliament had a statutory appeal procedure; it is only in exceptional circumstances that an order for judicial review would be granted and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the contexts of the particular case and ask itself what in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it.”

15. Counsel urged that since the ex parte Applicant has not explained why its dispute should not be referred to the National Environmental Tribunal, it should fail both under section 62 and section 129 of the EMCA and that the application should be dismissed with costs.

The Interested parties Case

16. The Interested Parties case is set out **firstly**, in the Replying Affidavit of George P. Nesbitt sworn and filed on 12th December 2011 with the consent of the Sixth, Seventh, Eighth, Ninth, and Tenth Interested Parties, and **secondly**, in the written submissions of Cootow & Associates, Counsel for the Interested Parties, dated 6th October 2014, and **thirdly** in the list of Authorities dated and filed on 15th December 2015.

17. The Interested Parties case is that they were not consulted as there was no public participation. The Interested Parties also contend that as registered owners of parcels of land adjacent to the project land the proponents of the project, were obliged to consult them, on the nature and extent of the project as the development would affect the value of their properties, and enjoyment of a clear and healthy environment.

18. More importantly the Interested Parties argue, it is the Respondent and not they, who made the decision to stop the Applicant from executing the project. The Interested Parties also argue that the Application herein does not disclose any or any reasonable cause of action [against either the Respondent or the Interested Parties], and should consequently be struck out with costs to the Interested Parties and Respondent. On this ground and on principle of the overriding objects under section 1A and 1B of the Civil Procedure Act, be struck out against both the Interested Parties, and the Respondents.

The Issues and Analysis of Submissions

19. I have analyzed the pleadings as well as the submissions, written and oral made by Counsel respectively for the ex parte Applicant, the Respondent and the Interested Parties. The ultimate issue of course is whether the Respondent acted **ultra vires** the provisions of its constituting statute, namely, the **Environment Management and Control Act**. The subsidiary issue, but equally important issue, is whether this court has jurisdiction to determine the application, [which issue was raised by the Respondent] where the statute has provided for an alternative remedy. I will take each of these issues in turn.

Of Jurisdiction

20. The issue of jurisdiction was raised by the Respondent which referred to the decision in **Republic vs.**

NEMA (supra) that where Parliament has provided an alternative statutory remedy, there must exist exceptional circumstances for an order of judicial review to be granted. The court's duty is to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself, **what**, in the context of the statutory power was the real issue to be determined and whether the statutory procedure of appeal was suitable to determine that issue.

21. Section 129 provides that any person who is aggrieved by -

(a) a refusal to grant a licence or to the transfer of his licence under this Act or regulations made thereunder;

(b) the imposition of any condition, limitation or restriction on his licence under this Act or regulations made thereunder;

(c) the revocation, suspension or variation of his licence under this Act or regulations made thereunder;

(d) –

(e) The imposition against himself any environmental restoration order or environmental improvement order by the Authority under this Act or regulations made thereunder, may within sixty days after the occurrence of the event against which he is dissatisfied appeal to the Tribunal in such manner as may be prescribed by the Tribunal.

(2) Unless otherwise expressly provided in this Act, where this Act empowers the Director General, the Authority or Committee of the Authority to make decisions, such decisions may be subject to an appeal to the Tribunal in accordance with such procedures as may be established by the Tribunal for that purpose.

22. Section 129 (4) is both clear and unambiguous as to what the grievance should be –

(a) a refusal to grant a licence, or transfer it,

(b) imposition of any condition, limitation or restriction on the licence;

(c) variation of the terms of the licence,

(d) imposition of **inter alia** environmental improvement condition,

23. The ex parte Applicant's claim is that the Respondent cancelled its licence. The letter of alleged "**cancellation**" dated 28th November, 2011 clearly stated "**environmental concerns had not been adequately addressed**", and asked the ex parte Applicant to address "**the concerns of the immediate/adjacent neighbours.**" In times of section 129 of the EMCA, this was an additional imposition on conditions. There is no material to show that the ex parte Applicant addressed that issue, or even replied to it. The ex parte Applicant construed it to mean a "**cancellation of the approval**" conveyed to it in the Respondent's letter of 24th October, 2011.

24. But even if it were a cancellation (and in my view it was merely an additional condition), it was within the Respondent's powers to do so under section 129 of the EMCA. Any construction or interpretation to the contrary is not borne out by the provisions of the Act.

25. Besides section 129 (4) of EMCA provides that pending the hearing of an appeal to the tribunal under section 129 (3) the status quo of any matter or activity, which is the subject of the appeal, shall be maintained until the appeal is determined. In turn, the decision of the tribunal under section 129 (3) is subject to appeal to the High Court within thirty days of the decision of the tribunal and the High Court decision on appeal shall be final.

26. It therefore follows that having been aggrieved by the additional condition the proper and efficacious remedy was not judicial review but an appeal to the tribunal under section 129 of **EMCA**

27. It also follows further that there are no circumstance exceptional or otherwise which warrant departure from the clear provisions of the Act as to the requirements and procedure for determination of grievance such as those of the ex parte Applicant. Any finding of exceptional circumstances would not only be a curious interpretation of the clear promisors of the law, but also an unjustifiable intervention by the court. Where Parliament has in a statute stated in a clear and unambiguous manner the procedure for determination of disputes in relation to acts, decisions or orders made under the Act it will be an ill wind blowing through the court if it were to allow a departure from the clear language of statute.

28. Envitably, therefore, the application herein does not lie. The proper forum was the National Environment Tribunal; and not the court of judicial review. The Respondent succeeds on this ground.

Of The Illegality Irrationality and Procedural Impropriety

29. Having arrived at the conclusion that the judicial review court was not the proper forum for resolution of the applicants' dispute with the Respondent, I should have concluded this Ruling. However, I consider these grounds because counsel for the ex parte Applicant dwelt at length on the alleged illegality, irrationality, and procedural impropriety by the Respondent, in relation to the additional condition imposed by the Respondents in its letter of 28th November, 2011.

30. Indeed as cited by Mr. Gikandi, learned Counsel for the ex parte Applicant, the principles of judicial review were restated in the case of **CIVIL SERVICE UNION vs. THE MINISTER FOR CIVIL SERVANTS [1985] AC 374** where Diplock LJ stated:-

“Judicial review has I think developed to a stage today when one can conveniently classify into three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call “illegality”, the second, “irrationality,” and the third “procedural impropriety.” By illegality, as a ground for judicial review I mean that the decision-maker must understand carefully the law that regulates his decision-making power and must give effect to it. By “irrationality” I mean what can now be succinctly referred to as “Wednesbury unreasonableness.” It applies to a decision which is so, outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. I have described the third as procedural impropriety rather than failure to observe the rules of natural justice or failure to act with procedural fairness towards the person affected by the decision.”

31. The Court of Appeal restated these principles in **REPUBLIC vs. KENYA REVENUE AUTHORITY, ex parte YAYA TOWERS LIMITED [2008] e KLR**, into –

- (i) abuse of discretion;
- (ii) irrationality;
- (iii) excess of jurisdiction;
- (iv) improper motives;
- (v) failure to exercise discretion;
- (vi) abuse of the rules of natural justice;
- (vii) fettering discretion;
- (viii) error of the law

32. Section 62 of the EMCA provides as follows:-

“62. The Authority may require any proponent of a project to carry out at his own expense further evaluation or environmental impact assessment study, review or submit additional information for the purpose of ensuring that the environmental impact assessment study, review or evaluation report is as accurate and exhaustive as possible”

33. What the letter of 28th November, 2011 did was to direct the ex parte Applicant to carry out a review and expansion of its environmental impact assessment report, and include, **“immediate/adjacent neighbours to the proposed project before project implementation.”**

34. Clearly this letter was in tandem with the terms of the letter of conditional approval conveyed to the ex parte Applicant, in the Respondent’s letter of 24th October, 2011 (Ref. NEMA/CP/PR/1/1/1171, which required the applicant to comply not only with the conditions set out in the said letter but other reasonable conditions required by the Respondent. In this regard, I concur with, and reiterate herein the decision of the court in **PETER BOGONKO vs. NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY [2006] KLR (E & L), where Wendo J, referred to HTV LTD vs. PRICE COMMISSION [1976] ICR 170**, where Lord Denning said –

“ . . . it has been said, I know that a public body which is entrusted by Parliament with the exercise of powers for the public good, cannot fetter itself in the exercise of them. It cannot be estopped from doing its public duty. But that is subject to the qualification that it must not misuse its powers; and it is a misuse of power to act unfairly or unjustly towards a private citizen where there is no overriding public interest to warrant it.”

35. Section 62 of the EMCA empowers the Respondent to require a proponent to comply with conditions of approval of a project. Such conditions include adequate public participation. The question of public participations was considered in the case of **MOSES MUNYENDO & 908 OTHERS vs. ATTORNEY – GENERAL & ANOTHER [2013] eKLR** in which reference was made to the case of **REPUBLIC vs MINISTER OF FINANCE & ANOTHER, ex parte Nyongo, [2007] KLR 299** wherein the court stated –

“Good public administration requires a proper consideration of the public interest. There is considerable public interest in empowering the public to participate in the issue. It ought to be the core business of any responsible government to empower the people because the government holds power in trust for the people. People’s participation will result in the advancement of the public interest. Good public administration requires a proper consideration of legitimate interests”

36. The Respondent is as a representative of the State, bound under Article 62 (1) (g), to eliminate processes and activities that are likely to endanger the environment. Likewise, the ex parte applicant has obligation under Article 69 (5) to cooperate with the Respondent and the Interested Parties to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.

37. The principle of public participation seeks to ensure environmental democracy and requires that the public, especially local communities, should participate in environment and development decisions that affect their lives and that this principle requires that the public should have appropriate access to information concerning the environment that is held by public authorities, and should be given an opportunity to participate in decision-making process.

38. It is thus clear to me that requiring the applicant to review and expand the environment impact assessment report cannot be regarded as an **unlawful act**, or a **cancellation** of the conditional approval set out in the letter of 24th October, 2011. This is one of those instances where an applicant abandons its project, turns around and alleges that the approving authority terminated its project illegally, irrationally or without regard to procedural propriety.

39. I think this is one of those unusual judicial review cases, where the court must say, that there is no cause or any reasonable cause of action against the Respondent. The Respondent cannot be faulted on requiring adequate public participation and especially by the owners of the adjacent properties. The Interested Parties cannot be faulted for insisting upon their right to a clean and healthy environment.

40. For those reasons I find and hold that the Application herein has no merit at all. The ex parte Applicant's Notice of Motion dated 22nd December, 2011 is therefore dismissed with costs.

41. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 14th day of October, 2016.

M. J. ANYARA EMUKULE

JUDGE

In the presence of:

Mr. Ongela bolding brief Mr. Gikandi for Applicant

No Appearance for Respondent

No Appearance for Interested Parties

Mr. Silas Kaunda Court Assistant