



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

MISCELLANEOUS APPLICATION 186 OF 2010

**IN THE MATTER OF AN APPLICATION BY JAMES MUIRURI GICHANGO, PETER
MUTHEE KIHUTU, PETER KIOKO NDIKU, MARGARET MUTHONI NDEGWA,**

**JOHN KARIUKI MAINA, PATRICK NDAMBUKI MUTUNGI, JAMES WAINAINA NDUNGU
AND JOHN MUTUNGA MWANGI FOR LEAVE TO APPLY FOR**

JUDICIAL REVIEW IN FORM OF ORDERS OF CERTIORARI AND PROHIBITION

**IN THE MATTER COMMENDED IN THE CHIEF MAGISTRATE'S COURT CRIMINAL
COURT**

BEING

REPUBLIC

VERSUS

1. JAMES MUIRURI GICHANGO
2. PETER MUTHEE KIHUTU
3. PETER KIOKO NDIKU
4. MARGARET MUTHONI NDEGWA
5. JOHN KARIUKI MAINA
6. PATRICK NDAMBUKI MUTUNGI
7. JAMES WAINANA NDUNGU
8. JOHN MUTUNGA

MWANGI.....ACCUSED

VERSUS

1. JAMES MUIRURI GICHANGO
2. PETER MUTHEE KIHUTU
3. PETER KIOKO NDIKU
4. MARGARET MUTHONI NDEGWA
5. JOHN KARIUKI MAINA
6. PATRICK NDAMBUKI MUTUNGI

7. JAMES WAINAINA NDUNGU
8. JOHN MUTUNGA

MWANGI.....APPLICANTS/RESPONDENTS

VERSUS

1. THE CHIEF MAGISTRATE'S COURT, MACHAKOS
2. THE COMMISSIONER OF
POLICE.....RESPONDENTS

THE EAST AFRICAN PORTLAND CEMENT COMPANY
LTD.....INTERESTED PARTY/APPLICANT

R U L I N G

Before me is a Notice of Motion dated 7th July 2011 filed by East African Portland Cement Company Ltd, described as an interested party/applicant. It was filed under Article 159 and 165 of the Constitution of Kenya, and sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act (Cap 21 of the Laws of Kenya), as well as Order 51 Rule 1 of the Civil Procedure Rules. It has six (6) prayers, two of which have been spent as follows:-

1. (Spent).
2. (Spent).

3. **THAT** this Honourable Court be pleased to vary, vacate and or set aside the second limb from the amongst the orders granted to the Applicants/Respondents on 17/11/2010 to the effect that leave granted to the Applicants/Respondents to commence judicial review proceedings seeking orders of prohibition from proceeding with, and *certiorari* to quash Criminal Case Number 1546 of 2010 – Machakos **(REPUBLIC –vs- JAMES MUIRURI GICHANGO, PETER MUTHEE KIHUTU, PETER KIOKO NDIKU, MARGARET MUTHONI NDEGWA, JOHN KARIUKI MAINA, PATRICK NDAMBUKI MUTUNGI, JAMES WAINAINA NDUNGU, JOHN MUTUNGA MWANGI, BISHOP PHILIP MAKANGA, CHARLES WAMBUA MUNYASYA, GIDEON MACHARIA KAMAU, PAULINE WANJIRU NJINU, JUSTUS NJUGUNA, CAPTAIN AUDI ODHIAMBO** do operate as a stay of the criminal proceedings in the aforesaid case.

4. **THAT** this Honourable Court be pleased to vary, vacate and or set aside the orders granted to the Applicants/Respondents on 17/11/2010 allowing leave to commence judicial review proceedings and that the leave granted to the Applicants/Respondents to commence judicial review proceedings seeking orders of prohibition from proceedings with, and *certiorari* to quash Criminal Case Number 1546 of 2010 – Machakos **(REPUBLIC –vs- JAMES MUIRURI GICHANGO, PETER MUTHEE KIHUTU, PETER KIOKO NDIKU, MARGARET NDUNGU, JOHN MUTUNGA MWANGI, BISHOP PHILIP MAKANGA, CHARLES WAMBUA MUNYASYA, GIDEON MACHARIA KAMAU, PAULINE WANJIRU NJINU, JUSTUS NJUGUNA, CAPTAIN AUDI ODHIAMBO** do operate as a stay of the criminal proceedings in the aforesaid case.

5. **THAT** this Honourable Court be pleased to dismiss the Applicants'/Respondents' application dated 20/01/2010 seeking to extend the orders of stay to other criminal cases, i.e. Machakos-Chief Magistrate Criminal Cases Nos. 376 of 2010, 2468 of 2010 and 96 of 2011 all concerning L.R No. 10425 situated along the Nairobi Mombasa Highway and the entire judicial review proceedings herein for being an abuse of the process of this Honourable Court.

6. **THAT** the costs of this Application be provided by the Applicants/Respondents.

The application has grounds on the face of the Notice of Motion. The grounds are that a substantive Notice of Motion not having been filed within 21 days as directed by court under the provisions of Order

53 Rule 3 of the Civil Procedure Rules, the stay lapsed as there is no suit. That the applicants obtained the orders of stay without disclosing material facts. That the applicants/respondents had purported to apply the order of 17/11/2010 to other matters while the same only applied to Criminal Case No. 1546 of 2010 – Machakos. That there were currently interim orders obtained by the interested party/applicant in **Machakos HCCC 93 of 2009 East African Portland Cement Co. Ltd –vs- Bishop Philip Makanga and 6 others**, barring entry and trespass on plot LR No. 10425 along Mombasa Nairobi highway, which orders had never been vacated and that suit was pending judgment. That in spite of those injunction orders, the applicants/respondents had continued to act contrary to the court's orders. That in commencing these judicial review proceedings, the applicants/respondents were abusing the process of the court and avoiding arrest and prosecution for the criminal offence of trespass. That the interested party was now not able to perform its mandatory duties of mining some raw material in the production of cement. That the instant judicial review application was fatally defective, as it was not in the name of the Republic as the applicant.

The application was supported by an supporting affidavit sworn by Sheila Kahuki, the Legal Officer of the interested party/applicant. It was deponed *inter alia*, that the applicants/respondents did not file the substantive Notice of Motion after being granted leave within 21 days as required. Instead, they filed an application for the extension of the stay orders, and also applied to extend the application of the stay orders granted to other criminal cases. That the stay orders do not extend to any other cases. That when the applicants/respondents came to court and obtained stay orders, they were aware that there were injunction orders issued against them in **HCCC 93 of 2009**. That the way related criminal cases had been handled was brought to the full attention of the PS Provincial Administration & Internal Security, the Law Society of Kenya, the Commissioner of Police, the Attorney General, and the OCS Athi River Police Station by way of correspondence. That the applicants/respondents had with impunity started moving into the suit land and began constructing permanent structures in violation of the existing restraining orders. That the application for leave to file judicial review proceedings was fatally defective, as it was not in the name of the Republic.

Though the present application was served, the applicants/respondents or their counsel neither filed a response, nor did they appear in court on the hearing date. Mr Simiyu, appeared in court on the hearing date. Mr Simiyu, appeared for the present interested parties/applicants, while Mrs Gakobo, appeared for the State.

Mr Simiyu, submitted that service was effected on Odiwuor Advocate for the applicants/respondents. He stated that before the application for leave and stay was filed, the respondents knew that they were enjoined. They should not have sought stay orders without disclosing that fact.

Mrs Gakobo, submitted that the Notice of Motion for judicial review was filed within 21 days. However, there was non-disclosure of material facts.

I have perused the documents in the file. The leave granted to file judicial review proceedings was so granted on 17th November 2010. A Notice of Motion dated 6th December 2010 was stamped in the High Court registry on 7th December 2010, which was within 21 days. However, there is a similar Notice of Motion dated 11th January 2011 that was stamped as having been filed on 18th January 2011. The latter was definitely stamped beyond the 21 days allowed by law. It is the latter Notice of Motion that was assessed for payment of court fees of Kshs.12,150/=. I see however, no evidence that the said amount was paid. The applicants have also not come to court to clarify the position or respond to the present application. It is apparent to me that no Notice of Motion was validly filed within the time prescribed by law and paid for. I so find. This means that the leave granted lapsed as there are no valid proceedings for judicial review pending herein.

Secondly, the stay granted by the court was only in respect of specific existing criminal proceedings and no more. It was a stay of proceedings only in Machakos CM Criminal Case No. 1546 of 2010, and did not cover any other proceedings. That stay also lapsed 21 days after it was granted, since the formal Notice of Motion was not filed.

For the above reasons, I confirm that the order of stay only related to Criminal Case No. 1546 of 2010. I also hold that there are no pending judicial review proceedings herein. Consequently the stay orders granted have lapsed. Any subsequent applications filed consequent upon the leave and stay granted, are hereby dismissed. For the avoidance of doubt, let me state that there are no existing judicial review proceedings herein, and there are also no stay orders existing. The application therefore succeeds. Costs to East African Portland Cement Co. Ltd.

It is so ordered.

Dated and delivered at Machakos this **21st** day of **June** 2012.

George Dulu
Judge