REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Judicial Review 408 of 2012

IN THE MATTER OF THE ENVIRONMENT MANAGEMENT AND COORDINATION ACT

BETWEEN

REPUBLIC .....APPLICANT

VERSUS

NATIONAL ENVIRONMENT TRIBUNAL.....RESPONDENT

EX PARTE

PALM HOMES LIMITED

AND

ERIK SUNDE AND ZUENA HASSAN…….....INTERESTED PARTIES

JUDGEMENT
INTRODUCTION

1. By a Notice of Motion dated 15th November 2012 filed on 16th November, 2012, the *ex parte* applicant herein, **Palm Homes Limited**, seeks the following orders:

(i) AN ORDER OF CERTIORARI to remove into the High Court and to quash the decision of the Respondent made on 6th November 2012 issuing a stop order for construction of 6 town houses on LR No. 3734/476 Nairobi.

(ii) Costs be provided for.

EX PARTE APPLICANT'S CASE

2. The application is based on the Statement filed on 13th November, 2012 and a verifying affidavit sworn the same day by **Hussein Mohamed Shariff**, a Director of the Applicant Company.

3. According to the deponent, through a letter dated 6th November 2012 from the National Environment Tribunal, the Tribunal ordered the Applicant to stop construction of 6 town houses on LR No. 3734/476 purportedly under the provisions of section 129(4) of the Environment Management and Co-ordination

Act, 1999. According to the deponent, the applicant was informed that an appeal was lodged by **Erik Sunde** and **Zuena Hassan** who are proprietors of LR No. 3734/475 and the interested party herein while the Applicant is the proponent of the project erected on LR No. 3734/476. The said project report was prepared by one **Fredrick Owiti** and was approved by the **Environment Management Authority** (NEMA) through a letter dated 18th June 2012 and upon approval thereof the Applicant embarked on construction and the project is now at an advanced stage. An environmental impact assessment licence was also issued on 18th October 2012 pursuant to the approval of the project study which project study disclosed sufficient mitigation measures to curb any adverse effect on the environment.

4. However, the Interested party lodged an appeal with the respondent on 5th November 2012 but did not disclose that there was a pending petition in the High Court of Kenya at Nairobi being Petition No. 467 of 2012 where the Interested party raised the same issues concerning impact of the project on the environment and in particular on their parcel of land LR No. 3734/475. Although the Interested party applied for conservatory orders and or injunction to restrain the Applicant from continuing with construction on LR No. 3734/476 the said application was not granted and the application is pending before the Constitutional division of this Court. The Interested party then retained another counsel to lodge an appeal with the Respondent over the environmental impact assessment licence issued to the Applicant hence the present scenario is that the Interested party has lodged a multiplicity of suits to frustrate the project.

5. The Applicant is aggrieved because, according to the deponent, the Respondent has exceeded its statutory authority and issued a stop order without any sanction of law. The decision contained in the letter dated 6th November 2012 is, according to him, oppressive and smacks of bad faith and is unreasonable because it does not take into account the financial ramifications of stopping the project since the contractor on site will charge the Applicant contractual damages for idle plant and labour which conservatively stands at Kshs. 3,000,000/= per day and yet there is no prospect of recovering these damages from the respondent because the law exempts the respondent from civil or criminal liability. Therefore to arrest the loss occasioned to the Applicant a stay of the stop order is necessary otherwise the present suit would be rendered nugatory. In support of the applicant's case, the deponent exhibited copies of the letter dated 6th November 2012; Appeal against the decision of the National Environment Management Authority by **Erik Sunde** and **Zuena Hassan**; and Petition No. 467 of 2012.

INTERESTED PARTIES' CASE

6.In opposition to the application, the Interested Party filed a replying affidavit sworn on 17th December 2012 by **Zuena Hassan**, one of the interested parties herein.

7. According to her, the interested parties, who are husband and wife, are the registered proprietors of all that property known as LR No. 3734/475 situated on Njumbi road and that the *Ex parte* Applicant herein commenced construction of six (6) townhouses on 0.758 of an acre on the property known as LR No. 3734/476 in or about May 2012. This construction, according to her, was clearly contrary to the provisions of the Nairobi City Council Bye laws and they took legal advice from Messrs Hamilton Harrison and Mathews who instituted Petition No. 467 of 2012 to challenge the same. The construction, according to the interested parties, was commenced before the NEMA had issued a licence under the provisions of the Act. On the advice sought from their advocates, the interested parties were informed that until the Director General made a decision then no cause of action lay under the provisions of the Environment Management and Co-ordination Act. It is only munch later and after the construction had advanced a great deal, and after they had filed the Petition that the *Ex parte* Applicant obtained a licence from the NEMA dated 18th October, 2012. Accordingly, the interested parties instructed their current advocates to challenge to the issuance of the said licence from the Tribunal which has jurisdiction, the National Environment Tribunal and an appeal was filed on their behalf on 5th November, 2012. They have, however been advised by their advocate on record **Ms. Wangui Ndegwa Shaw** that Section 129(4) of the ***Environmental management and Co-ordination Act*** (hereinafter referred to as the Act) provides that upon the filing of an appeal, the *status quo* on any matter or activity shall be maintained until the appeal is heard and determined and that the Tribunal issues an order enforcing the provisions of the Act

which order is a creature of statue under the said section. It is deposed that the appeal against the decision of the NEMA to licence the project could only be filed upon the decision of the director General to licence the project and not before.

8. It is therefore the interested parties' that the interested parties are merely exercising their constitutional right by instituting proceedings before a tribunal mandated by parliament to make decisions on matters concerning environmental licences and that this Honourable court has no jurisdiction to vary the orders issued by the Tribunal in the circumstances.

APPLICANT'S SUBMISSIONS

9. On behalf of the *ex parte* applicant it was submitted, while reiterating the contents of the supporting affidavit that section 129(4) of the Act does not mandate the Tribunal to interpret and or define what constitutes *status quo* as the purpose of the section is simply to declare a *status quo* in relation to the matter or activity in question. If Parliament intended that the proponent of a project will stop the project pending determination of an appeal nothing would have been easier than to say so. In the *ex parte* applicant's view the section is ambiguous in scope and it is doubtful whether the Respondent is competent to resolve the ambiguity hence the stop order was made in want or excess of jurisdiction. Reliance for this line of submissions is placed on **Mugoya Construction and Engineering Limited vs. NSSF Board of Trustees HCCC No. 59 of 2005**. It is the *ex parte* applicant's case that if it is taken that once an appeal is lodged then a *status quo* is imposed by law then the Respondent acted in excess of jurisdiction by interpreting what was the *status quo* without hearing the *ex parte* applicant as well. Referring to **R vs. Kenya National Examinations Council *ex parte* Njuguna**, it is submitted that an order of certiorari will issue whenever a decision is made in want or excess of jurisdiction.

10. *Status quo*, according to the *ex parte* applicant, is a question of fact and cannot be determined administratively through a letter as it means things remain as they are and whoever is developing should continue developing and the case of Housing **Finance Company of Kenya Limited vs. Ngige Kitson Mondo [2006] eKLR** is cited in support of this line of submission. This, it is submitted, is the clear policy of the law as envisaged in sections 58(8) and (9) of the Act. According to it, it is not the intention of the Act to undermine development projects but to protect the environment from the impact of such projects and citing **Council of Civil Service Unions vs. Minister for Civil Service [1985] AC 374**, it is submitted that all errors of law are amenable to judicial review and a decision will be quashed if based on wrong view of the law.

11. Taking into account the financial ramifications of stopping the project and the fact that the Respondent is not liable in damages while exercising statutory powers, it is submitted that the decision to issue the stop order is unreasonable and procedurally flawed since under Article 47 of the constitution, procedural fairness is about notice and an opportunity to influence events. To interpret the provision of section 129(4) to mean an automatic injunction, it is submitted, would violate the principles of procedural fairness encapsulated in Article 47 of the Constitution. Administrative action must be reasonable and it is not reasonable to stop a construction simply because someone feels offended about it. There must be sufficient legal right deserving protection since in a democratic society people are offended about many things about which they can do nothing since society is founded on tolerance of coexistence.

12. It is further submitted that the Respondent is under a legal obligation to ensure that it carries its statutory power in a manner that is not oppressive and disproportionate to the legitimate aims of the law and the decision to issue the stop order is disproportional. In the *ex parte* applicant's view, the stop order defies logic and is for quashing.

INTERESTED PARTIES' SUBMISSIONS

13. On behalf of the Interested Parties, it is submitted, while reiterating the contents of their replying affidavit that the right to justice is now a recognised fundamental right and that the cause of action to institute the appeal against the decision of the Director General of NEMA to licence the construction on 18th October 2012 arose immediately upon the issuance of the EIA licence. The Interested Parties, it is

submitted, instituted the appeal in the Tribunal under section 129 of the Act in pure exercise of their environmental and constitutional. According to the interested parties, a Stop Order is a creature of statute under section 129(4) of the Act under which the Stop Order in issue was made. In their view *status quo* means the construction should stop pending the hearing and determination of the appeal and relies on **Republic vs. National Environmental Tribunal *Ex parte* National Housing Corporation High Court Miscellaneous No. 622 of 2009**.

14. In the interested parties' view there is no unreasonableness in the Respondent complying with the statute and there is no error of jurisdiction.

15. The interested partes have also taken an issue with the omission to join NEMA as a party to these proceedings when it is the decision of NEMA that is being questioned. In the interested parties' view prerogative remedies cannot be issued against a public institution that is carrying out its statutory duty to the letter and the establishment of special Tribunals such as the Respondent herein, is to ensure that matters relating to the environment are tried within the shortest time possible and with the relevant expertise that such institutions provide. Accordingly, it is submitted that this Honourable Court has no jurisdiction to interfere as the Tribunal is yet to finalise its hearings and deliver its award hence there is no cause of action.

DETERMINATION

16. Section 129(2) of the Environmental Management and Co-ordination Act provides:

(2) Unless otherwise expressly provided in this Act, where this Act empowers the Director-General, the Authority or Committees 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.

(3) Upon any appeal, the Tribunal may:—

(a) confirm, set aside or vary the order or decision in question;

(b) exercise any of the powers which could have been exercised by the Authority in the proceedings in connection with which the appeal is brought; or

(c) make such other order, including an order for costs, as it may deem just.

(4) Upon any appeal to the Tribunal under this section, the status quo of any matter or activity, which is the subject of the appeal, shall be maintained until the appeal is determined.

17. It is not in dispute that there is an appeal pending before the Tribunal filed by the Interested Parties herein challenging the decision of the Director General to grant Environmental Impact Assessment licence for construction on LR 3734/476. There is no contention that under section 129(4) the effect of an appeal is the maintenance of the *status quo* until the appeal is determined. The law does not give the Tribunal any discretion in the matter. Therefore, in my view, the letter dated 6th November 2012 was unnecessary as the Tribunal is not empowered to give any orders after the appeal is lodged. However, the Tribunal ought to bring the fact of the filing of the appeal to the attention of the party whose activity is statutorily adversely affected so that the provisions of section 129(4) may be complied with. This should have been the purpose of the letter dated 6th November 2012. That letter was only drawing attention of the *ex parte* applicant to the fact of the filing of the appeal and to that extent was not an order by the Tribunal although it was erroneously referred to as an order. Where the authority concerned is simply making recommendations which are not binding and which may or may not be complied with until a decision is made to comply therewith, there is no decision made that can be subjected to judicial review by way of certiorari. Similarly, where a person is simply conveying a decision of an authority or the provisions of a statute, that cannot be said to be an order from that authority.

18. That leads me to the issue *status quo*. The word *status quo* is defined by ***Blacks Law Dictionary***, 9th Edition at page 155 as "state in which" that is "the situation that currently exists". ***Ballentine's Law Dictionary*** by Jack G Handlerat page 522 defines the same word as "the existing state of affairs: things as they are". ***A Concise Law Dictionary*** by P G Osborn, 5th Edition at page 300 defines the word as "the state in which things are, were". Therefore when a Court of law orders or a statute ordains that the *status quo* be maintained, it is expected that the circumstances as at the time when the order is made or the statute takes effect must be maintained. An order maintaining *status quo* is meant to preserve existing state of affairs. Where for example there is a dispute between a tenant and a landlord and there is an order for maintenance of *status quo*, if the tenant is in occupation it means he retains the occupation. If on the other hand he is not in occupation it means he remains out unless the order is for the maintenance of *status quo ante*. *Status quo* must therefore be interpreted with respect to existing factual scenario and in this case with respect to the purpose of what is intended which is the hearing of the appeal by the Tribunal. At the conclusion of the Appeal, the Tribunal is empowered to inter alia, confirm, set aside or vary the order or decision granting the EIA licence. If it were to set aside the order granting the licence, it would mean that the project in question would not be carried on or not carried on in the same manner in which it was being undertaken. For the project to continue while the appeal is being determined would defeat the whole idea behind the maintenance of *status quo*. The *ex parte* applicant, however, contends that the section is ambiguous. Where the language of a statute if in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words or even the structure of the sentence. The court will endeavour to give some meaning to the section and will not allow the error of the draftsman to destroy the clear intention of the Legislature. See **The King vs. Vasey and Lally 2 KB 750; *Maxell on The Interpretation of Statutes (3rd Ed) at 34.***

19. This attitude also fits in this case with the Mischief Rule which may also be called the ***"Rules in Hyedoon's Case"*** to the effect that it is always proper to construe an ambiguous word or phrase in the light of the mischief which the provisions is obviously designed to prevent and in the light of the reasonableness of the consequences which follow from giving it a particular construction. See **Cartside vs. IRC (1968) AC 553, 612.**

20. The spirit of the Act in my view is captured in section 3(1) thereof where it is stated that every person in Kenya is entitled to a clean and healthy environment. This provision is now underpinned in the Constitution under which Article 42 provides that every person has the right to a clean and healthy environment.

21. Taking these provisions in their totality, I am not convinced that the requirement for maintenance of *status quo* under section 129(4) of the Act means that the construction of the project in question ought to proceed. In my view that would negate the whole purpose of the section.

22. The impugned "Stop Order" therefore cannot be said to be contrary to the said provision. Even if I were to hold that the Tribunal had no powers to issue the said order the law is that the decision whether or not to grant the remedy of judicial review is discretionary. In **Republic vs. Judicial Service Commission *ex parte* Pareno [2004] 1 KLR 203-209** it was held that judicial review orders are discretionary and are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders. Since the court exercises a discretionary jurisdiction in granting prerogative orders, it can withhold the gravity of the order where among other reasons there has been delay and where the a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised. See **Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 of 2000.**

23. In my view where the authority makes a statement which it is not under any obligation to make but which is a restatement of the correct legal position, that statement should not in the exercise of the Court's discretion be quashed solely on the ground that there was no duty imposed upon the authority to make it in the first place. That, in my view, is the position in the present circumstances.

24. Since the appeal is yet to be heard and at the hearing of the said appeal, the *ex parte* applicant will be afforded an opportunity of being heard, I cannot state at this point in time that the provisions of section 129(4) amounts to an infringement upon Article 47 of the Constitution. In my view, it is only fair and reasonable that where an environmental issue is raised, taking into account the fact that certain acts of environmental degradation are impossible to restore, the environment ought to remain intact until the dispute is resolved. However, such appeals ought to be determined expeditiously and where the Tribunal takes too long to do so, a party affected by the delay may properly be entitled to move the Court for an order of mandamus compelling the Tribunal to determine the appeal.

25. I agree with Michael Fordham in ***Judicial Review Handbook***; 4th Edn. At page 1007 that:

"procedural fairness is a flexi-principle. Natural justice has always been an entirely contextual principle. There are no rigid or universal rules as to what is needed in order to be procedurally fair. The content of the duty depends on the particular function and circumstances of the individual case".

26. In **Kenya Revenue Authority vs. Menginya Salim Murgani Civil Appeal No. 108 of 2009,** the Court of appeal delivered itself as follows:

"In the court's view, the fairness of a hearing is not determined solely by its oral nature. It may be conducted through an exchange of letters as happened in the present case. The hearing does not necessarily have to be an oral hearing in all cases. There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing. Whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made."

27. In **R vs. Aga Khan Education Services *ex parte* Ali Sele & 20 Others High Court Misc. Application No. 12 of 2002**, it was held *inter alia* as follows:

"On the allegation that there was breach of the rules of natural justice, it is not in every situation that the other side must be heard. There are situations where a hearing would be unnecessary and even in some cases obstructive. Each scale must be put on the scales by the court and there cannot be general requirement for hearing in all situations. There will be for example situations when the need for expedition indecision making far outweighs the need to hear the other side and in such situations, the court has to strike a balance."

28. In **Russel vs. Duke of Norfork [1949] 1 All ER at 118**, the Court expressed itself as hereunder:

"There are in my view no words which are of unusual application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on circumstances of the case, the nature of the inquiry, rules under which the tribunal is acting, the subject matter that is being dealt with and so forth. Accordingly I do not derive much assistance from the definition of natural justice which have been from time to time being used, but whatever standard is adopted one essential is that the person concerned would have had a reasonable opportunity of presenting his case."

29. As was held in **Simon Gakuo vs. Kenyatta University and 2 Others Misc. Civil Application No. 34 of 2009:**

"The *audi alteram partem* rule should not be interpreted to mean a full adversarial hearing or anything close to it as per the courtroom situations and as per section 77 of the Constitution. Interpreting the demands of natural justice as requiring an adversarial hearing or anything similar is a serious misdirection in law. There are no rigid or universal rules as to what is needed in order to be procedurally fair. What is needed is what the court considers sufficient in the context of each situation with its own unique facts with the needs of good administration in view. I urge practitioners of law not to rigidly import the hearing requirements in court room situation etc."

30. The mere fact that a particular piece of legislation provides for ex parte proceedings does not, in my view, necessarily render an order emanating therefrom illegal if there is an opportunity to challenge the said proceedings and where the order emanating therefrom is not final but merely peremptory. This is the same scenario in applications for extension of time to file suits which are expressed to be ex parte but orders emanating therefrom are challlengeable at the hearing of the suit.

ORDER

31. Accordingly, I find no merit in the Notice of Motion dated 15th November 2012 which I hereby dismiss with costs to the interested parties.

Dated at Nairobi this 25th day of April 2013

G V ODUNGA
JUDGE

Delivered in the presence of Mr Kiarie for the applicant.