



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

JUDICIAL REVIEW APPLICATION NO.4 OF 2014

IN THE MATTER OF AN APPLICATION BY PETER NYAMWEYA FOR LEAVE TO INSTITUTE JUDICIAL REVIEW PROCEEDINGS IN THE NATURE OF PROHIBITION, MANDAMUS AND CERTIORARI

AND

IN THE MATTER OF THE NATIONAL ENVIRONMENTAL TRIBUNAL AT NAIROBI, TRIBUNAL APPEAL NO. NET/111/2013 (JERUSHA KERUBO NYAMWEYA VERSUS NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY)

AND

IN THE MATTER OF ETAGO LAND DISPUTES TRIBUNAL

AND

IN THE MATTER OF THE ORDERS OF THE NATIONAL ENVIRONMENT TRIBUNAL AT NAIROBI, TRIBUNAL APPEAL NO. NET/111/2013 ISSUED ON 31ST DECEMBER, 2013 IN FAVOUR OF JERUSHA KERUBO NYAMWEYA

BETWEEN

PETER MARAGIA NYAMWEYA.....APPLICANT

AND

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY...1ST RESPONDENT

NATIONAL ENVIRONMENT TRIBUNAL.....2ND RESPONDENT

AND

JERUSHA KERUBO NYAMWEYA.....INTERESTED PARTY

RULING

1. What is before me is an exparte application by **Peter Maragia Nyamweya** (hereinafter referred to only as **“the applicant”**) dated 25th February, 2014 in which he is seeking leave of the court to institute judicial review application for orders of Prohibition and Certiorari against the respondents. The application is brought on the grounds set out in the supporting affidavit sworn by the applicant on 25th February, 2014 and the Statement of facts of the same date. The application is seeking the following reliefs;
 - i. **That the applicant be granted leave to apply for an order of Prohibition directed at the 1st respondent prohibiting it from issuing the interested party with the development approval and Environmental Impact Assessment License for the project proposed by the interested party, namely, construction of eight commercial residential apartment units in a three-storey building on Land Reference Number NYARIBARI CHACHE/ B/ B/ BOBURIA/ 3221 in Kisii Municipality, within Kisii County.**
 - ii. **That the applicant be granted leave to apply for an order of Certiorari directed at the 2nd respondent to bring to this court for the purpose of being quashed, the proceedings, decision, ruling and orders issued by the 2nd respondent on 31st December, 2013 in Tribunal Appeal No. NET/111/2013 in which the 2nd respondent among others rescinded the 1st respondent’s decision to deny the interested party development approval and Environmental Impact Assessment License.**
 - iii. **That the grant of such leave does operate as a stay of the ruling and consequential orders issued on 31st December, 2013 by the 2nd respondent in Tribunal Appeal No. NET /111/ 2013 and also bar the interested party from further carrying out any excavation, construction works or development on Land Reference Number NYARIBARI CHACHE/ B/ B/ BOBURIA/ 3221 in Kisii Municipality, within Kisii County pending the filing, hearing and final determination of the substantive application for orders of judicial review.**
 - iv. **That the costs of the application to be provided for.**

2. The applicant has sought leave to bring judicial review application for the orders mentioned above on the following main grounds;
 - i. **that the 2nd respondent condemned the applicant unheard in its decision made on 31st December, 2013 contrary to the rules of natural justice ;**
 - ii. **that the proceedings and consequential orders issued by the 2nd respondent on 31st December, 2013 are nullities and incapable of being legally and lawfully enforced;**
 - iii. **that the orders made by the 2nd respondent on 31st December, 2013 violated the applicants legitimate expectation of a fair hearing and protection of his fundamental rights to a clean and healthy environment.**
 - iv. **That the decision of the 2nd respondent made on 31st December, 2013 was arrived at arbitrarily, fancifully and the same was influenced by extraneous considerations.**

In summary, the facts giving rise to the present application as set out in the affidavits on record and the exhibits annexed thereto are as follows. The interested party had proposed to construct eight commercial residential apartment units in a three-storey building on her parcel of land known as LR. No. Nyaribari Chache/ B/ B/ Boburia/ 3221 (hereinafter referred to as **“the suit property”**). In accordance with the provisions of the Environmental Management and Coordination Act, 1999, the interested party applied to the 1st respondent for development approval and Environmental Impact Assessment License for the proposed development. By a letter dated 17th December, 2012, the 1st respondent notified the interested party of its decision not to issue the interested party with the Environment Impact Assessment License. The interested party was denied the said License on the ground that the social impacts associated with the

interested party's proposed development project will not enhance sustainable development. The interested party was aggrieved by the 1st defendant's decision and preferred an appeal to the 2nd respondent against the same. The 2nd respondent heard the interested party's appeal and in the process visited the suit property to ascertain for itself the situation on the ground. In the course of the hearing of the interested party's appeal, the applicant made an application to be joined in that appeal as a respondent or an interested party. That application was made on the ground that the appellant would be affected by the interested party's project and as should be heard by the 2nd respondent before a decision is made whether or not to allow the project to go on. The applicant's application to join the said appeal was dismissed by the 2nd respondent and the appeal proceeded without the applicant's participation. In a decision made on 31st December, 2013, the 2nd respondent overturned the 1st respondent's decision to deny the interested party development approval and Environmental Impact Assessment License. The 2nd respondent proceeded to grant to the interested party the Environmental Impact Assessment License. It is that decision by the 2nd respondent that the applicant seeks to challenge by way of the orders of judicial review. The applicant has contended that by denying him an opportunity to be heard, the 2nd respondent violated the rules of natural justice. As I have stated above, the applicant has contended further that his legitimate expectation to a fair hearing and a right to a clean and healthy environment was also violated. The decision by the 2nd respondent has also been attacked on the grounds of arbitrariness.

3. When the applicant's application came up for hearing before me ex parte on 3rd March, 2014, I did direct for reasons that I gave in my ruling of that date that the application be served for hearing inter-partes. The respondents and the interested party were served with the application. The application has been opposed only by the interested party. The interested party filed a document entitled "Affidavit" drawn by one, Simba David in opposition to the application. The document is not an affidavit because it was not sworn and the name of the deponent is not stated therein. When the application came up for hearing inter partes on 2nd April, 2014, Mr. Naeku appeared for the applicant while the interested party appeared in person. There was no appearance for the respondents. In his submission, Mr. Naeku submitted that what the court needs to determine at this stage is whether the applicant has established a prima facie case to be argued in the intended judicial review application. Mr. Naeku relied entirely on the applicant's affidavit in support of the application and the applicant's statement of facts and submitted that on the material placed before the court, there is no doubt that the applicant has established a prima facie case against the respondents. Counsel submitted further that there was no proper response to the application. He urged court to strike out the document referred to as "affidavit" which was filed in court by the interested party that I have referred to hereinabove. On whether the leave if granted should operate as a stay, Mr. Naeku submitted that there is no evidence before the court that the interested party has been issued with the development approval and Environment Impact Assessment License and as such, there is no hindrance to the granting of the stay sought. In her submission in response to the applicant's submission, the interested party submitted that the applicant was given an opportunity to be heard which he did not make use of. The interested party submitted that the applicant's failure to appear before the 2nd respondent was intentional. The interested party submitted that the applicant had an opportunity to appear before the 2nd respondent either as a respondent to the appeal or as a witness and he did neither. In support of this submission, the interested party referred the court to the proceedings of the 2nd respondent which are annexed to the applicant's affidavit more particularly page 93 thereof which contains the ruling made by the 2nd respondent on the applicant's application to join the appeal that had been lodged by the interested party with the 2nd respondent. The interested party submitted that in view of the foregoing, the applicant's complaint that he was denied an opportunity to be heard has no basis. On the stay sought by the applicant, the interested party submitted that the decision of the 2nd respondent was itself a license to her to proceed with the project and as such it was not correct as submitted by the applicant that she had not been issued with a license. The interested party submitted further that there is no reason at all why she should be stopped from carrying out

development on her own land. The interested party denied that her development would block access to the applicant's residence. She argued that if that was the case, her building plans could not have been approved. She submitted further that the 2nd respondent had made a finding that the development was not going to block access to any building. The interested party submitted that the position on the ground is that she is continuing with the development.

4. I have considered the applicant's application together with the statement and affidavit filed in support thereof. I have also considered the applicant's advocates submissions and the interested party's submission in reply thereto. I have not considered the purported affidavit filed by the interested party. I have considered the interested party's oral submissions because; I am of the opinion that due to the nature of the proceedings, the interested party was entitled to be heard in the matter even without an affidavit. This being an application for leave to institute judicial review application, the only issues that present themselves for determination at this stage in my view are the following;

- I. **Whether the applicant has established a prima facie case against the respondents which should be pursued in a judicial review application.**
- II. **Whether the leave sought should be granted.**
- III. **Whether the leave if granted should operate as a stay of proceedings;**

5. **Issues Nos. I and II:**

In the Court of Appeal case of, **Njuguna -Vs- Minister for Agriculture (2000) 1 E.A 184**, it was held that, **"the test as to whether leave should be granted to an applicant for judicial review is whether, without examining the matter in any depth, there is an arguable case, that the reliefs might be granted on the hearing of the substantive application."** I am satisfied from the material placed before me that the applicant has in this application raised weighty issues of law and fact against the proceedings and decision of the 2nd respondent complained of herein. It is not in dispute that the applicant is the interested party's immediate neighbor and that the interested party's development in dispute would have an impact on the applicant. In the circumstances, the applicant had legitimate interest in the proceedings before the 2nd respondent where the issue whether or not the interested party's development should proceed was going to be determined. If the applicant was denied an opportunity by the 2nd respondent to participate in the said proceedings without any reasonable cause then the 2nd respondent violated the rules of natural justice which makes its decision complained of liable to review by this court. The interested party has contented as I have stated above that the applicant was granted ample opportunity to appear before the 2nd respondent but failed to do so. Whether the applicant was given an opportunity to be heard as claimed by the interested party cannot be determined in these proceedings. I am satisfied that the applicant has an arguable case against the respondents and as such he is entitled to the leave sought.

6. **Issue No.III.**

Whether or not to make an order that leave to apply for an order of certiorari or prohibition should operate as a stay is a matter for the discretion of the court. Like any other discretion, it must be exercised judicially and in accordance with well-established legal principles. The decision of the respondents complained of herein does not seem in my view to be prima facie unreasonable and irrational and that the same is likely to cause serious prejudice and loss to the applicant if not stayed. The applicant has not demonstrated the pecuniary loss that he will suffer if the stay sought is not granted. The applicant has claimed that the interested party's project would block access to his residence. The 2nd respondent had visited the project site before making the decision complained of and found as a fact that the project would not block access to any premises. The applicant has also claimed that the project would violate his social and cultural interests. In this regard, the applicant has contented that the project would interfere with the

graves of the applicants' ancestors. Again the 2nd respondent had found as a fact that the said graves are not near the project site. What is before me is not an appeal against the decision of the 2nd respondent. This court would not be able therefore to overturn these findings of fact by the 2nd respondent. I am of the opinion that the applicant has not met the threshold for granting a stay. The interested party has already been issued with development approval and Environmental Impact Assessment License. According to the decision of the 2nd respondent complained of, the said license was issued, *forthwith*. No good reasons have been advanced to warrant the drastic step of stopping the ongoing construction works by the interested party.

7. Conclusion;

From what I have set out herein above, the applicant's Chamber Summons application dated 25th February, 2014 shall be allowed in part. The said application is hereby allowed in terms of prayers 1 and 2 thereof. The judicial review application shall be filed within 21 days from the date hereof. The costs of the application shall abide the outcome of the judicial review application.

Delivered, Dated and Signed at Kisii this 23rd day of May 2014.

S. OKONG'O

JUDGE

In the presence of:-

Miss Michoma h/b for Naeku for the Applicant

N/A for the Interested Party

N/A for the Respondents

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE