



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JR. CIVIL APP. NO. 198 OF 2011

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY JUDICIAL REVIEW
ORDERS OF PROHIBITION AND CERTIORARI**

AND

IN THE MATTER OF: MIREMA QUARRY ON L.R. NO.11478/NAIROBI

AND

**IN THE MATTER OF: THE NATIONAL ENVIRONMENTAL MANAGEMENT
AND CO-ORDINATION ACT (EMCA) OF 1999**

AND

**IN THE MATTER OF: THE ENVIRONMENTAL (IMPACT ASSESSMENT
AND AUDIT) REGULATIONS, 2003**

AND

**IN THE MATTER OF: THE INTERPRETATION AND GENERAL
PROVISIONS ACT CAP.2 OF THE LAWS OF KENYA**

AND

**IN THE MATTER OF: PURPORTED RESTORATION ORDER CONTAINED
IN THE LETTER DATED 4TH AUGUST 2011**

BETWEEN

ELIZABETH NJERI HINGA

ANTHONY LAWRENCE HINGA (Suing as the

Administrators of the Estate of the Late

BERNARD NJENGA HINGA.....APPLICANT

VERSUS

NATIONAL ENVIRONMENTAL MANAGEMENT

AUTHORITY.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....
.....2ND RESPONDENT

AND

HINGA RESIDENTS WELFARE ASSOCIATION.....
.....INTERESTED PARTY

EXPARTE

ELIZABETH NJERI HINGA

ANTHONY LAWRENCE HINGA

RULING

This is a ruling on two preliminary objections filed by the 1st Respondent, the National Environmental Management Authority (NEMA) and the 2nd Respondent who is the Hon. Attorney General of the Republic of Kenya (Hon. AG).

In the notice of preliminary objection filed by the 1st Respondent, it is stated that the 1st Respondent was objecting on a point of law to the application for Judicial Review on grounds that it was wrongly before this court pursuant to **Section 129 (1)** of the Environmental Management and Co-ordination Act 1999 (EMCA).

The preliminary objection filed on behalf of the 2nd Respondent attacks the Applicants chamber summons application for leave to commence judicial review proceedings dated 22nd August 2011 on the following grounds:

1. The Applicants' application contravenes the provisions of section 110 of the Environmental Management and Co-ordination Act, Act No.8 of the Laws of Kenya.
2. The Applicants' application contravenes the provisions of section 129 of the Environmental Management and Co-ordination Act, Act No.8 of the Laws of Kenya.

In their preliminary objections, both the 1st and 2nd Respondents urge the court to strike out the applications objected to with costs to them.

The objections were strenuously opposed by the Exparte Applicants herein **Elizabeth Njeri Hinga** and **Anthony Lawrence Hinga (suing as the Administrators of the Estate of the Late Bernard Njenga Hinga)**. The Interested Party Hinga Residents Welfare Association supported the Respondents preliminary objections against the Exparte Applicants.

To advance their respective positions in the matter, all the parties herein filed written submissions which their advocates highlighted before the court on 20th February 2012.

Even before going to the merits of the submissions made by the parties in support or in opposition to the Respondents preliminary objections, having perused the court record and considered the substance of the preliminary objections filed herein, I find that the said preliminary objections are misconceived and incompetent. In my view, they cannot be sustained for the following reasons:-

Starting with the objection filed on behalf of the 1st Respondent, I find that the said objection is premature. It is based on the assumption that the Applicant herein has already filed the substantive Notice of Motion for judicial review which was the subject of its attack yet looking at the court records, it is clear that no such Notice of Motion has been filed by the Applicants to date.

Even if the court were to assume that such an application had been filed by the Applicant, it would have been filed pursuant to leave granted by the court to commence Judicial Review proceedings like the one granted in this case by J. Wanjiru Karanja on 22nd August 2011. Considering the 1st Respondent's position in this matter as expressed by Mr. Gitonga in his submissions on its behalf, namely that in its application for leave the Applicant had failed to disclose that it had an alternative remedy in **Section 129 of EMCA** and that the Applicants had failed to demonstrate that the remedy of judicial review was more efficacious and convenient than the statutory mechanism of Review and Appeal provided for under the provisions of EMCA, legally the 1st Respondent ought to have challenged the grant of leave on grounds that it was obtained through material non disclosure and concealment of material facts and that the same should be set aside to pave way for the prayer that a Notice of Motion filed subsequent to such grant of leave should be struck out.

These observations are neither here nor there since as a matter of fact no Notice of Motion was actually filed by the Applicant herein and there is therefore nothing for this court to strike out as sought in the 1st Respondent's preliminary objection.

In the premises the 1st Respondent's preliminary objection fails and it is hereby dismissed with no orders as to costs.

Turning now to the preliminary objection filed on behalf of the 2nd Respondent, it is my considered view that the same is also misplaced and incompetent in so far as it seeks the striking out of the chamber summons seeking leave to commence Judicial Review proceedings by the Applicant.

It is clear from the wording of the preliminary objection that the same was aimed at the first limb of the application contained in Prayers 2 and 3 in which the Applicant sought leave to commence Judicial Review proceedings and not the 2nd limb of the application contained in Prayer 4 seeking that leave if granted operates as stay of the 1st Respondent's decision contained in letter dated 4th August 2011 purporting to stop the project known as Mirema Quarry pending the hearing and determination of the substantive motion or further orders of the court.

Though this later prayer is still pending hearing, Prayers 2 and 3 which appear to have formed the basis of the 2nd Respondent's objection were finally determined on 22nd August 2011 when leave was granted as prayed by J. Wanjiru Karanja.

The 2nd Respondent's preliminary objection was filed on 4th October 2011 while leave had been granted on 22nd August 2011 and to that extent by the time the preliminary objection was filed it had already been overtaken by events.

As in the case of the 1st Respondent, the 2nd Respondent did not expressly challenge the grant of leave and seek that the same be set aside. Instead, it proceeded to invite the court to strike out an application which was partially spent on grounds that demonstrated that the target of the objection were prayers in the application which had earlier been determined by the court and there was nothing left for this court to strike out - as prayed.

The application for leave was spent the minute the court granted leave as prayed and any challenge to that leave ought to have been brought by way of an application seeking the setting aside of the said leave.

In the circumstances, I also find no merit in the 2nd Respondent's preliminary objection and it is hereby dismissed with no orders as to costs.

Having disposed off the preliminary objections filed by the Respondents in this case, I wish to make some observations which in my view are pertinent as they go to the core of the instant proceedings.

As stated earlier, though leave was granted to the Applicant by the court to commence Judicial Review Proceedings on 22nd August 2011, todate the Applicant has not filed a Notice of Motion as required to institute the contemplated Judicial Review proceedings. Though the court that granted leave did not specify the time limit within which the Notice of Motion should have been filed, the law as provided for in Order 53 Rule 3(1) is very clear that such Notice of Motion should be filed within 21 days after grant of leave.

Order 53 Rule 3(1) is coached in mandatory terms. It states as follows:

“When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing”.

The fact that the court granting leave did not specify the time within which the Applicants should have filed the Notice of Motion did not excuse or preclude the Applicants from following the law since the Applicants and their Advocate are presumed to know the law and in any case ignorance of the law is not a defence in the Kenyan legal system.

Similarly, though the court granting leave had directed that the prayer for leave operating as stay be decided after hearing both parties, there was nothing to stop or prevent the Advocates on record for the Exparte Applicants from filing a Notice of Motion for the contemplated Judicial Review proceedings within 21 days of 22nd August 2011 in order to comply with the provisions of Order 53(3)(1) of the Civil Procedure Rules as they waited for that prayer to be determined after hearing inter parties.

The consequence of the Exparte Applicants' failure to file the Notice of Motion within the time required by the law is that leave granted on 22nd August 2011 expired before Judicial Review proceedings were instituted by the Applicants. The said leave expired in or around mid September 2011 yet todate no Notice of Motion has been filed by the Exparte Applicants.

It is unfortunate that this fatal omission by the Exparte Applicants was not discovered by this court earlier otherwise there wouldn't have been any need to waste precious judicial time hearing the Respondents' objections in this matter since by the time the objections were heard there were no judicial review proceedings pending before the court. I make this observation because once leave expired, there was nothing left of the Exparte Applicants' case that was capable of any further proceedings by this court. The grant of leave in Judicial Review proceedings is everything and if leave expires and no extension is sought or obtained under the courts inherent jurisdiction, then the permission granted to commence judicial review proceedings lapses immediately and the exparte Applicant's case automatically comes to an end.

In this case leave expired around mid September 2011 before the Exparte Applicant filed a Notice of Motion to commence Judicial Review proceedings. No extension of time within which to commence Judicial Review proceedings was sought or obtained.

In the circumstances, it is my finding that there are no proceedings before the court which are capable of being continued on behalf of the Exparte Applicant in any way.

Consequently, in the exercise of this courts inherent jurisdiction, I hereby order that this case be marked as closed since no purpose will be served by leaving it hanging or pending without any definite orders.

It is so ordered.

DATED and **DELIVERED** at Nairobi this **20th** day of **March, 2012**.

C. W. GITHUA
JUDGE

In the presence of:

Court Clerk - Florence

Mr. Okindo for Exparte Applicants

M/s Baraza for the 2nd Respondent and holding

brief for Mr. Gitonga for the 1st Respondent

Mr. Kago for the Interested party