Syokimau Residents Association & 3 others v National Environmental Management Authority; Endmor Steel Millers Limited & another (Interested Party) (Environment and Land Miscellaneous Application E012 of 2021) [2022] KEELC 2245 (KLR) (19 May 2022) (Ruling)

Neutral citation: [2022] KEELC 2245 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E012 OF 2021

CA OCHIENG, J

MAY 19, 2022

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW PURSUANT TO ORDER 53 OF THE CIVIL PROCEDURE RULES 2010 LAWS OF KENYA

AND

IN THE MATTER OF THE ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION ACT NO. 8 OF 1999

AND

IN THE MATTER OF FAIR ADMINISTRATION ACTION ACT NO. 4 OF 2015

AND

IN THE MATTER OF TRIBUNAL APPEAL NUMBER NET 003 OF 2019

IN THE MATTER OF LEAVE FOR THE ORDERS OF MANDAMUS PURSUANT TO ORDER 53 OF THE CIVIL PROCEDURE RULES, SECTIONS 8 & 9 OF THE LAW REFORM ACT CAP 26 AND FAIR ADMINISTRATION ACT 2015 OF THE LAWS OF KENYA

BETWEEN

SYOKIMAU RESIDENTS ASSOCIATION ..... 1ST APPLICANT

NAZIR HUSSEIN HAKADA ..... 2ND APPLICANT

JOHN MUTINDA MWANZIA ..... 3RD APPLICANT

FRANKLIN MAINA GATHERU ..... 4TH APPLICANT

AND

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY ..... RESPONDENT

AND

ENDMOR STEEL MILLERS LIMITED ..... INTERESTED PARTY

NATIONAL ENVIRONMENT COMPLAINTS COMMITTEE .... INTERESTED PARTY

RULING

1. What is before Court for determination is the 1st Interested Party's Notice of Preliminary Objection dated 5th July, 2021 and Respondent's Notice of Preliminary Objection dated 6th July, 2021. In the Preliminary Objection dated the 5th July, 2021, the 1st Interested Party is seeking to have this suit to be struck out on the following grounds *inter-alia;*

    a) That the Honourable Court lacks jurisdiction to entertain the matter in light of special jurisdiction donated by Environmental Management and Coordination Act 1999 to the Tribunal.

    b) That the application and entire suit are completely time barred and offends the relevant statutes relating to limitation of time.

    c) The applicants have not met the threshold for granting leave to file for Judicial Review.

    d) The Application and Appeal is a back door Appeal of the Tribunal delivered on 18th December, 2020.

2. While in the Notice of Preliminary Objection dated the 6th July, 2021, the Respondent is seeking to have this suit struck out on the following grounds:

    1. That the Chamber Summons Application for leave flies in the face of Section 7 of the *Fair Administration Actions Act* as the same does not relate to any administrative action or decision by the Respondent.

    2. That the Respondent has not exceeded any statutorily prescribed timelines to constitute an unreasonable delay under Fair Administration Actions Act.

3. The Notice of Preliminary Objection was canvassed by way of written submissions.

Analysis and Determination

4. Upon consideration of the two Notices of Preliminary Objection including the Chamber Summons Application dated the 14th June 2021, as well as the respective submissions, the only issue for determination is whether this suit should be struck out.

5. The 1st Interested Party in its submissions reiterated its averments as per the Notice of Preliminary Objection and relied on Section 130 of *Environmental Management and Coordination Act* (EMCA). It insisted that the Applicants' should have filed an appeal and not challenge the Tribunal's Judgment dated 18th December, 2020. It contended that the Applicants' being dissatisfied with the said decision could only appeal to the High Court pursuant to Section 130(1) of the EMCA. Further, that Judicial Review ought to have been filed within six (6) months from the date of the Judgment. It averred that the instant suit and application were filed way out of the stipulated time. Further, no leave has been sought for extension to explain the inordinate and unreasonable delay for seeking orders of mandamus out of time. It reiterates that in the NET, the ex parte applicants were merely Interested Parties. Further, that the 1st Applicant has no capacity to institute a suit of any nature as it completely lacks locus standi.

To buttress its averments, it relied on the following decisions: *Mukhisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* 1969 E.A.696; which was cited in the Court of Appeal case of *Wavinya Ndeti V Independent Electoral & Boundaries Commission (IEBC) & 4 others [*2014] eKLR; *Republic vs National Environmental Management Authority,* CA 84/2010; *Mutanga Tea & Coffee Company Ltd V Shikara Limited & another* [2015] eKLR;Raila *Odinga & 6 others vs. Nairobi City Council* Nairobi HCCC NO. 899 of 1993; (1990-1994) EA 482 which was cited in the case of *Republic v Kiambu Land Dispute Tribunal & 2 others ex parte Wambui Chege Macharia & 2 others* [2016] eKLR; *Republic v Chief Magistrate's Court at Milimani Law Courts; Director of Public Prosecutions & 2 others (Interested Parties); ex-parte Applicant: Pravin Galot* [2020] eKLR.

6. The Respondent in its submissions provided a background of the dispute herein and contended that the Applicants' Chamber Summons is defective in substance as it goes against the provisions of Section 7(3) of the Fair Administrative Action Act. Further, that the Applicants herein have neither demonstrated that the Respondent herein has refused, failed or neglected to take action nor put forth evidence that there is indeed a current period specified under law or any current prescribed period to act. It reiterated that the Application does not meet the legal requirements for Grant of an Order of *Mandamus*. To support its arguments, it relied on the following decisions: *Republic v Kenyatta University Ex parte Martha Waihuini Ndungu* [2019] eKLR, Miscellaneous Civil Application 111 of 2018; *Republic v University of Nairobi & 3 others Ex parte Patrick Best Oyeso* [2018] eKLR, Judicial Review Miscellaneous Application 562 of 2017; Ugandan Case of *J K Patel vs. Spear Motors Ltd* SCCA No. 4 of 1991 [1993] VI KALR 85; *Republic vs. Kenya National Examinations Council ex parte Gathenji & others*,Civil Appeal No. 266 of 1996.

7. The Applicants in their submissions contend that they have /*locus standi* to approach the court and relied on Article 22 of *the Constitution* and Section 3(3) of EMCA. They insist this Court has jurisdiction to entertain this application since they are only seeking orders of mandamus to compel the Respondent to carry out tests on the Interested Party's facility and relied on Section 11(a) and (f) of the Fair Administrative Action Act. They explain that the Respondent has not taken any action since December, 2020 even after they made follow up on 2nd June, 2021. They reiterate that this suit is not statute barred as claimed. To buttress their averments, they relied on the following decisions: *National Environmental Tribunal v Overlook Management Limited & 5 others* (2019) eKLR; *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* (2012) eKLR; *Sustainable Energy Systems Limited V Kenya Forest Service* (2017) eKLR; Republic v National Land Commission & 2 others; *Kakuzi Division Development Association & 6 others (Interested Parties) Ex parte: Kakuzi PLC* (2020) eKLR; Judicial Revie No. 4 of 2016 *Republic v Kiambu County Executive Committee & 3 others ex parte James Gacheru Kariuki & 9 others* (2017) eKLR; *Mohammed Abey Mohamed & another v Cabinet Secretary for Ministry of Interior and Coordination of National Government & 4 others* (2021) eKLR; *Republic v Speaker of the Senate & Another ex parte Afrison Export Import Limited & another* (2018) eKLR; *Repulic v Speaker of Nairobi City County Assembly & another ex parte Evans Kidero* (2017) eKLR and *Republic vs Public Procurement Administrative Review Board ex parte Syner – Chemie* (2016) eKLR.

8. In this instance the ex parte Applicants sought for leave vide a Chamber Summons Application dated the 14th June, 2021 to apply for an Order of *Mandamus* compelling the Respondent to carry out tests with regard to stack emissions, ambient air quality emissions and noise emissions from the factory of the 2nd Interested Party in compliance with the orders of the National Environmental Tribunal (NET) contained in the Judgment issued on 18th December 2020 in Tribunal Appeal Number NET 3 of 2019; Further that the said leave to operate as STAY of any decision whether intended or actual made by the Respondent to renew Environmental Impact Assessment and Stack Emission Licenses pending the hearing of this suit. The said Application was supported by the Verifying Affidavit of Juliet Isaac

Wamiri and the Statutory Statement attached to the said Chamber Summons. From the explanation in the statement, it is evident the ex parte applicants are seeking enforcement of the judgement from NET issued on 18th December 2020 in Tribunal Appeal Number NET 3 of 2019. It is the Applicants contention that the Respondent has failed to carry out tests with regard to stack emissions, ambient air quality emissions and noise emissions from the factory of the 2nd Interested Party in compliance with orders contained in the impugned judgment from NET. It is on this basis that the Applicants have filed the instant application, seeking an order of mandamus to compel the Respondent to carry out the said tests with regard to air and noise emissions.

9. I will proceed to make reference to Order 53 Rule 1 which governs institution of Judicial Review proceedings and states that:

> (1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule. (2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on. (3) The judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit including cash deposit, bank guarantee or insurance bond from a reputable institution.(4) The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise: Provided that where the circumstances so require, the judge may direct that the application be served for hearing inter-partes before grant of leave. Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days."

10. Judicial Review is not concerned about the merits of the decisions but the process, which was adhered to. It challenges the administrative action of a person in position of authority. I note the Applicants are merely seeking to compel the Respondent to enforce the directive in the impugned judgement issued in NET. The Respondent and 1st Interested Party contend that this is an appeal through the backdoor, the application is statute barred and the court is devoid of jurisdiction to deal with it.

11. At this juncture, as a Court I will not analyze the merits or demerits of the impugned Judgment but only whether the Applicants have raised pertinent issues in the instant application to warrant leave to commence orders of Judicial Review.

12. In the Supreme Court case of *Judges and Magistrates Vetting Board v Centre for Human Rights and Democracy* [2014] eKLR it was held that:

> "When Courts conduct judicial review, they are in essence ensuring that the decisions made by the relevant bodies are lawful. Consequently, should they find that the decision made is unlawful, Courts can set aside that decision. Judicial review, therefore, can be said to safeguard the rule of law, and individual rights; and ensures that decision makers are not above the law, but have taken responsibility for making lawful decisions, in the knowledge that they are reviewable."*

13. Further in the case of *Felix Kiprono Matagei v Attorney General; Law Society of Kenya (Amicus Curiae)* [2021] eKLR the Court held that:

> "It is also noted that the necessity for leave before commencement of legal proceedings is a requirement in various areas of legal practice. For instance, there is need for leave before one can appeal certain decisions under the Civil Procedure Rules, 2010. The need for leave by itself cannot therefore be said to be unconstitutional. Fortunately, the Petitioner need not seek leave to commence judicial review proceedings under the FAA Act. 92. The courts have over the years established that for a party to prove violation of rights under the provisions of the Bill of Rights they must not only state the provisions of *the Constitution* allegedly infringed in relation to them, but also the manner of infringement and the nature and extent of that infringement, and the injury suffered. 93. The requirement to discharge the burden of proof has been stated in many decisions including *Britestone Pte Ltd v Smith & Associates Far East Ltd* [2007] SGCA 47 where it was held that: "The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him." 94. The Petitioner pointed out the constitutional provisions allegedly violated by the impugned provisions without tendering evidence of how the requirement for leave before the commencement of judicial review proceedings violates those provisions. He did not state how the necessity for leave negatively affects the right to access justice under Article 48. His claim that the need for leave before applying for judicial review orders contravenes Article 159(3)(c) & (d) which requires justice to be done without delay and undue regard to technicalities does not accord with the decisions of the superior courts of this country to the effect that procedural rules are necessary for the delivery of justice. I therefore find no merit in this petition and I dismiss it. 95. This petition, however, has demonstrated the need to formally do away with sections 8 and 9 of the LR Act and Order 53 CPR. In my view, sections 8 and 9 of the LR Act and Order 53 of the CPR no longer serve any purpose as the FAA Act has aligned judicial review of administrative action with *the Constitution*. 96. What is now required is for the Chief Justice to make rules under Section 10(2) of the FAA Act and the Cabinet Secretary for the time being responsible for the administration of justice, in consultation with the Commission on Administrative Justice, to make regulations under Section 13(1) of the Act. The National Assembly may also need to formally repeal sections 8 and 9 of the LR Act so that the FAA Act becomes the only law upon which applications for orders of judicial review are anchored. 97. Nevertheless, as I have already stated, sections 8 and 9 of the LR Act and Order 53 of the CPR have been rendered otiose and their continued retention in our statute books will only serve to promote the wrong notion that Kenya has a two-tracked system for seeking judicial review against administrative action."

14. Based on the facts as presented while associating myself with the cited decisions and quoted legal provisions, I opine that orders the Applicants are seeking are to compel the Respondent which is a public institution to undertake certain actions as per the Judgment from NET. It is trite that under the *Fair Administrative Action* and Article 47 of *the Constitution*, a party does not require leave to institute proceedings for Judicial Review. Further, that Section 11 (a) and (f) of the *Fair Administrative Action Act* are very explicit on this position and I find that this suit is not statute barred as claimed by the Respondent and Interested Party as the aforementioned legal provisions do not provide for timelines. Be that as it may, since the Applicants sought for leave, I find that they are indeed entitled to leave to commence an application for Mandamus as they are merely seeking enforcement of a Judgment from NET which the Respondent as a public institution has failed to implement. I further beg to

disagree with the Respondent and 1st Interested Party and hold that the Applicants have *locus standi* to approach the court in accordance with Article 22 of *the Constitution*. I further opine that this court has jurisdiction to entertain this application in accordance with the provisions of Section 13 of the *Environment and Land Court Act*.

15. On whether leave should operate as a stay of the Respondent's action, I note the Applicants herein are seeking orders to compel the Respondent to enforce orders granted in a Judgment by NET in 2020. Further, they pray that the said leave do operate as a stay of any decision whether intended or actual made by the Respondent to renew Environmental Impact Assessment and Stack Emission Licenses pending the hearing of this suit. The Respondent and Interested Party have vehemently opposed the application. From the explanations in the verifying affidavit, I am of the view that the Applicants have not demonstrated what prejudice they stand to suffer if the order of stay is not granted. Further, they have not explained the 1st Interested Party's current position in respect to its Environmental Impact Assessment and Stack Emission Licenses. In the circumstances, I will decline to make an order for stay as sought.

16. It is against the foregoing that I find the two Notice of Preliminary Objections unmerited and will dismiss them. I will further grant the Applicants' leave of 21 days to file and serve the substantive motion on Judicial Review.

17. Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 19TH DAY OF MAY, 2022**

CHRISTINE OCHIENG

JUDGE