REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Judicial Review 24 of 2010

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDER OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF: THE NATIONAL ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION ACT 1999

AND

IN THE MATTER OF: THE LAW REFORM ACT, CAP 26, THE CIVIL PROCEDURE ACT CAP 21 LAWS OF KENYA

AND

IN THE MATTER OF:

1. **CRIMINAL CASE NO. 161 OF 2010**
   REPUBLIC -VS- FRANCIS MJOMBA MOMBO
2. **CRIMINAL CASE NO. 155 OF 2010**
   REPUBLIC -VS- MARY WAVINYA MWANGI & ANOTHER
3. **CRIMINAL CASE NO. 159 OF 2010**
   REPUBLIC -VS- JOHN KINYWA GICHOHI

AND

IN THE MATTER OF: THE CONSTITUTION, THE ENVIRONMENTAL MANAGEMENT AND COORDINATION ACT, THE CRIMINAL PROCEDURE CODE, CAP 75 LAWS OF KENYA AND ORDER LIII RULES 1(1) & (2) OF THE CIVIL PROCEDURE RULES

BETWEEN

FRANCIS MOMBO t/a BELLA VISTA RESTAURANT …… 1ST APPLICANT
MARY WAVINYA MWANGI t/a ONE PALM RESORT …..…. 2ND APPLICANT
JOHN KINYUA t/a MASTERS RESTAURANT ……..…… 3RD APPLICANT
KINYUA SIMON t/a BUXTON INN LTD ……..…….. 4TH APPLICANT

AND

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY ... 1ST RESPONDENT
THE COMMISSIONER OF POLICE …….. 2ND RESPONDENT
THE HON. ATTORNEY GENERAL ……..…….. 3RD RESPONDENT
THE CHIEF MAGISTRATE, MOMBASA …….. 4TH RESPONDENT

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RULING

Before me are two applications. The first is dated 29th March 2010 and the second is dated 9th February 2010. By the first application dated 29th March 2010 the Applicant **PIERLUCIANO SENZANI t/a THE NEW BIG TREE BEACH RESORT** seeks inter alia

> ***"(a) The Applicant herein wishes to be enjoined as a Co- Applicant/Plaintiff against the 1st Respondent NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY (N.E.M.A.) having a common interest, common grievance and the relief claimed is similar as against the Respondents which Application is due to be heard inter-party on 28th April, 2010.***

The second application dated 9th February 2010 seeks inter alia the following orders

> ***"2 THAT pursuant to Order LIII Rule 1(3) of the Civil Procedure Rules this Honourable Court be inclined to dispense with the notice to the Registrar due to reasons of urgency"***

The ex-parte Applicant further sought leave for orders of both Certiorari and Prohibition to remove into the High Court and quash the proceedings in

- **CRIMINAL CASE NO. 161 OF 2010**
  REPUBLIC –VS- FRANCIS MJOMBA MOMBO
- **CRIMINAL CASE NO. 155 OF 2010**
  REPUBLIC –VS- MARY WAVINYA MWANGI & ANOTHER
- **CRIMINAL CASE NO. 159 OF 2010**
  REPUBLIC –VS- JOHN KINYUA GICHOHI

Learned counsel Mr. Tindi argued the application on behalf of the Applicant whilst Mr. Nganga appeared for the 1st Respondent. The 2nd Respondent was not represented on 28th April 2010 when the matter came up for hearing.

Before I delve into the merits or otherwise of this Judicial Review application, it is important to establish whether all prerequisites to the bringing of such an application have been met. Applications for Judicial Review are grounded on O 53 of the Civil Procedure Rules. Rule 1(3) thereof provides

> ***"The applicant shall give notice of the application for leave not later than the preceding day to the registrar and shall at the same time lodge with the registrar copies of the statement and affidavits"***

As Mr. Nganga for the 1st Respondent told the court, O 53 r3(2) the term used is ***'shall'*** thus making this a mandatory and express requirement. I am mindful of the proviso to this rule which gives the court the discretion to excuse any failure to so file the notice for ***"good cause shown"***. In the present application no such good cause has been shown. Indeed Mr. Tindi in his submissions did not even address the issue of their failure to comply with r1(3). How then can

the court be asked to excuse a failure if no good grounds are shown to exist as to why this provision was not complied with. The mere fact that the application for leave also included a prayer to excuse compliance does not suffice. The Applicant must satisfy the court that good cause exists to excuse such failure. In this case I find that no such good cause has been argued much less shown to exist. As such I do agree with Mr. Nganga that this mandatory provision of O 53 was not complied with rendering this present application a non-starter as it is fatally defective.

However even if that were not the case, for an application to commence Judicial Review proceedings to be successful the Applicant must show an arguable case. Mr. Tindi for the Applicants argues that the due process of law was not followed as no notice was served upon the Applicants as required under Regulation No. 25 of the Improvement Notice served. On his part Mr. Nganga argues that the charges brought against the Applicants in the lower court are brought under S. 8(1) as read with Regulation 8(1) and 28 of the Noise Regulation. The Applicants he argues have not been charged with any violation of Regulation 25. I have had a careful look at the annexed charge sheet and note that the charges read as follows

> ***"COUNT NO. 1***
>
> ***PLAYING LOUD MUSIC CONTRARY TO SECTION 8(1) AS READ WITH SECTION 28 OF THE ENVIRONMENTAL MANAGEMENT AND CORDINATION (NOISE AND EXCESSIVE VIBRATIONS POLLUTION) (CONTROL) REGULATION, 2009***
>
> ***COUNT NO. 2***
>
> ***FAILING TO COMPLY WITH A RESTORATION ORDER CONTRARY TO SECTION 28(1)(C) OF THE ENVIRONMENTAL MANAGEMENT AND COORDINATION (NOISE AND EXCESSIVE VIBRATIONS POLLUTION) (CONTROL) REGULATIONS, 2009"***

Therefore it is abundantly clear that regulations 8 and 28 form the basis of the charges and **not** regulation 25 as submitted by Mr. Tindi. Regulation 8 creates the offence and Regulation 28 provides for the penalty if one is found guilty of having committed the offence. The Applicants do not face any charge of violating Regulation 25. Even if they did Regulation 25 which deals with ***"Improvement Notices"*** provides that

> ***"25(1) Where an Environmental Inspector has reasonable cause to believe that any person is emitting or likely to emit noise or excessive vibration in any area in excess of the maximum permissible levels, or is causing or is likely to cause annoyance, the Environmental Inspector may (my emphasis) with the approval of the Director-General, in consultation with the relevant lead agency, serve an improvement notice on that person in the form prescribed in the Tenth Schedule directing all or any of the following ……"***

A clear reading of this provision makes it abundantly clear that service of an improvement notice is purely discretional and is not a mandatory requirement as has been submitted for the applicants. The use of the discretionary term ***'may'*** as opposed to the mandatory '***shall'*** gives a clear discretion to the Environmental Inspector on whether or not to issue on improvement notice. Therefore even for charges brought under S. 25 failure to issue an improvement notice does not render the criminal proceedings a nullity. I have perused the case of **R. –VS- OLKEJUADO COUNTY COUNCIL & ANOTHER (ex-parte) PETER K. WAWERU & ANOTHER [2006] KLR** and I find the same to be distinguishable from this case in that in the **Waweru case** the proceedings related to S. 120 of the Public Health Act under which issuance of such notice is mandatory. The same does not apply in the present proceedings.

The Applicants are facing charges of a criminal nature in the subordinate courts. It is my considered opinion that much of what Mr. Tindi has submitted in support of this present application can and ought to be presented as defences before the lower court. It cannot be the purpose of Judicial Review proceedings to pre-empt proceedings before the subordinate courts.

Lastly on the first prayer of this application to be enjoined, as co-applicants this must of necessity fail. At the time the said application was being made leave to institute Judicial Review proceedings had not yet been granted. Based on my analysis above I do find that the Applicants have not made out an arguable case such as to warrant the grant of the prayers for leave as sought. I do therefore dismiss in its entirety this present application dated 9th February 2010. In those circumstances the application dated 29th March 2010 must also fail. Costs to be met by the Applicants.

Dated and Delivered at Mombasa this 28th day of May 2010.

M. ODERO

JUDGE

Read in open court in the presence of:

Mr. Tindi for Applicant

M. ODERO

JUDGE

28/05/2010