REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC JUDICIAL REVIEW NO. 1 OF 2018

REPUBLIC.....APPLICANT

-VERSUS-

CABINET SECRETARY, MINISTRY OF MINING.....RESPONDENT

-AND-

STOUT MIN METALS LIMITED.....INTERESTED PARTY

EX PARTE-

CHINA COMMUNICATIONS AND CONSTRUCTION COMPANY

CHINA ROAD AND BRIDGE CORPORATION

JUDGMENT

By a Notice of Motion dated 5th February 2018, the Exparte Applicant sought the following orders: -

a) An Order of Certiorari removing to this Honourable Court for purposes of being quashed the purported proceedings and the entire determination of the Respondent dated 24th November 2017 in the matter of the memorandum of complaint against China Road and Bridge Corporation and China Communications Construction Company dated 11th October, 2017.

b) An Order of Prohibition, prohibiting the Respondent, his officers, agents or any other person under his authority from enforcing the Order contained in the Respondent's purported determination dated the 24th November, 2017 in the matter of the memorandum of complaint against China Road and Bridge Corporation and China Communications Construction Company dated 11th October, 2017.

c) An order of Prohibition, prohibiting the Respondent his officers, agents or any other person under his authority from stopping the Applicant's activities within the licence area as threatened in the said determination or in any manner or guise interfering with the Applicant's lawful quarrying or construction activities in the licence area in purported enforcement of the Respondent's purported determination dated 24th November, 2017 in the matter of the memorandum of complaint against China Road and Bridge Corporation and China Communication Construction Company dated 11th October, 2017.

BACKGROUND

The brief facts of this Application are that Ex-parte Applicants filed a Notice of Motion dated 5th February 2018, with the supporting documentation. The Respondent did not respond to the application despite being served while the Interested Party, on the other hand, responded by way of a Replying Affidavit sworn on 8th February 2018.

On 19th April 2018, the Honourable Court granted stay of enforcement and/or implementation of the impugned decision dated 24th November 2017 and directed parties to file and exchange their written submissions.

The Applicants are currently constructing berths in the Lamu Port Project which is part of the Lamu Port-South Sudan Ethiopia (LAPSSET) corridor project and to fulfil their construction needs, the 2nd Applicant acquired L.R. NO. MWAPULA/MAGOGONI/603 which the 2nd

Applicant owns as an absolute proprietor and from which it obtains ballast.

It was the Applicants' case that they have valid Environmental Impact Assessment licences from the NEMA and, also, authority from the Ministry of Mining to carry out quarrying of ballast on the 2nd Applicant's said property. The Applicant stated that through a demand letter to the Applicants dated 10th October, 2017, the Interested Party purported that it had a Special Licence granting it exclusive rights to minerals which the Applicants were infringing on by mining ballast on the said property and that the Interested Party sought the sum of USD 1,920,000 from the Applicants.

The Interested Party forwarded the purported dispute to the Respondent vide Memorandum dated 11th October 2017 and subsequently, the Applicants provided the Respondent with their responses to the Interested Party's Memorandum by way of Response to Memorandum dated 16th November 2017.

It was the Applicants case that they came to learn later that vide a letter dated 2nd November 2017, the Respondent invited one Sherman Nyongesa & Mutubia Advocates to attend a hearing before the Respondent on 8th October 2017 a date that was long past ostensibly in an unrelated matter. The Applicants were not made aware of the Respondent's said letter dated 2nd November 2017 at the time and only became aware of it by reference in the impugned decision.

The Applicants stated that they were not invited by the Respondent to any hearing over the dispute between the Applicants and the Interested Party, on the purported hearing of 8th October, 2017.

The Applicants stated that on 24th November 2017, the Respondent purported to make the impugned decision where only the Interested Party was present and that it had not received any communication from the Applicants. Consequently, the Respondent held that: -

> ***"……I have considered the matter and hereby issue the following determination as contemplated by Section 156(3), (4) and (5);***
>
> ***(i) OBSERVE that the Respondent failed in carrying out proper due diligence before commencing their quarrying activities. The onus was upon the Respondent to ensure that they undertake their operations having been satisfied that their actions do not infringe on any existing mineral rights. It was therefore incumbent upon the Respondents to ascertain this through the Ministry of Mining before commencing their operation. In view of the above, I hereby find merit in the Petitioner's claim of wrongful actions by the Respondent.***
>
> ***(ii) DIRECT that the Petitioner and the Respondent commence discussions with a view of finding an amicable resolution of the issues brought before me within 21 days of the date of the Mining Act."***
>
> ***(iii) NOTICE is hereby given to the Respondents and the County Commissioner of Kilifi that in the event that not amicable settlement is registered with the Ministry within 21 days the Ministry will move to stop all activities within the licence area until all parties are fully compliant with the provisions of the Mining Act."***

It was the Applicants case that based on the impugned decision, the Interested Party started harassing the Applicants to pay the Interested Party the sum of USD 1,920,000 among other payments, as compensation. That on 27th December 2017, the Respondent attempted to act on its said impugned decision by purporting to stop all activities by the Applicants on their said property which action was only communicated to the Respondent.

The Applicants also came to learn later, in a letter dated 9th November 2017 (a day after the purported hearing of 8th November) and written by the Interested Party to the Respondent, that the Interested Party also did not attend the purported hearing of 8th November 2017 contrary to the Respondent's assertions in its impugned decision that the Interested Party was present.

That this was evident from the Interested Party's letter dated 9th November 2017 where the Interested Party had sought to know from the Respondent when the next hearing date would be since it had received communication from the Respondent's office on 7th November 2017 (a day before the hearing) that the hearing of 8th November 2017 would not take place and so did not attend.

INTERESTED PARTY'S SUBMISSIONS

The Respondent did not respond to the application despite being served while the Interested Party responded by way of a Replying Affidavit sworn on 8th February, 2018. The Interested Party avers that it is the exclusive owner of the mineral rights in the area of Special Licence 310 B by virtue of the Special Licence issued on 28th June, 2011 and thereafter reviewed from time to time.

Interested Party averred that the said Licence covers an area of 589 square Kilometres within Kilifi County and that it expended great amounts of money carrying out exploration programs for limestone resources which included geographical mapping, sampling, trenching, test pitting, drilling, geological modelling and feasibility studies.

It is the Interested Party's case that sometime in 2017, the Ex parte Applicants, without any colour of right, encroached on the Licence Area and commenced mining activities and carrying away limestone from the Licence Area. That the Applicants did not have any regard for the Interested Party's mineral rights which they claimed amounted to theft of limestone.

The Interested Party deposed that by the time it complained to the Minister, the Applicant had mined at least 800,000 tonnes of limestone whose value they put at $1,920,000.00 from the Licenced Area. It is accordingly their case that the Respondent rightly assumed jurisdiction over the dispute and proceeded to determine the same within the confines of the law.

The Hon. Attorney entered appearance in this matter for the Cabinet Secretary, Ministry of Mining (the Respondent) but they did not file a substantive response thereto.

APPLICANTS' SUBMISSIONS

Counsel submitted on one single issue for determination on whether the impugned decision was made in complete violation of the rules of natural justice and in violation of the Applicants' legitimate expectation of a fair hearing and whether the same was made in a biased manner and is irrational.

Counsel relied on Article 50 of the Constitution which provides that every person has the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. Counsel further relied on Article 47(1) of the Constitution, which provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

Mr. Obok cited the case of ***REPUBLIC V NATIONAL POLICE SERVICE COMMISSION EXPARTE DANIEL CHACHA CHACHA (2016) eKLR*** to support his submission on right to fair hearing. Counsel submitted that the Respondent made a deliberate, reprehensible, unlawful and impartial decision to lie in its impugned determination of a hearing that never took place on 8th November 2017 at all, therefore the Respondent's impugned decision is a complete.

Mr. Obok also submitted that the impugned determination is unreasonable, ultra vires, procedurally unfair, arbitrary based on irrelevant and unlawful considerations and in excess of jurisdiction conferred on the Respondent by law.

Counsel further relied on Section 156 of the Mining Act which sets the procedure for determination of dispute by the Respondent and submitted that the Respondent was under a statutory duty to accord the Applicants a reasonable opportunity to be heard, to consider the Applicants written statement and evidence and to act impartially, duties which the Respondent completely failed to perform to the detriment of the Applicants.

Counsel relied on the case of ***Council of Civil Servants Unions vs Minister for the Civil Service (1985) AC cited in Republic v Public Procurement Administrative Review Board & 2 others Ex-parte – Sanitam Services (E.A) Limited (2013) eKLR*** where the court held that: -

> ***"Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards".***

Counsel therefore urged the court to intervene and stop the implementation of orders dated 24th November, 2017.

ANALYSIS AND DETERMINATION.

Having considered the facts as stated by the applicant and the response by the Interested party, the court has to determine whether the process as enumerated was proper and fair. It is important to restate the meaning and the purpose of Judicial Review as a writ.

The purpose of judicial review was enunciated in the case of ***Municipal Council of Mombasa…Vs…Republic Umoja Consultants Ltd, Nairobi Civil Appeal No.185 of 2007(2002) eKLR***, where the Court of Appeal held that: -

> ***"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 make 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 they 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 this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of Judicial Review".***

A Handbook by Michael Fordham titled Judicial ***Review Handbook, 6th edition, Hart Publishing, 2012, p. 5*** defines judicial review as the rule of law in action and a central control mechanism of public administrative law where the judiciary discharges the constitutional responsibility of protecting against abuses of power by public authorities. This remedy is however not limited to decisions made by public bodies only but also covers decisions made by private entities. A plain and literal reading of ***The Fair Administrative Action Act, 2015*** in particular ***Section 3(1)*** confirms that private entities have been brought into the purview of judicial review. The particular section reads: -

> 3. ***Application.***
>
> ***(1) This Act applies to all state and non-state agencies, including any person***

(a) exercising administrative authority;

(b) performing a judicial or quasi-judicial function under the Constitution or any written law; or

(c) whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.

It is trite law that a court exercising judicial review jurisdiction is only concerned with the procedural propriety of a decision and not the merits. The court cannot be invited in a judicial review proceeding to act as an appellate court to reverse the decision of the 1st Respondent.

I have perused the letter by the Respondent dated 2nd November, 2017 annexed to the Verifying Affidavit of Li Qiang sworn on 20th December, 2017 which is the subject of this matter. The letter indeed shows that the Applicants were invited to attend a meeting on 8 th October, 2017 at 10:00 a. m which date had clearly passed.

The communication in this case shows that there was a disconnect as the parties who were meant to be in the dispute were never properly notified in good time to attend the dispute. Maybe there was some mischief in that the notification or the invitation was not meant to reach the parties. It is strange that even the Interested Party was not part of the proceedings as can be seen from the Interested Party's letter dated 9th November 2017 where the Interested Party had sought to know from the Respondent when the next hearing date would be since it had received communication from the Respondent's office on 7th November 2017 (a day before the hearing) that the hearing of 8th November 2017 would not take place and so did not attend. Who were the parties that the Respondent was dealing with during the purported hearing where parties rights were affected without being given an opportunity to a fair hearing? .

The Constitution provides for a right to a fair hearing and in the case of ***Evans Odhiambo Kidero & 4 others v. Ferdinand Ndungu Waititu & 4 others Petition No. 18 OF 2014*** as consolidated with ***Petition No. 20 of 2014 [2014] eKLR*** elaborated on the right to fair hearing as follows: -

> *"Fair hearing, in principle incorporates the rules of natural justice, which includes the concept of* **audi alteram partem***(hear the other side or no one is to be condemned unheard) and* **nemo judex in causa sua** *(no man shall judge his own case) otherwise referred to as the rule against bias.* **Peter Kaluma, Judicial Review: Law, Procedure and Practice** *2nd Edition (Nairobi: 2009) at page 195, notes that the rules of natural justice generally refer to procedural fairness in decision making. Further he analyses the two mentioned concepts of the rules of natural justice and states [at pages 176 and 177] that it is the duty of the courts, when dealing with individual cases, to determine whether indeed the rules of natural justice have been violated and noting that* **"although the necessity of hearing is well established, its scope and contents remain unsettled."**

The provisions of Article 47(1) and (2) 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.

Apart from that provision Section 4(1), (2) and (3) of the ***Fair Administrative Action Act*** provides as follows: -

1) ***Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.***

2) ***Every person has the right to be given written reasons for any administrative action that is taken against him.***

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.***

The Respondent was obliged to under those provisions to give prior and adequate notice and reasons for the proposed administrative action

and an opportunity to be heard.

It is evident that the Applicants were not given an opportunity to be heard and that the decision was arrived at was in violation of the Applicants right to a fair hearing hence was against the rules of natural justice. This is evident form the letters which were sent after the date had passed. That is a more reason why the Respondent never defended the impugned decision.

In the case of ***Geothermal Development Company Limited vs. Attorney General & 3 Others [2013] eKLR*** the court held that: -

> ***"As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it. Elementary justice and the law demand that a person be given full information on the case against him and given reasonable opportunity to present a response*. This right is not limited only in cases of a hearing as in the case of a court or before a tribunal, but when taking administrative actions as well. (See *Donoghue v South Eastern Health Board* [2005] 4 IR 217). Hilary Delany in his book, *Judicial Review of Administrative Action, Thomson Reuters 2nd edition, at page 272,* notes that, *"Even where no actual hearing is to held in relation to the making of an administrative or quasi-judicial decision, an individual may be entitled to be informed that a decision which will have adverse consequences for him may be taken and to notification of the possible consequences of the decision."***

The letter dated 2nd November, 2017 did not meet the requirements of notification and sufficient notice to the Applicant whose rights and interests stood to be adversely affected by the Respondent's administrative action.

I have considered the application the submissions by counsel and find that the application has merit as the rules of natural justice to a fair hearing were not followed. The process was opaque and was done irregularly by not involving the parties concerned. It is on record that even the Interested Party did not attend the meeting which came up with the impugned decision.

According I grant the following reliefs: -

a) An Order of Certiorari is hereby issued removing to this Honourable Court for purposes of being quashed the purported proceedings and the entire determination of the Respondent dated 24th November 2017 in the matter of the memorandum of complaint against China Road and Bridge Corporation and China Communications Construction Company dated 11th October, 2017.

b) An Order of Prohibition is hereby issued prohibiting the Respondent, his officers, agents or any other person under his authority from enforcing the Order contained in the Respondent's purported determination dated the 24th November, 2017 in the matter of the memorandum of complaint against China Road and Bridge Corporation and China Communications Construction Company dated 11th October, 2017.

c) An order of Prohibition is hereby issued prohibiting the Respondent his officers, agents or any other person under his authority from stopping the Applicant's activities within the licence area as threatened in the said determination or in any manner or guise interfering with the Applicant's lawful quarrying or construction activities in the licence area in purported enforcement of the Respondent's purported determination dated 24th November, 2017 in the matter of the memorandum of complaint against China Road and Bridge Corporation and China Communication Construction Company dated 11th October, 2017.

d) The costs of this application are awarded to the Applicant to be borne by the Respondent.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 22ND DAY OF MARCH, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.